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Iowa. Laws, statutes, etc. Codes

McCLAIN'S

ANNOTATED STATUTES

OF THE

STATE OF IOWA,

SHOWING THE

GENERAL STATUTES IN FORCE JULY 4, 1880,

EMBRACING

THE CODE OF 1873 AS AMENDED, AND ALL PERMANENT, GENERAL AND PUBLIC ACTS OF THE FIFTEENTH, SIXTEENTH, SEVENTEENTH AND EIGHTEENTH GENERAL ASSEMBLIES, WITH A BRIEF DIGEST UNDER EACH SECTION, OF THE DECISIONS RELATING THERETO.

By EMLIN McCLAIN, Esq.,

OF THE DES MOINES BAR.

VOLUME II.

CHICAGO:
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PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

PRELIMINARY PROVISIONS.

Remedies classed. R. § 2605.

SECTION 2504. Remedies in civil cases in the courts of this state are divided into actions and special proceedings.

Civil action defined. R. § § 2606, 2609.

SEC. 2505. A civil action is a proceeding in a court of justice in which one party, known as the plaintiff, demands against another party known as the defendant, the enforcement or protection of a private right, or the prevention or redress of a private wrong. It may also be brought for a recovery of penalty or forfeiture.

Civil actions include everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8-40.

Where a note provided for an attorney's fee, in case *action* was brought thereon, *held*, that filing the note as a claim against the estate, the claim being resisted, was sufficient *bringing of action* to entitle plaintiff to the attorney's fee: *Davidson v. Verse*, 82-384.

Special proceedings. R. § 2607.

SEC. 2506. Every other remedy in a civil case is a special proceeding.

Proceedings to disbar an attorney are special proceedings: *The State v. Clark*, 46-155.

As to method of trying issues in special proceedings, see note to § 2737.

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Form of actions. R. § § 2608, 2610.

SEC. 2507. All forms of action are abolished in this state; but the proceedings in a civil action may be of two kinds, ordinary or equitable.

The legislature has no power to abolish the distinction between law and equity. Such distinction is defined and recognized by the Constitution. (See art. 5, § § 4 and 6): *Claussen v. Lafrenz*, 4 Gr. 224.

Although forms of proceedings are abolished, yet pleas in abatement, such as to the jurisdiction, or of another action pending, are still proper and legitimate: *Rawson v. Guiberson*, 6–507.

By the Code of 1851 it was intended to assimilate and make uniform the procedure in all law and equity cases. The changes introduced were to be applied equally to both. (Prior cases in which this fact was overlooked, cited and criticised): *Shepard v. Ford*, 10–502.

The term civil action includes proceedings in equity as well as ordinary proceedings: *Kramer v. Rebman*, 9–114.

For somewhat similar provision, see § 2644.

Equitable proceedings. R. § 2611.

SEC. 2508. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of this code, had jurisdiction; and must so proceed in all cases where jurisdiction was exclusive.

Foreclosure of mortgage: action on note. R. § 4179.

SEC. 2509. The action on a note, together with a mortgage or deed of trust, for the foreclosure of the same, shall be by equitable proceedings. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings.

The provision that an action to foreclose a mortgage shall be by equitable proceedings, is not in conflict with the Constitution, art. 1, § 9, guaranteeing the right of trial by jury. Such right was never recognized in equity suits: *The State v. Orwig*, 25–280; *Clough v. Seay*, 49–111.

As to effect of bringing separate suits on the note and mortgage, see § 3320.

Mechanic's lien. R. § 4183. C. '51, § 985.

SEC. 2510. The action for mechanics' lien shall be prosecuted by equitable proceedings, and therewith shall no other cause of action be joined.

All persons interested must be made parties to the proceedings before they can be affected by the decree: *Jones v. Hartsock*, 42–147, 153.

Held, that an action at law might, by consent of parties, be tried in connection with equitable actions to enforce mechanics' liens against the same defendant, and one judgment rendered therein adjusting all claims between them: *Hines v. Whitebreast C. & M. Co.*, 48–296.

Under Rev. § 4183, by which an action for a mechanic's lien was to be prosecuted as an ordinary proceeding, *held*, that subsequent incumbrancers need not be made parties, and that even though not made parties they could not bring action to redeem, and that in such cases there was no equity of redemption as in case of a mortgage: *The State v. Eads*, 15–114; assented to by two members of the court in *Shields v. Keys*, 24–298, 308, the other two members expressing no opinion.

Divorce. R. § 4184.

SEC. 2511. An action for a divorce shall be prosecuted by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith.

An action for divorce being equitable, the right to a trial by jury does not exist, and the parties are entitled to a trial *de novo* in the supreme court: *Sherwood v. Sherwood*, 44–192.

Sureties: occupying claimants. R. § 4185.

SEC. 2512. Actions by sureties, and by occupying claimants, and on a lost note or bond, may be by ordinary proceedings.

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SEC. 2513. In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. Ordinary proceedings. R. § 2612.

Action for writ of *habeas corpus* is therefore to be tried as an ordinary action at law: *Ex rel. Shaw v. Nachtwey*, 43–653; *Drumb v. Keene*, 47–435.

SEC. 2514. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer of the action to the proper docket. Error: effect of. R. § 2613.

An action erroneously brought at law may be changed to an action in equity without leaving the court: *Holmes v. Clark*, 10–423, 427.

An error in commencing an action in equity instead of at law, or *vice versa*, should be corrected as here provided. It is not a ground of demurrer: *Conyngham v. Smith*, 16–471; *Brown v. Mallory*, 26–469; *Wright v. McCormick*, 22–545.

That plaintiff has a full, speedy and complete remedy at law is not proper ground for demurrer. The remedy is by motion to have the action changed into the proper proceeding as here contemplated: *Savery v. Browning*, 18–246; *Traer v. Lytle*, 20–301; *Gray v. Coan*, 23–344; *Gibbs v. McFadden*, 39–371.

Where an answer to a petition at law set up both legal and equitable defenses and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27–476.

See, also, notes to §§ 2517 and 2519.

SEC. 2515. Such error may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterwards, on motion in court. How corrected by plaintiff. R. § 2614.

SEC. 2516. The defendant may have the correction made by motion at or before the filing of his answer, where it appears by the provisions of this code the wrong proceedings have been adopted. By defendant. R. §§ 2615, 2616.

The motion here contemplated cannot be made after filing an answer, nor at the time of filing an answer to an amended petition, when the fact of error in the proceedings was apparent, but not taken advantage of, at the time of filing an answer to the original petition: *Moore v. Dist. Tp. of Union*, 28–425

SEC. 2517. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues were such as were heretofore cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings. Ordinary changed into equitable. R. § 2617.

The issue must be made before the transfer to the chancery docket can be ordered by the court. The discretion of the court is a legal one and is reviewable: *McHenry v. Sypher*, 12–585.

A case properly commenced by ordinary proceedings is not to be *transferred to the equity docket* on filing an answer setting up equitable defenses but either party may have such equitable issue tried by equitable proceedings: *Byers v. Rodabaugh*, 17–53.

The equitable issues which either party elects to have tried by equitable proceedings may be, and under ordinary circumstances should be, first tried and settled: *Hackett v. High*, 28–539; and after the equitable issues are thus tried, any legal issues remaining are to be disposed of in the manner provided for the disposal of such issues: *Rosierz v. Van Dam*,

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16–175; *Van Orman v. Spafford*, 16–186; *Kramer v. Conger*, 16–434; *Corbin v. Woodbine*, 33–297; but it is not imperative that the equitable issue be tried first. That issue should be first tried which may result in rendering a further trial unnecessary: *Morris v. Merritt*, 52–496.

To entitle a defendant to a trial of such equitable issue by equitable proceedings, such issue must be one heretofore exclusively cognizable in equity. (Decided under Rev. § 2617): *Walton v. Gray*, 29–440.

Equitable defenses may be pleaded in an action at law: See notes to § 2655.

Court may order change.

SEC. 2518. If there be more than one party plaintiff or defendant who fail to unite on the kind of proceeding to be adopted, the court, on its own motion, may direct such proceedings to be changed to the same extent as if the parties had united in asking that the same be done.

Errors waived. R. § 2619.

SEC. 2519. An error as to the kind of proceedings adopted in the action is waived by a failure to move for its correction at the time and in the manner prescribed in this chapter; and all errors in the decisions of the court are waived unless excepted to at the time, except final judgments and interlocutory or final decrees entered of record.

The objection that the action is brought by the wrong kind of proceedings cannot be taken advantage of after judgment: *Hatch v. Judd*, 29–95; nor can such objection be first made in the supreme court: *Tugel v. Tugel*, 38–349

If the proper steps to effect the change are not taken in the court below, the remedy is regarded as waived: *Parshall v. Moody*, 24–314; *Green v. Marvel*, 37–95; *Knott v. Tincher*, 39–628.

Generally a judgment in an equitable proceeding will be sustained if objection has not been made under § 2516, though the action should have been by ordinary proceedings; but if upon the merits of the case the relief granted would have been denied at law and ought not to have been given in an equitable proceeding, the judgment will not be sustained: *Richmond v. D. & S. C. R. Co.*, 33–422, 489.

Where an action is improperly prosecuted by equitable proceedings, a failure to object thereto as provided in § 2516, operates as a waiver of a jury trial: *Ibid.*, 490.

See notes to § 2516.

Uniformity of procedure. R. §§ 2620, 4173. C. '51, § 2516.

SEC. 2520. The provisions of this code concerning the prosecution of a civil action, apply to both kinds of proceeding, whether ordinary or equitable unless the contrary appears, and shall be followed in special proceedings not otherwise regulated so far as applicable.

Proceedings to condemn property for a work of internal improvement should be governed, as far as practicable, by the rules governing ordinary actions: *Forney v. Ralls*, 30–559.

Section applied to proceedings to disbar an attorney: *The State v. Clarke*, 46–155, 159.

Actions on judgments: when brought.

SEC. 2521. No action shall be brought upon any judgment, against a defendant therein, rendered in any court of record of this state within fifteen years after the rendition thereof without leave of the court for good cause shown and on notice to the adverse party, nor on a judgment of a justice of the peace of this state within eight years after the same is rendered, except in cases where the docket of the justice, or record of such judgment is, or shall be, lost or destroyed.

This section affects the remedy and applies to judgments rendered before as well as after its passage: *Watts v. Everett*, 47–269.

Failure to allege leave of court to prosecute an action is subject for demurrer: *Ibid.*

Where the record of a judgment is lost or destroyed, suit thereon as here contemplated is not intended to be

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the *only* method for supplying the same: *Gammon v. Knudson* 46–455.

Prior to the enactment of this section, *held*, that an action might be maintained on a domestic judgment while in full force and upon which an executior might issue, in the absence of any legislative restriction: *Thompson v. County of Lee*, 22–206; *Simpson v. Cochran* 23–81.

"There is no reason why a party should be harassed by suit after suit when one judgment can be made just as effective as a hundred:" *Code Com'rs' Rep.*, p. 74.

The restriction here imposed is not applicable to actions in the U. S. circuit court: *Phillips v. O'Brien Co.*, 2 Dillon (U. S. C. C.), 518.

SEC 2522. Judgment obtained in an action by ordinary proceedings, shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counter claim in the action on which the judgment was recovered.

Judgments cannot be annulled by equitable proceedings. R. § 2621.

This does not prevent the issuance of an injunction against the collection of a judgment which is being enforced contrary to the agreement of parties: *Baker v Redd*, 44–179.

Judgment in garnishment proceedings, although rendered for an amount in excess of garnishee's liability to judgment debtor, cannot be modified in an action in equity: *B. & M. R. R Co. v. Hall*, 37–620.

Where a defendant permits judgment to go against him by default on a legal demand, he may in a subsequent action set up and rely upon equitable matters which would have constituted an available defense in the first action; and *semble*, that the same would be true where the claim available as a defense is a legal one: *Fairfield v. McNany*, 37–75.

SEC. 2523. No action to obtain a discovery shall be brought, except that where any person or corporation is liable, either jointly or severally with others by the same contract, an action may be brought against any parties who are liable, to obtain discovery of the names and residences of the others who are liable. In such action, the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract who are known to him have property sufficient to satisfy his claim. The petition shall be verified, and the cost of such action shall be paid by the plaintiff, unless the discovery be resisted.

For discovery when brought. R. § 4127.

SEC. 2524. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action has arisen therefrom.

Successive actions. R. 4128.

Section referred to in *Richmond v. D. & S. C. R. Co.*, 33–422.

SEC. 2525. All causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same.

Actions survive. R. §§ 3407, 4110. C. '51, § 2502. 9 G. A. ch. 174, § 4.

Held, that an action for libel would survive: *Carson v. McFadden*, 10–91; so also an action for injury to the person: *McKinlay v. McGregor*, 10–111; so also an action for seduction brought under § 2555: *Shafer v. Grimes*, 23–550.

But an action for divorce is abated by the death of one of the parties, and with it all claim for alimony: *Barney v. Barney*, 14–189; *O'Hagan v. O'Hagan*, 4–509.

If a counter claim is properly maintainable in favor of two defendants, the death of one of them will work no abatement thereof: *Moorehead v. Hyde*, 38–382.

A claim based upon a personal tort may be assigned: *Weir v. City of Davenport*, 11–49; *Gray v. McAllister*, 50–497.

As to survival of actions pending upon appeal, see notes to § 3211.

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Civil remedy not merged in crime. Damages for act producing death.
R. § 4111.
C '51, § 1698.

SEC. 2526. The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.

[The word "enforced" in the second line is printed "forced" in some, but not all copies of the printed code.]

A corporation is liable in a civil action for wrongful acts of its servants, done in its employment and producing death. Its liability, however, would not probably be held to exempt the immediate agent from liability: *Donaldson v. M. & M. R. Co.*, 18–280.

Where an employe of a railroad company received injuries through the wrongful act of a co-employe resulting in death, the company was held to be the "perpetrator" within the language of Rev. § 4111, and civilly liable, (see § 1307 and note): *Philo v. Ill. Cent. R Co.*, 33–47.

Under this section damages to the *estate* only are to be recovered, and not those resulting to the next of kin. Whether exemplary damages could be recovered, *quære*: *Sherman v. West'n Stage Co.*, 24–515.

In an action by the administrator of a minor to recover damages to the estate resulting from injuries causing his death, the recovery is limited to those damages accruing after the minor would have attained his majority and up to the limit of his probable expectancy of life. The damages accruing before majority are not to the estate but to the father or other person entitled to the minor's services: *Walters v. C. R. I. & P. Co.*, 36–458.

Proceedings: limitation of action.
R. § 4111.
C. '51, § 1699.
9 G. A. ch. 174, § 4.

SEC. 2527. The actions contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as provided for service of original notices.

No notice to defendant is necessary when the cause is continued in favor of the legal representative of plaintiff, and the substitution of such representative is no cause of continuance on behalf of defendant: *Masterson v. Brown*, 5–442.

Under Code of '51, *held* that where one of the joint makers of a note died during the pendency of a suit thereon, the action could not be continued, jointly, against the administrator of the deceased and the surviving joint obligors: *Pecker v. Cannon*, 11–20; *Marsh v. Goodrel*, 11–474.

As to survival of actions pending on appeal, see § 3211.

Construction: rule of common law not applicable.
R. § 2622.
C. '51, § 2503.

SEC. 2528. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.

Similar provision in Code of '51, applied: *Strother v. Steamboat Hamburg*, 11–59; *Kramer v. Rubman*, 9–114.

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CHAPTER 2.

OF LIMITATION OF ACTIONS.

SECTION 2529. The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared: Period of. R. § 2740. C. '51, § 1659.

1. Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years; Two years.

2. Actions to enforce a mechanics' lien, within two years from the time of filing the statement in the clerk's office; R. § 1865. C. '51, § 984. 15 G. A. ch. 140 § 2.

3. Those against a sheriff, or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the non-payment of money collected on execution, within three years; Three years.

4. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years; Five years.

5. Those founded on written contracts, on judgments of any courts, except those courts provided for in the next section, and those brought for the recovery of real property, within ten years; Ten years.

6. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years. Twenty years.

IN GENERAL: The statute of limitations begins to run from the time the cause of action accrues. After the statute once begins to run, no subsequent disability will suspend it unless the statute itself provides therefor. Before a cause of action will accrue or the statute begin to run, there must exist a cause of action and a person authorized to prosecute it. So the statute will not run against a cause of action accruing to the estate of a decedent until there is a personal representative in whose name it may be prosecuted: *Sherman v. Western Stage Co.*, 24–515, 553.

Statutes of limitation pertain to the remedy and not to the essence of the contract, and an act extending the time for bringing suit on a cause of action is valid: *Edwards v. McCaddon*, 20–520; and such statutes are not unconstitutional as impairing the obligation of existing contracts: *Parsons v. Carey*, 28–431; *Harrincourt v. Merritt*, 29–71;

Statutes of limitation do not affect the validity of the cause of action; therefore the fact that a judgment is still valid and may be enforced in the state where rendered does not prevent its being barred by the provisions of our law, notwithstanding the provision of U. S. Const., art. 4, § 1, that full faith, etc., shall be given to the judicial proceedings of another state: *Meek v. Meek*, 45–294.

Our statute of limitations applies equally to actions at law and suits in equity: *Relf v. Eberly*, 23–467; *Williams v. Allison*, 33–278; *Phares v. Walters*, 6–106.

The statute of limitations does not run against the state: *Kellogg v. Decatur Co.*, 38–524; and though the action be brought in the name of the county, yet if it be for the benefit of the state, as for the recovery of a part of the school fund, it will not be barred by the statute: *The County of DesMoines v. Harker*, 34–84. But the statute will run against a county: *Brown v. Painter*, 44–368; even though the action is technically in the name of the state, if for the benefit of the county: *The State v. Henderson*, 40–242.

The statute also runs against a city:

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City of Burlington v. B. & M. R. R. Co., 41-134; *City of Pella v. Scholte*, 24-283.

A debt which is simply barred by the statute cannot be regarded as paid or extinguished: *Austin v. Wilson*, 46-362.

In case of fraudulent concealment of a cause of action by the party against whom it exists, preventing the opposite party from acquiring knowledge thereof, the statute will not commence to run until the cause of action was, or might have been, discovered, and this, irrespective of the provisions of § 2530: *Dist. T'p. of Boomer v. French*, 40-601; *Findley v. Stewart*, 46-655.

The statute of limitations must be specially pleaded and will be held waived unless taken advantage of by demurrer or answer. (See § § 2648, 2650 and 2718): *Robinson v. Allen*, 37-27.

The filing of an amended petition, if the cause of action remains the same, does not affect the question as to whether the action is brought in time: *Cobb v. I. C. R. Co.*, 38-601, 626.

The statute of limitations does not apply to an action for any portion of the school fund, see § 2542.

PAR. 1. Injuries resulting in death are "injuries to the person" within the meaning of this section, and an action by the personal representative therefor is barred in two years: *Sherman v. Western Stage Co.*, 22-556; *S. C.*, 24-515; *Nord v. B. & M. R. R. Co.*, 37-498; so also are actions under § 1557 for injuries from the sale of intoxicating liquors: *Emmert v. Grill*, 39-690.

But in case of injuries resulting in immediate death, *held*, by two of the judges, that the cause of action accrued only to the personal representative, and the statute did not commence to run until his appointment (but, see § 2527 and note): *Sherman v. Western Stage Co.*, 24-515, 553.

In case of injury to the person, the statute of limitations begins to run from the time of the injury and not from the time the extent thereof is discovered by the person injured: *Gustin v. County of Jefferson*, 15-158.

The double damages allowed against a railroad company for killing stock (§ 1289) are not a statute penalty so as to come within this section. The action may therefore be brought within five years. What are statute penalties as here contemplated, discussed: *Koons v. C. & N.W. R. Co.*, 23-493.

PAR. 3. An action against a treasurer, not on his bond, for moneys received and appropriated, is within this paragraph: *Keokuk County v. Howard*, 41-11; so an action against a treasurer and his sureties on his bond for failure to account for and pay over revenues in his hands, is within this clause and barred within three years. It does not fall within the provisions of ¶ 5: *The State v. Dingee* 17-232; *The State v. Henderson*, 40-242.

The action of mandamus against a public officer to compel the performance of an official duty cannot be maintained until there has been a refusal to perform such duty, and the statute commences to run from the time when the plaintiff has a *right* to demand the performance of the act, and he cannot delay or postpone it by neglecting to make such demand: *Prescott v. Gonser*, 34-175; *Beecher v. County of Clay*, 52-140.

In an action against the clerk of the court for damages resulting from his negligence in accepting an insufficient stay bond, *held*, that the cause of action did not accrue nor the statute begin to run until the stay expired: *Steel v. Bryant*, 49-116.

Under the Code of 1851, *held*, that the failure of a county judge to pay over money received by him in his official capacity was not the omission of an official duty within the meaning of this clause, and, therefore, that the three years limitation did not apply to an action on his bond to recover such money: *County of Poweshiek v. Ogden*, 7-177.

PAR. 4. In order to constitute a written contract sufficient to bring a case within the next paragraph and prevent the bar of five years from applying, the *essential facts* establishing the liability of defendant, should be in writing: *Lamb v. Withrow*, 31-164.

This paragraph, and not § 3261 governs in actions for use and occupation of real estate: *Tibbitts v. Morris*, 42-120.

An action for relief on the ground of fraud must be brought within five years from the time of its discovery. (See § 2530.) In such cases defendant pleading the statute of limitations must show that plaintiff had knowledge of the fraud more than five years before the action was brought: *Baldwin v. Tuttle*, 23-66; *Harlin v. Stevenson*, 30-371.

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The statute commences to run as against an unliquidated claim against a county from the time the account accrues and not from the time the demand required by § 2610 is made: *Baker v. Johnson Co.*, 33–151; *Kinsey v. Louisa Co.*, 37–438.

Upon an unwritten contract for a loan of money payable on demand, the statute commences to run from the time of the loan: *Hall v. Letts*, 21–596.

As to when an action against the county to recover taxes erroneously paid is barred, see *Callanan v. County of Madison*, 45–561, in notes to § 870.

PAR. 5: CONTRACTS. Actions to enforce specific performance of a contract to convey real estate are within this paragraph: *Wright v. McClaire*, 3–221.

In an action to recover the part of the purchase money paid, in case of breach of written contract to convey, the statute commences to run from the time of demand and refusal to convey, and not from date of payment of the money, such action not being for money had and received: *Deming v Haney*, 23–77.

MORTGAGES: The limitation of this paragraph is applicable to suits for the foreclosure of mortgages: *Newman v. DeLorimer*, 19–244; and also to actions to redeem: *Gower v. Winchester*, 33–303; *Green v. Turner*, 38–112.

An action to foreclose or redeem from a mortgage is barred at the same time as an action at law on the mortgage debt: *Smith v. Foster*, 44–442; but a mortgage is not barred so long as the debt is unpaid and capable of being enforced: *Clinton Co. v. Cox*, 37–570; *Brown v. Rockhold*, 49–282.

Adverse possession for more than ten years after the accruing of a right of action on the mortgage is a bar to an action to foreclose: *Jamison v. Perry*, 38–14.

A mortgagor does not hold adversely to his mortgagee, but he may convert his possession into an adverse possession: *Ibid.*

The mere possession of a mortgagee will not be held adverse to the mortgagor, even after payment of the mortgage debt, so as to give him the benefit of the statute. Something beyond mere possession after payment is necessary to make such possession adverse: *Green v. Turner*, 38–112, 118.

JUDGMENTS: The order of a probate court allowing a claim, is not such a judgment as is here contemplated: *Smith v. Shawhan*, 37–533.

FOR RECOVERY OF REAL PROPERTY: Mere possession for the time mentioned is not sufficient to enable defendant to rely on the bar of the statute. Such possession must be adverse, under color of title or claim of right: *Wright v. Keithler*, 7–92; *Jones v. Hockman*, 12–101; *Clagett v. Conlee*, 16–487; *Larum v. Wilmer*, 35–244; *Davenport v. Sebring*, 52–364.

But, claim of right alone is sufficient. Color of title is not essential: *Ibid; Colvin v. McCune*, 39–502.

A tax deed, void on its face, is sufficient to give color of title: *Colvin v. McCune*, 39–502.

A descent cast, or a devise, gives color of title, although the ancestor or devisee was a mere trespasser: *Hamilton v. Wright*, 30–480.

The adverse possession must be under claim of right with intention to claim title, and not by agreement with the true owner: *McNamee v. Moreland*, 26–96.

The possession, to be adverse, must be actual, continued, visible, notorious, distinct, and hostile, and commenced under claim or color of title, but actual residence on the land is not necessary to constitute such possession. Any acts which are open and notorious, done under claim or color of title and continued for a necessary time will justify the finding of adverse possession: *Robinson v. Lake*, 14–421; *Booth v. Small*, 25–117.

The title under which the adverse possession is held need not be valid and perfect, but must be claimed in good faith; nor need the possession be shown to have been known to the adverse party or his grantor: *Close v. Samm*, 27–503.

Adverse possession must be open and notorious, and if so, the person against whom it is maintained is presumed, as matter of law, to know of it: *Teabout v. Daniels*, 38–158.

A mere continuance in possession by the grantor, after conveyance by him, will not ripen into a right to rely upon the statute of limitations: *Livermore v. City of Maquoketa*, 35–358.

Merely paying taxes upon wild lands and occasionally looking at them and showing them to others, *held*, not such actual, visible, notorious, adverse possession as is necessary to enable a party to take advantage of the statute: *Brown v. Rose*, 48–231.

The adverse possession need not be

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in defendant personally and solely, but it is sufficient if it be in him and those through whom he derives title, they claiming title: *Kilbourne v. Lockman*, 8–380.

A possession not at first adverse may afterward become so by acts of the party: *Allen v. Wright*, 30–480. Where possession is originally lawful a mere forcible entry thereon, not followed by continuous possession, will not prevent the statute from continuing to run. But otherwise if entry be peaceable and continuous possession thereunder is retained: *City of Pella v. Scholte*, 24–283.

The possession must be under claim of right, and such claim will not be presumed by mere possession. So *held*, in case of a mistake as to the boundary line: *Grube v. Wells*, 34–148. But where parties have established a line and used it as a boundary irrespective of the true line, the possession will be adverse, and after the lapse of the necessary period, conclusive upon the parties and their grantees: *Hyatt v. Kirkpatrick*, 48–78.

It seems that exclusive occupancy by one tenant in common for a long time will constitute ouster of a cotenant, but under the circumstances of a particular case, *held*, that an occupancy of seventeen years would not have that effect: *Flock v. Wyatt*, 49–466.

The provisions of this paragraph are applicable to a suit by a widow for dower, either in equity or by action to recover real property: *Phares v. Walters*, 6–106; but the statute does not commence to run against her until her right to dower is denied: *Starry v. Starry*, 21–254; *Nelson v. Rice*, 27–148; *Sulley v. Nebergall*, 30–339; *Felch v. Finch*, 52–563. Lapse of ten years will not bar doweress of her dower where there has been no adverse possession: *Berry v. Furhmann*, 30–462.

The limitation commences to run from the time of ouster by one who enters with claim of adverse possession, and not from the time the adverse claimant obtains title: *Robinson v. Lake*, 14–421.

As against an action for the recovery of real property, the statute begins to run at the time adverse possession is taken and held by the tenant or those under whom he claims. The possession of a tenant holding over after his term, or that of a mere trespasser, does not amount to a disseizin such that the statute will begin to run. Disseizin occurs only when possession is taken and held without assent of the owner, with intent to hold the estate therein under claim adverse to him: *Barrett v. Love*, 48–103.

Ten years use of a highway by the public under claim of right will bar the owner of the soil: *Keyes v. Tait*, 19–123; at least in the absence of proof that the road was used by leave, favor, or mistake: *Onstott v. Murray*, 22–457.

Whether the statute of limitations runs against the public because of adverse possession of a highway established in the manner prescribed by law, *quære*, but, *held*, that in case of non-use of a highway for a long time and actual adverse possession thereof for ten years, the public were estopped from asserting any right thereunder: *Davies v. Huebner*, 45–574.

Mere non-user of an easement granted by deed will not bar the right. There must be some use adverse to that of the grantee to have that effect: *Barlow v. C., R. I. & P. R. R. Co.*, 29–276.

PAR. 6: A revival of a judgment by *scire facias* is not a new judgment against which the statute of limitations commences to run, but the period of limitation continues to run against the original judgment: *Meek v. Meek*, 45–294.

A judgment against a decedent must be filed as a claim under § 2421, or it will be barred as there specified: *Davis v. Shawhan*, 34–91.

Fraud: mistake: trespass. R. § 2741. 13 G. A. ch. 167, § 9. C. '51, § 1660.

SEC. 2530. In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of shall have been discovered by the party aggrieved.

In an action such as here contemplated, the defendant setting up the statute of limitations must show the lapse of five years after the discovery of the fraud or mistake: *Baldwin v. Tuttle*, 23–66; *Harlin v. Stevenson*, 30–371.

The fraud here contemplated is only such as was heretofore "solely cognizable in chancery," as specified in § 2529, ¶ 4: *Gebhard v. Sattler*, 40–152; *Brown v. Brown*, 44–349; *Phœnix Ins. Co. v. Dankwardt*, 47–432.

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Where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception here made does not apply: *Relf v. Eberly*, 23–467.

The mistake, however, may be such as was cognizable either at law or in equity: *Higgins v. Mendenhall*, 42–675; *McGinnis v. Hunt*, 47–668; (these two cases, however, overruled so far as they refer to 13 G. A., ch. 167, § 9, which contained no provision as to cases of *mistake*): *Higgins v. Mendenhall*, 51–135.

As to when the statute begins to run in case of a fraudulent concealment of a cause of action, see notes to § 2529.

The exception of this section does not apply where the fraud, etc., *might*, by the use of diligence, have been discovered: *Humphreys v. Mattoon*, 43–556.

Section applied: *Cowin v. Tool*, 31–513; *Shank v. Teeple*, 33–189.

SEC. 2531. When there is a continuous open current account, the cause of action shall be deemed to have accrued on the date of the last item therein as proved on the trial. Open account. R. § 2743. C. 51, § 1662.

The statute commences to run from the date of the last item, whether debit or credit: *Thorn v. Moore*, 21–285; *Mills v. Davies*, 42–91.

The account here contemplated is one which is not interrupted nor broken, not closed by settlement or otherwise, and is a running, connected series of transactions. Where there was a hiatus of two years, followed by an item of a different character than those before, *held*, that the last item was not properly a part of the same account: *Tucker v. Quimby*, 37–17.

A claim for work performed at different periods of time, under separate and distinct contracts, is not a continuous, open, current account: *Shorick v. Bruce*, 21–305.

Where the indebtedness was accruing daily, monthly or yearly for items of board, rent, etc., *held*, that it would constitute a current account: *Moser v. Crooks*, 32–172; and so *held*, in case of a charge for keeping and providing for another continuously: *Wendeling v. Besser*, 31–248.

Though a special contract be made as to a specific piece of work, the price thereof may still be a proper item of account: *Mills v. Davies*, 42–91.

The fact that no date, or an incorrect date was fixed to the account, or that it was not directly charged to any one, *held*, not to prevent the provisions of this section from applying: *Tubbs v. City of Maquoketa*, 32–564.

In a case not involving the construction of this section, *held*, that an intervening statement of a balance did not prevent subsequent items from forming a portion of the same continuous account: *Lamb v. Hanneman*, 40–41.

That an account appears on its face to be barred, is no ground of objection to the introduction in evidence of the book containing it: *Thorn v. Moore*, 21–285.

SEC. 2532. The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action. Commencement of action. R. § 2744. C. 51, § 1663.

The action is not commenced or *pending* until the delivery of the notice to the sheriff as here contemplated, although the petition be previously filed: *Collins v. Bane*, 34–385.

However, in an injunction proceeding, *held*, that the filing of a petition and service of the writ operated to commence the action, although no original notice was served before the period of limitation had expired: *Sweatt v. Faville*, 23–321.

Action may be considered begun, for some purposes when the petition is filed; for instance, for the purpose of issuing a writ of attachment, (§ 2949): *Hagan v. Burch*, 8–309; *Reed v. Chubb*, 9–178; *Elliott v. Stevens*, 10–418.

This section only fixes the time of the commencement of actions with reference to the statute of limitations. As to what is, in general, the commencement of an action, see § 2599, and notes: *Parkin v. Travis*, 50–436.

An action in relation to real estate is pending so as to affect third persons with notice, from the date of filing the petition; see § 2628.

Section applied: *Snyder v. Ives*, 42–157.

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Non-residence. R § 2745. C. '51, § 1664.

SEC. 2533. The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above described.

The expressions "out of this territory" and "the time of such person's absence," occurring in the corresponding section of the act of Feb. 15, 1843, relating to the same subject, *held*, to mean such an absence as suspended the power to commence action against such party in any of the methods provided by law; but not a mere temporary absence, during which the family of the party remained at his usual place of abode, and service of notice might have been had upon him by leaving a copy with some member of such family: *Penley v. Waterhouse*, 1–498.

Residence, and not citizenship or domicile, is here contemplated: *Savage v. Scott*, 45–130.

A person on his decease ceases to be a non-resident. The disability of non-residence ends with his death: *Ibid.*

A party claiming advantage of the exception contained in this section has the burden of establishing it: *Evans v. Montgomery*, 50–325.

A party must rely upon either the domestic or foreign bar. He cannot weld the time which elapsed before he came to this state to that which elapsed thereafter, in order to obtain the years requisite to constitute a bar under our statute: *Sloan v. Waugh*, 18–224.

As against an indebtedness contracted while defendant was a resident of another state, the statute only commences to run when he becomes a resident of this state (unless the claim was then barred as provided in § 2534): *Petchell v. Hopkins*, 19–531.

If by reason of non-residence of the debtor, an action on a note is not barred, neither is the action to foreclose a mortgage securing the same: *Clinton Co. v. Cox*, 37–570.

The fact that a non-resident land owner has had a tenant in possession of the property, against whom action might have been brought under § 3246, will not cause the statute of limitations to run in favor of such non-resident owner: *Heaton v. Fryberger*, 38–185, 196.

Barred by laws of another country. 13 G. A. ch. 167, § 10 C. '51, § 1665.

SEC. 2534. When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state.

If the cause of action did not arise in this state, the fact that defendant resided here before going to the state where the cause of action became barred, will not prevent his taking advantage of such bar in a subsequent suit here: *Lloyd v. Perry*, 32–144.

The use of the words "has previously resided" does not imply that the defendant interposing the plea of bar must at such time be a resident of this state. That plea may be interposed by either a resident or a non-resident: *Lebrecht v. Wilcoxon*, 40–93.

Aside from statute the rule is that a debt barred by the statute of the state in which it was contracted is not barred by the laws of another state in which suit may be brought. To enable a party to avail himself of the provisions of our statute to the contrary, he must show that he has, previous to his removal to this state, resided in another state by the laws of which the cause of action has been *fully* barred: *Sloan v. Waugh*, 18–224; *Petchell v. Hopkins*, 19–531.

In an action commenced before the amendment of 1870 (which added the last clause of the section,) *held*, that the section applied to actions arising within the state, if general in their nature so that they might have been prosecuted where defendant resided: *Davis v. Harper*, 48–513.

It will not be presumed that because notes are barred by the law of the state where the defendant has previously resided, a mortgage given to secure them is also barred thereby: *Gillette v. Hill*, 32–220.

Minors and insane persons. R. § 2747. C. '51, § 1666.

SEC. 2535. The times limited for actions herein, except those brought for penalties and forfeitures, shall, in favor of minors as defined by this code, and persons insane, be extended so that

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they shall have one year from and after the termination of such disability within which to commence said actions.

The statute commences to run during infancy, but the action is not barred until at least one year after majority: *Mathews v. Stephens*, 39–279.

Where the minor owns as tenant in common with others, the fact that his claim or right is kept alive by this exception in his favor, will not keep alive the claims of his co-tenants: *Peters v. Jones*, 35–512.

Under the Rev. there was no such exception in favor of insane persons, nor was there at common law: *Shorick v. Bruce*, 21–305.

Section applied: *Campbell v. Long*, 20–382; *McGinnis v. Edgell*, 39–419, 423.

Death: exception. R. § 2748. C. '51, § 1667.

SEC. 2536. If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided for, the limitation above mentioned shall not apply until one year after such death.

Failure of action. R. § 2749. C. '51, § 1668.

SEC. 2537. If after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

Bank bills. R. § 2750. C. '51, § 1669.

SEC. 2538. The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall, in other respects, be applicable to all actions brought by or against all bodies corporate and politic, except when otherwise expressly declared.

The state is not intended to be included among bodies corporate and politic here referred to, and the statute does not run against it: *County of Des Moines v. Harker*, 34–84.

But the statute does run as against counties and cities; See notes to § 2529.

Admission in writing. R. § 2751. C. '51, § 1670.

SEC. 2539. Causes of action founded on contract, are revived by an admission that the debt is unpaid as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby.

Whether an admission would be good, if made to one not a party in interest or the agent of such party, *quære*: *Collins v. Bane*, 34–385, 389; *Palmer v. Butler*, 36–576, but the admission need not show to whom it was made: *Mahon v. Cooley*, 36–479.

A writing admitting the debt proven to be by the party sought to be charged, but not *signed* by him, is not admissible, and the oral testimony of defendant that the debt in controversy is the one referred to in certain written admissions is not competent, not being an admission in writing. The question whether the written admission refers to the debt in controversy is one of fact for the jury: *Collins v. Bane*, 34–385, 390.

Parol evidence may be received to show that a letter containing an admission was addressed to the plaintiff by defendant, and referred to the account in suit, but the amount of the recovery must be limited to the amount therein admitted: *Wise v. Adair*, 50–104.

A renewal by acknowledgment or new promise made prior to the sale of the premises mortgaged to secure the debt so renewed, will be binding on the vendee thereof, and he cannot set up the statute of limitations against such mortgage: *Palmer v. Butler*, 36–576; but otherwise if the renewal is made subsequently to the sale: *Day v. Baldwin*, 34–380.

An admission or new promise may be made before the bar of the statute becomes complete as well as afterwards: *Penley v. Waterhouse*, 3–418; *Lindsey v. Lyman*, 37–206. A new consideration is not necessary to support it. The action should be brought on the original cause of action and not on such admission or new promise: *Frisbee v. Seaman*, 49–95.

Either an admission or new promise is sufficient. Both are not necessary: *Mahon v. Cooley*, 36–479; *Ayres v. Bane*, 39–518.

A new promise which operates to keep alive a debt will also keep alive

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the lien of a mortgage given to secure the same: *Clinton County v. Cox*, 37–570. And an admission of the husband, without the wife's consent, will keep alive the lien of a mortgage given on the homestead to secure the debt: *Mahon v. Cooley*, 36–479.

An admission should not be excluded because made on Sunday: *Ayers v. Bane*, 39–518.

Partial payments and indorsements thereof on a promissory note are not sufficient to prevent the bar of the statute. The rule was different before the adoption of the statutory provision, but as the statute applies to the remedy, it is not unconstitutional as affecting contracts already made: *Parsons v. Carey*, 28–431; *Harrencourt v. Merritt*, 29–71; *Roberts v. Hammon*, 29–128.

Whether a payment on an account by the debtor will revive the same after it has once become barred, *quære*; but a payment before it is barred will prevent the statute from running as to any part of the account until five years from such payment. (§ 2531): *Thorn v. Moore*, 21–285.

A new promise to pay a debt at a different time and in a different manner from that of the original contract, does not constitute a new agreement, but only a new promise to pay, and hence cannot be enforced unless it is in writing: *Price v. Price*, 34–404.

A proposition to compromise is not a new promise to pay and does not revive the debt: *Morehead v. Gallinger*, 9–519.

Certain statements in a letter, *held*, to constitute a sufficient admission; also, *held*, that the cause of action upon a note being revived, the statute of limitations began to run anew from that time and would run for ten years: *Bayliss v. Street*, 51–627.

Certain statements, *held*, not an admission or new promise: *Oakson v. Beach*, 36–171.

The first part of this section simply declares the common law rule. An acknowledgment of the debt is a sufficient admission, but it seems that if the admission or acknowledgment is coupled with the expression of an unwillingness to pay and an intention not to pay, it will not revive the debt: *Penley v. Waterhouse*, 3–418.

Counter claim: when barred. R. § 2752.

SEC. 2540. A counter claim may be plead as a defense to any cause of action, notwithstanding the same is barred by the provisions of this chapter, if such counter claim so pleaded was the property of the party pleading it at the time it became barred, and the same was not barred at the time the claim sued on originated; but no judgment thereon except for costs can be rendered in favor of the party so pleading the same.

Section applied: *Allen v. Maddox*, | 40–124.

Injunction or statutory prohibition.

SEC. 2541. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action.

School fund. 9 G. A. Ch. 148, § 13.

SEC. 2542. The provisions of this chapter shall not be applicable to any action brought on any contract for any part of the school fund.

Similar provision, see § 1880.

CHAPTER 3.

OF PARTIES TO AN ACTION.

Party in interest. R. § 2757. C. 51, § 1676.

SECTION 2543. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section.

The real party in interest may sue on a negotiable note, although he is not the payee or indorsee: *McDowell v. Bartlett*, 14–157. He may be entitled to sue under an assignment made otherwise than by indorsement:

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Warnock v. Richardson, 50–450; *Allison v. Barrett*, 16–278; a verbal assignment will be sufficient: *Green v. Marble*, 37–95.

The party holding the legal title of a note or instrument, may sue on it, though he be an agent or trustee and liable to account to another for the proceeds of the recovery; but defendant in such cases may interpose any defense which he may have against the party beneficially interested. The party beneficially interested may also sue in his own name: *Cottle v. Cole*, 20–481; *Farwell v. Taylor*, 5–535; *Pearson v. Cummins*, 28–344; thus an indorsee may sue in his own name, although he holds the note only as security: *Sheldon v. Middleton*, 10–17.

A party suing on an instrument not negotiable by delivery, must show by what right he claims to sue. It is not sufficient to aver simply that he is the owner: *Montague v. Reineger*, 11–503; and he must have the legal title, or a beneficial interest. A surety, prior to the payment of the note, has no right of action thereon against his principal: *Dennison v. Soper*, 33–183.

While parties may not, by agreement, upon assignment of the legal title of a note, provide that suit shall be prosecuted thereon in the name of the assignor, yet a party may, pending an action on a note, assign to another his interest in the recovery, without rendering it necessary to change the name of the party plaintiff: *Allen v. Newberry*, 8–65; *Howey v. Willtrout*, 10–105; but where there is a transfer of the ownership of the note during the pendency of the suit, the new owner may be substituted as plaintiff on his own motion: *Ferry v. Page*, 8–445; *Fannon v. Robinson*, 10–272.

The assignee of a chose in action may sue thereon in his own name: *Roberts v. Corbin*, 26–315, 325.

The assignee, by parol assignment, of a bond may sue thereon: *Conyngham v. Smith*, 16–471; and a bond given partly for the benefit of a party not named therein, may be sued by such person in his own name: *Huntington v. Fisher*, 27–276.

The beneficiary in a trust deed may sue in his own name: *Devin v. Hendershott*, 32–192.

The holder of the legal title of real property is the real party in interest in an action for the recovery thereof, although he be under obligation to account to another for the proceeds: *Boardman v. Beckwith*, 18–329.

The assignee by verbal assignment of an instrument of guaranty may sue thereon: *Green v. Marble*, 37–95.

A judgment may be assigned, and action thereon should be prosecuted in the name of the assignee: *Edmonds v. Montgomery*, 1–143.

Where a subscription was made payable to the treasurer of an unincorporated association, *held*, that he might sue thereon in his own name: *McDonald v. Gray*, 11–508.

A surviving partner of a firm is the real party in interest as to claims existing in favor of the partnership and he should sue *as surviving partner*, without joining the representatives of the deceased partner: *Brown v. Allen*, 35–306.

It would seem that the mortgagee of property might maintain an action on a policy of insurance issued to the mortgagor, notwithstanding a provision therein prohibiting its assignment: *Mershon v. Nat'l. Ins. Co.*, 34–87.

The claim of the wife for damages for a tort against her should be prosecuted in her own name, and not jointly with her husband. The sections allowing her to sue alone in such cases are not simply permissive but imperative: *Musselman v. Galligher*, 32–383.

Where the plaintiff in an action to recover real property conveys his title during the pendency thereof, the action may be continued in his name. (See § 2561): *Jordan v. Ping*, 32–64.

An action cannot be prosecuted in a name which is not that of a partnership, corporation or person. "Steamboat Pembinaw and owners," *held* not to be the name of a *party* within the meaning of this section: *Steamboat, &c., v. Wilson*, 11–479.

SEC. 2544. An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted.

Exception. R. § 275. C. '51, § 1676.

Where a contract is made with an agent or trustee, the real party in interest may sue in his own name without joining such agent or trustee, or the latter may sue without joining the former: *Rice v. Savery*, 22–470.

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The trustee of an unincorporated association may sue in his own name for the benefit of the association, as the trustee of an express trust: *Laughlin v. Greene*, 14–92.

Where a bond in a replevin suit concerning property of an intestate was made payable to the executor in his individual capacity, *held*, that he might sue thereon either in his representative capacity or individually: *Oliver v. Townsend*, 16–430. And so in a case where no es were devised by will and the devisee was made executrix, *held*, that she might recover thereon in a suit brought as executrix: *Grimmell v. Warner*, 21–11.

The penalty of a bail bond being payable into the county treasury for the benefit of the school fund, renders the county such a "trustee" therefor, that it may bring action for such penalty: *Shelby Co. v. Simmonds*, 33–345.

In an action brought by a party to recover an amount deposited by him for himself and others as a wager, *held* that the contract being void, he could not recover as the "party with whom or in whose name a contract is is made," but could only recover the amount of the deposit belonging to him individually: *Toney v. Snyder*, 50–73.

The section applied: *Moorehead v. Hyde*, 38–382.

Plaintiffs joined. R. § 2759. C. 51, § 1678.

SEC. 2545. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this code.

Where there is unity of interest as to the object to be attained by a bill in equity, all parties seeking redress may join in the same complaint: *Powell v. Spaulding*, 3 Gr. 443. So a number of separate property owners equally interested in restraining the collection of an illegal tax may join in an action by injunction for that purpose: *Brandirff v. Harrison Co.*, 50–164.

The fact that two parties who join in a contract to perform certain work, are each to receive certain distinct, specified sums of money therefor, does not make it necessary that they should bring separate suits on such contract: *Fauble v. Davis*, 48–462.

Sureties who have paid money for their principal, may join in an action against him therefor: *Skiff v. Cross*, 21–459.

But in an action to compel reimbursement of money paid by plaintiffs which defendants should have paid, *held*, that plaintiffs could not join, but must bring separate actions for their proportionate shares: *Ind. Sch. Dists. of Graham Tp. v. Ind. Sch. Dist. No. 2*, 50–322.

Two plaintiffs cannot join in an action for slanderous words spoken of them jointly: *Hinkel v. Davenport*, 38–355; nor for fraudulent representations made to them: *Bort v. Yaw*, 46–323; nor can parties who are jointly arrested and tried for larceny join in an action for malicious prosecution: *Rhoads v. Booth*, 14–575.

Misjoinder of parties is not a ground for demurrer, but should be taken advantage of by motion to strike out the names of the parties improperly joined: *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 44–512; *Ind. Sch. Dist. of Graham Tp. v. Ind. Sch. Dist. No. 2*, 50–322.

Such defect is not waived by failure to set it up by way of demurrer or answer: *Bort v. Yaw*, 46–323.

Assignment: right of defendant saved. R. § 2760.

SEC. 2546. In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counter claim, defense, or cause of action whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due.

This section applies only to an assignment of a non-negotiable thing in action. The transferee of a negotiable note *after maturity*, takes it subject to equities arising out of the note itself, but not subject to an independent set-off: *Richards v. Daily*, 34–427.

A judgment passes to an assignee charged with all the equities which could be asserted against it in the hands of the assignor: *Burtis v. Cook*, 16–194; *Ballinger v. Tarbell*, 16–491.

As bearing on this section, see notes to § 2084.

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In proposing the change made in this section from the corresponding section of the Rev., the commissioners say, "Parties may have claims against each other, but not connected with or growing out of the same transaction. One may assign and become insolvent; in an action by an assignee the other party cannot bring in his claims as a defense. The substitute provides a remedy, and will do much to prevent the transfer of any but negotiable paper before due. None other should be protected": *Code Com'rs' Rep.*, p. 84.

SEC. 2547. Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the question involved in the action, except as otherwise expressly provided by law. Defendants. R. § 2761.

To entitle a party to be made a defendant, his claim must be made in good faith with an apparent interest in the controversy. A mortgagor who has conveyed mortgaged property with covenants, may, on his own motion, be made a party to a suit to foreclose the mortgage: *Gifford v. Workman*, 15–34

The administrator is a proper, if not a necessary, party in a proceeding to foreclose a mortgage executed by his decedent: *Darlington v. Effey*, 13–1.7.

And so in an action to foreclose a mortgage executed by defendant before his marriage, on property which subsequently to such marriage became his homestead, the wife is a necessary party defendant, and her rights in the homestead cannot be otherwise cut off: *Chase v. Abbott*, 20–154.

The trustee of a deed of trust of real property, should be made a party in a foreclosure proceeding thereon: *Tucker v. Silver*, 9–261.

In an action by equitable proceedings to correct a mistake in a chain of a title, previous grantors may be made parties defendant: *Walkup v. Zehring*, 13–306.

SEC. 2548. Persons having an united interest must be joined on the same side either as plaintiffs or defendants, except as otherwise expressly provided by law. But when some who should thus be made plaintiffs refuse to join, they may be made defendants; the reason thereof being set forth in the petition. United interest: joinder of parties. R. § 2762. C. '51, § 1679.

SEC. 2549. When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. Common interest: one suing for all. R. § 2763. C. '51, § 1680.

Persons severally charged with a tax have no such common or general interest in resisting its collection as will authorize one to sue for all: *Fleming v. Mershon*, 36–413.

Where one party sues for the benefit of others, those for whose benefit the action is brought are not parties to the suit in such sense as to have a right to appeal: *Ibid.*

One or more of the members of an unincorporated society may be sued or defend for all if they are so numerous that it would be impracticable to bring them all before the court: *Keller v. Tracy*, 11–530.

SEC. 2550. Where two or more persons are bound by contract, or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives. An action or judgment Joint and several obligations: how sued. R. § 2764. C. '51, §§ 1681, 1682.

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against any one or more of several persons jointly bound, shall not be a bar to proceedings against the others.

The maker and assignor or guarantor of an instrument not negotiable, may be made joint defendants in an action thereon: *Tucker v. Shiner*, 24-334; *Huse v. Hamblin*, 29-501; so the maker and assignors of a negotiable instrument may be joined: *Marvin v. Adamson*, 11-371; *Mix v. Fairchild*, 12-351; and so an endorser may be joined as defendant with the maker: *Stout v. Noteman*, 30-414.

An action on a promissory note against a surety, may be brought where there is judgment by confession against the principal: *Citizens', etc., Bank v. Oleson*, 47-492.

The provisions of this section are applicable to the members of a partnership, and an action on an obligation of a firm may be brought against one partner alone (and *held* that this was so irrespective of Rev. § 2785, which was similar to, but not identical with § 2553 of this Code): *Ryerson v. Hendrie*, 22-480.

A judgment in favor of a sole plaintiff against two defendants jointly, may be set off against a judgment against such plaintiff in favor of one of the defendants: *Ballinger v. Tarbell*, 16-491.

Parties who, under § 1557, are each liable to action for separate injuries committed thereunder, are not so bound "by statute" as to be joined as defendants by reason of the provision of this section, when they would not be otherwise jointly liable: *La France v. Krayer*, 42-143, 146.

Where a district township was divided into independent school districts, *held*, that action could not be brought on an indebtedness of the township against one of such independent districts alone: *Knoxville Nat. Bank v. Ind. Dist. of Washington*, 40-612; but that a joint action might be brought against all the independent districts composing what was formerly the district township, and a judgment against all of them might be rendered: *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 52-73; *Kennedy v. Ind. Dist. of Derby Grange*, 48-189.

Action may be brought against the personal representatives of one of two or more joint obligors, although the other joint obligor or obligors are still living: *Sellon v. Braden*, 13-365.

In an action on a joint policy of insurance made by four companies, in which each bound itself in case of a loss to pay one-fourth of the amount of insurance, *held*, that the cause of action against each was separate, and they could not properly be joined as defendants in one action: *Viele v. Germania Ins. Co.*, 26-9, 45.

Other parties brought in.
R. § 2765.
C. '51, § 1688.

SEC. 2551. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. But when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in.

This section is especially applicable to cases where the debtor is under an apparent liability to two different parties for the same debt, and only one of them is before the court: *Fowler v. Doyle*, 16-534.

In a proceeding to correct a misdescription of the premises, running through prior deeds, *held*, that the original grantor conveying with such mistaken description, or if dead, his heirs, were necessary parties, and should have been brought in: *Flanders v. McClanahan*, 24-486.

Bond payable to state, county, or municipal corporation.
R. § 2787.
C. '51, § 1693.

SEC. 2552. When a bond or other instrument given to the state or county, or other municipal corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus secured who has sustained an injury in consequence of a breach thereof.

A person intended to be secured, though his name be not mentioned in the bond, may bring suit thereon: *Huntington v. Fisher*, 27-276.

Where a bond intended for the security of a county was improperly given to the county judge, *held*, that the county might sue thereon: *Collins v. Ripley*, 8-129.

In case of a bond given to release

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attached property under § 2994, to the sheriff instead of the plaintiff, *held*, the plaintiff might sue thereon: *Moorman v. Collier*, 32–138.

A bond, though not such as is required in a particular case by statute, may still be good as a common law bond, and the party for whose benefit it was given may sue thereon: *Sheppard v. Collins*, 12–570; *Garretson v. Reeder*, 23–21.

Where a bond is executed to the sheriff, an assignment by him is not necessary to enable a party intended to be secured thereby to bring suit thereon: *Sheppard v. Collins*, 12–570.

For somewhat similar provision, see § 3368.

SEC. 2553. Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof, and a judgment against the firm, as such, may be enforced against the partnership property or that of such members as have appeared or been served with notice. But a new action may be brought against the other members on the original cause of action. Partnership. R. § 2785. C. '51, § § 1690, 1691.

[The following cases were decided under Rev. § 2785, not identical with this section.]

Where judgment on a partnership debt is recovered against individual members of a firm, a sale of individual property thereunder will not be invalid although an individual creditor might, by proceedings in equity in a proper case, compel a resort to partnership property: *Hamsmith v. Espy*, 13–439.

Whether a judgment against the firm alone, as such, is a lien upon anything but firm property, *quære*, but the individual property of the members may be made liable by proper action: *Markham v. Buckingham*, 21–494.

Service on one member of a copartnership, after dissolution, *held* sufficient to warrant judgment against the firm, to be satisfied out of the partnership property: *Hale v. VanSaun*, 18–19.

A judgment against a firm does not become a lien on real property held in the name of one partner, until made so by proper proceedings, although the firm may be the equitable owners: *Stadler v. Allen*, 44–198.

The surviving partner should sue as such for claims in favor of the partnership without joining the representative of the deceased partner: *Brown v. Allen*, 35–306.

SEC. 2554. Foreign corporations may bring suit in the courts of this state in their corporate name. Foreign corporations. R. § 2789. C. '51, § 1695.

SEC. 2555. An unmarried female may prosecute as plaintiff an action for her own seduction, and recover such damages as may be found in her favor. Unmarried woman. R. § 2790. C. '51, § 1696.

This section does not take away from the father the right to sue for damages for the seduction of his minor daughter. The action may be brought after she becomes of age, and in a suit by the father exemplary damages may be given. He may maintain the action although the daughter be not living with him or in his service, and though there be no loss of service. (Decided under Code of '51): *Stevenson v. Belknap*, 6–97.

To enable an unmarried female to recover for her own seduction, it is not necessary that she be of previously chaste character (as is required in a criminal prosecution for seduction, § 3867). Without that, she may recover for loss of health, etc., but not for loss of character: *Smith v. Milburn*, 17–30.

It is contemplated that the person seduced shall be unmarried at the time of the seduction: *Gover v. Dill*, 3–337.

Such action survives under § 2525 to the personal representatives of the female: *Shafer v. Grimes*, 23–550.

Section applied: *Gray v. Bean*, 27–221.

For other cases as to seduction, see notes to § 3867.

SEC. 2556. A father, or in case of his death or imprisonment or desertion of his family, the mother may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child. When parents may sue. R. § 2792. C. '51, § 1697.

The damages to be thus recovered are those accruing before the date of the minor's attaining majority. For damages accruing subsequently, the

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administrator must sue for the benefit of the estate, under § 2526: *Walters v. C., R. I. & P. R. Co.*, 36–458.

Name unknown. R. § 2788. C. '51, § 1694.

SEC. 2557. When the precise name of any defendant cannot be ascertained, he may be described as accurately as practicable, and when the name is ascertained it shall be substituted in the proceedings.

In a suit brought against "the heirs of Otis Reynolds," *held*, that the defendants were not described with sufficient certainty. The Code contemplates that the defendant shall be a known person, who can be described with some certainty: *Reynolds v. May*, 4 Gr., 283.

For similar provision as to proceedings before a justice, see § 3519.

Written instrument: suit on, how brought. R. § 2786. C. '51, § 1692.

SEC. 2558. When an action is founded on a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument.

Where the name inserted in the instrument as that of payee is not that of a person, partnership or corporation, the suit cannot be brought in that name. So *held*, where a note was made payable to "Steamboat Pembinaw and owners:" *Steamboat, etc., v. Wilson*, 11–479.

Under this section it is not necessary to allege either copartnership or corporate capacity: *Harris M'f'g Co. v. Marsh*, 49–11.

Prisoner in penitentiary. R. § 2784.

SEC. 2559. No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or if there is none, by a person appointed by the court to defend him.

State: actions by. R. § 2793.

SEC. 2560. The state shall commence and prosecute suits according to the laws of the land as in cases between individuals, except that no security shall in such cases be required.

Transfer: abatement. R. § 2794. C. '51, § 1698.

SEC. 2561. No action shall abate by the transfer of any interest therein during its pendency.

Under corresponding section of Rev., *held*, that where plaintiff in an action to recover property, transferred his interest pending the action, the suit might still be prosecuted in his name: *Jordan v. Ping*, 32–64; and that an action might be continued in the name of the original party, or the court might allow the person to which the transfer was made to be substituted: *Chicasaw Co. v. Pitcher*, 36–593. And see cases under § 2543.

MARRIED WOMEN.

May sue without joining husband. R. § 2772. 13 G. A. ch. 167, § 11.

SEC. 2562. A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action shall be enforced by or against her as if she were a single woman.

Personal judgments against married women may be enforced against subsequently acquired property the same as in case of judgments against other persons: *Van Metre v. Wolf* 27–341.

Defense by. R. § 2774. C. '51, § 1687.

SEC. 2563. If husband and wife are sued together, the wife may defend for her own right; and if either neglect to defend, the other may defend for such one also.

When husband or wife deserts family. R. § 2776. 13 G. A. ch. 167, § 12.

SEC. 2564. When a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and under like circumstances

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the same right shall apply to the husband upon the desertion of the wife.

MINORS.

SEC. 2565. The action of a minor must be brought by his guardian or next friend; but the court has power to dismiss it if it is not for the benefit of the minor, or to substitute the guardian of the minor or other person as next friend. Action: how brought. R. § 2777. C. '51, § § 1685 9.

An infant may sue by his next friend, and on the trial prove his infancy as establishing his right to sue in that manner: *Byers v. Lessees of D. V. R. Co.*, 21–54.

The "next friend" in whose name a suit for a minor is commenced, may be discharged and another substituted: *Thurston v. Cavenor*, 8–155.

In an action brought for a minor by his next friend, such next friend is liable for costs: *Vance v. Fall*, 48–364.

SEC. 2566. The defense of a minor must be by his regular guardian, or by a guardian appointed to defend him where no regular guardian appears, or where the court directs a defense, by a guardian appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian. Defense by R. § 2778. C. '51, § § 1685-9.

The court has no authority to appoint a guardian *ad litem* to act for a minor until complete service upon such minor has been had: *Good v. Norley*, 28–188, 199.

Failure to appoint a guardian *ad litem*, and rendition of judgment without defense by minor, does not render a judgment void. It is erroneous, but can only be taken advantage of by direct proceedings: *Drake v. Hanshaw*, 47–291; *Myers v. Davis*, 47–325, 330; *Bickel v. Erskine*, 43–213; *Cavender v. Heirs of Smith*, 5–157.

Where a guardian *ad litem* was not appointed for the minor defendant until the trial had commenced and plaintiff had rested, when an attorney for the defendant was appointed as such guardian, *held*, that a refusal of the court to re-try the case from the beginning would not be sufficient to warrant a reversal, no prejudice appearing to have resulted therefrom: *Wickersham v. Timmons*, 49–267.

SEC. 2567. The appointment cannot be made until after service of the notice in the action as directed in this code, and may then be made by the court or judge thereof, or during vacation, by the clerk; but the court shall have the power to remove such guardian when the interests of the minor require such change. If made by the judge or clerk, it shall be done by endorsing the name of the person appointed, and the time thereof, on the petition in the action. Guardian: appointment of. R. § 2779.

After service by publication in the same manner as in case of an adult, the court may appoint a guardian *ad litem* for a minor defendant as here provided: *Judd v. Mosely*, 30–423.

Where there has not been sufficient service of notice, the appointment and appearance by a guardian *ad litem* will not confer jurisdiction: *Allen v. Saylor*, 14–435.

SEC. 2568. The appointment may be made on the application of the minor if he is of the age of fourteen years, and applies at or before the time he is required to appear and defend. If he does not so apply, or is under that age, the appointment may be made on the application of any friend of the minor or on that of the plaintiff in the action. When over fourteen years of age. R. § 2780.

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INSANE.

Plaintiff: action by. R. § 2781.

SEC. 2569. The action of a person judicially found to be of unsound mind, must be brought by his guardian, and, if he have none, the court or judge thereof, or the clerk, in vacation, may appoint one for the purposes of the action.

Defense: guardian of. R. § 2782.

SEC. 2570. The defense of an action against a person judicially found to be of unsound mind, or a person confined in any state lunatic asylum, who, by the certificate of the physician in charge, appears to be of unsound mind, must be by his guardian or a guardian appointed by the court to defend for him. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff, but not until service has been made as directed in this code, and no judgment can be rendered against him until defense has been made as herein provided.

Pending suit. R. § 2783.

SEC. 2571. Where a party is judicially found to be of unsound mind, or is confined in any state lunatic asylum, and, by the certificate of the physician in charge, appears to be of unsound mind during the pendency of an action, the fact being stated on the record, if he is plaintiff his guardian may be joined with him in the action as such; if he is defendant, the plaintiff may, on ten days' notice thereof to his guardian, have an order making the guardian a defendant also.

INTERPLEADER.

Interpleader: substitution of parties: deposit of property. R. § 2767. C. 51, §§ 1685, 1686.

SEC. 2572. Upon affidavit of a defendant before answer, in any action upon contract for the recovery of personal property, that some third party without collusion with him has, or makes a claim to the subject of the action, or on proof thereof as the court may direct, the court may make an order for the safe keeping, or for the payment or deposit in court or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claims against the defendant, and in the meantime stay the proceedings. If such third party, being served with a copy of the order, fails to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the court for payment, deposit, or delivery thereof.

Application of rule to sheriffs and officers. R. § 2768.

SEC. 2573. The provisions of the last section shall be applicable to an action brought against a sheriff or other officer, for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him. And the defendant in any such action shall be entitled to the benefit of these provisions against the party in whose favor the attachment or execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the prop-

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erty, for the recovery of which, or its proceeds, the action was brought, was taken under such process.

The remedy here given the officer in such cases, is merely cumulative to that by indemnity bond provided in § 3055: *Kaster v. Pease*, 42–488.

SEC. 2574. In an action against a sheriff or other officer, for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant and of the party in whose favor the process issued, permit the latter to be substituted as defendant, sureties for the cost being given. Same. R. § 2769.

SEC. 2575. An action to recover the possession of specific personal property taken under a landlord's attachment, when it is brought by the tenant or his assignee or under-tenant, may be against the party who sued out the attachment; and the property claimed by such action may, under the writ therefor, be taken from the officer who seized it when he has no other claim to hold it than that derived from the writ. The endorsement of a levy on the property made upon the process by the officer holding it, shall be a sufficient taking of the property to sustain action against the party who sued out the writ. In case of landlord's attachment. R. § 2770.

CHAPTER 4.

OF PLACE OF BRINGING SUIT.

SECTION 2576. Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: In relation to real property. R. § 2795. C. 51, § 1703.

1. For the recovery of real property, or of an estate therein, or for the determination of such right or interest;
2. For the partition of real property;
3. For injuries to real property.

SEC. 2577. Actions for injuries to real property may be brought either in the county where the property is, or where the defendant resides. Same.

[This section and ¶ 3 of the preceding section seem inconsistent. In the original, the two sections are in different parts of the chapter, but in the re-arrangement by the editor, they are brought together in the printed code as here.]

SEC. 2578. An action for the foreclosure of a mortgage of real property, or for the sale of real property under an encumbrance or charge, or to enforce a mechanics' lien on real property, may be brought in the county in which the property to be affected or some part thereof is situated. Mortgage: mechanics' lien.

Action to foreclose a mortgage and for general judgment against mortgagor, may be brought either where the property is situated or where the defendant resides: *Cole v. Conner*, 10–299; *Finnagan v. Manchester*, 12–521. See, also, *Chadbourne v. Gilman*, 29–181.

SEC. 2579. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose; Fines, forfeitures: against officers and on official bonds. R. § 2796.

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1. An action for the recovery of a fine, penalty, or forfeiture imposed by a statute, except that when the offense for which the claim is made was committed on a water course or highway which is the boundary of two counties, the action may be brought in either of them;

2. An action against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command, or in his aid, shall do anything touching the duties of such officer or for neglect of official duty;

3. An action on the official bond of a public officer.

An action on a bail bond given upon change of venue from one county to another, conditioned for the appearance of defendant in the county to which the change is taken, should be brought in that county and not in the county where the indictment was found. The forfeiture belongs to the county to which the change was taken: *Decatur Co. v. Maxwell*, 26–398.

As to place of bringing action on bail bond, see § 4559.

Attachment of property.
R. § 2797.
C. '51, § 1703.

SEC. 2580. An action, when aided by attachment, may be brought in any county of the state wherever any part of the property sought to be attached may be found, when the defendant whose property is thus pursued is a non-resident of this state. If such defendant is a resident of this state, such action must be brought in the county of his residence, or that in which the contract was to be performed, except that if an action be duly brought against such defendant in any other county by virtue of any provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by an attachment.

The word "contract" in the phrase "that (county) in which the contract is to be performed," refers to such written contract as is contemplated in the following section and not to verbal contracts: *Hatch v. Johnson*, 44–535.

As to whether the proceedings in an action by attachment against a non-resident defendant served by publication, brought in a county where no property is found, but in which proceedings property in another county is levied on, are valid and may be removed to the proper county under § 2589 (discussing the question with reference to the provisions of Code of '51), see *Laird v. Dickerson*, 40–665.

Place of contract.
R. § 2798.
C. '51, § 1703.

SEC. 2581. When, by its terms, a written contract is to be performed in any particular place, action for breach thereof may be brought in the county wherein such place is situated.

Where defendant bought of plaintiff fruit trees, agreeing to pay therefor a certain sum on their delivery at a certain place, *held*, that the contract to pay was not, by its terms, to be performed in any particular place, and suit for the price should be brought where the defendant resided. The agreement to perform in a particular place must be in terms, and not by implication merely: *Hunt v. Bratt*, 23–171.

Where personal property is to be delivered by the vendor and received by the vendee at a particular place, an action for the breach of such contract may be brought in the county where, by its terms, the property was to be delivered: *Oliver v. Bass*, 30–90; *Hauger v. McCarthey*, 34–415.

Where a certificate of deposit was issued payable at a certain date on return of the certificate, *held*, that by its terms it was "to be performed" at the place where issued, so that an action on it might be brought in that county: *Sanbourn v. Smith*, 44–152.

Where a bond was given conditioned for the payment of a penalty if the principal failed to erect a schoolhouse at a place named, according to a certain written contract, etc, *held*, that it was not "to be performed in a particular place," and an action

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thereon should be brought in the county where defendants resided: *Ind. Sch. Dist. of Mason City v. Reichard*, 39–168.

Where plaintiff agreed to lay a railroad track for defendant in Lucas Co., and defendant agreed to deliver iron and material for laying the track at the end thereof, and pay plaintiff any damage sustained by reason of delay in finishing the grade, *held*, that as to damages for delay, etc., the action could not be brought in Lucas Co., as the place of performance of the contract, but *semble* that as to damages for not delivering iron, etc., at end of track, action might be brought in that county, under this section: *Manley v. Wolfe*, 24–141.

This section is permissive and not mandatory. Plaintiff may still sue in the county where the defendant resides: *Troy, etc., Mill Co. v. Bowen*, 7–465.

This section only applies to cases where personal service is had upon defendant within the state. If the proceedings are by attachment against a non-resident defendant, suit can only be brought where the property is attached. (§ 2580): *Hedrick v. Brandon*, 9–319.

For similar provision in actions before a justice, see § 3513.

SEC. 2582. Actions may be brought against railway corporations, the owners of mail stages, or other line of coaches or cars, including express companies, car companies, telegraph and canal companies, and the lessees, companies, or persons operating the same, in any county through which the line or road thereof passes, or is operated.

Common carriers. 9 G. A. ch. 169 § 8. 12 G. A. ch. 172, § 2. 14 G. A. ch. 95 § 1.

A railway corporation has a residence in the counties through which the road passes and in which it transacts business: *Baldwin v. M & M. R. Co.*, 5–518; *Richardson v. B. & M. R. R. Co.*, 8–260.

SEC. 2583. An action may be brought against any corporation company, or person, engaged in the construction of a railway, telegraph line, or canal, on any contract relating thereto, or to any part thereof, or for damages in any manner growing out of the work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which arose the damage claimed.

Construction of railways telegraphs or canals. 14 G. A. ch. 95, § 1.

SEC. 2584. Insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred.

Insurance companies. Same, § 3.

SEC. 2585. When a corporation, company, or individual, has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located.

Office: agency: suits growing out of. R. § 2891. C. 51, § 1705.

This section is permissive and not mandatory. The suit, if against a non-resident, may be brought in the usual manner of commencing actions against non-residents: *Dean v. White*, 5–266; and if against a railway corporation, may be brought in any county through which the railway passes: See § 2582 and notes.

The section merely fixes the county in which suit shall be brought; it does not define the manner in which jurisdiction over the person is to be acquired. (See §§ 2612, 2613): *Centennial, etc., Ass'n v. Walker*, 50–75.

See, also, *Milligan v. Davis*, 49–126.

SEC. 2586. Except where otherwise provided herein, personal actions must be brought in a county wherein some of the defendants actually reside. But if none of them have any residence within this state, they may be sued in any county wherein either of them may be found. But in all actions upon negotiable paper, except when made payable at a particular place, in which any maker of such paper, being a resident of the state, is made defend-

Place of residence. R. § 2890. C. 51, § 1701. 14 G. A. ch. 64.

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ant, the place of trial shall be limited to a county wherein some one of the makers of such paper resides.

A personal action may be brought in the county where one of the defendants resides and the fact as to whether the petition is sufficient to entitle the plaintiff to recover against such defendant cannot be determined on a motion for change of venue to the county where other defendants reside: *Armstrong v. Borland*, 35–537.

Previous to the enactment of the clause in relation to negotiable paper it was held, that when a joint action was brought against the maker and indorsers of a note it might properly be brought in the county where an indorser resided: *Stout v. Noteman*, 30–414; and that the fact that guarantors or indorsers become parties to the note subsequent to the maker, if in good faith, would not change the rule: *Troy, etc., Mill Co. v. Bowen*, 7–465.

The fact that an attachment is sought against property in another county than that of defendant's residence will not change the rule as to the place of bringing suit: *Gates v. Wagner*, 46–355.

The fact that the defendant is a resident of another state will not defeat the jurisdiction of our courts: *Swan v. Smith*, 26–87.

A person who, having relinquished his residence in one county, is in the act of removing to another with intent of residing within the latter, has not "a residence within this state," and may be sued in any county where found. The meaning of residence as here used is more precise and limited than that of domicile: *Cohen v. Daniels*, 25–88.

Same.

SEC. 2587. Where an action embraced in the preceding section is against several defendants, some of whom are residents and others non-residents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such non-residents may, upon motion, have said cause dismissed with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them.

Change of residence after suit brought.

SEC. 2588. If, after the commencement of an action in the county of the defendant's residence, he remove therefrom, the service of notice upon him in another county shall have the same effect as if it had been made in the county from which he removed.

Effect, if brought in wrong county. R. § 802. C. 51, § 1702.

SEC. 2589. If a suit be brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demand a change of place of trial to the proper county. In which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county. And if the sum so awarded, and costs, are not paid to the clerk by a time to be fixed by the court, or if the papers in such case are not filed by the plaintiff in the court to which the change is ordered ten days before the first day of the next term thereof, or if ten days do not intervene between the making of said order and the first day of the next term of said court, ten days preceding the first day of the next succeeding term thereof, in either event the action shall be deemed to be discontinued.

On the hearing of an application of a defendant for the transfer of an action to another county upon a showing that it is his place of residence, the plantiff should be allowed to make a counter showing on that question: *Turner v. Maddox*, 6–489.

This section has no application where an action is improperly changed to another county under the next

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section. In such case plaintiff does not waive the remedy by going to trial in the wrong county: *Ferguson v. Davis Co.*, 51–220

Default having been set aside and defendant granted a certain time to answer, *held*, that an application for a change of place of trial under this section, made after the expiration of the time given to answer was too late: *First Nat. Bank of Muscatine v. Krance*, 50–235.

This section does not apply to actions before a justice of the peace: *Post v. Brownell*, 36–497; *Meunch v. Breitenbach*, 41–527.

As bearing upon this section, see *Laird v. Dickerson*, 40–665, in note to § 2580.

CHAPTER 5.

OF CHANGE IN PLACE OF TRIAL.

When granted. R. § 2803. C. '51, § 1706. 13 G. A. ch. 167, § 13.

SECTION 2590. A change of the place of trial, in any civil action, may be had in any of the following cases:

1. Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury;

2. Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree;

3. Where either party files an affidavit verified by himself and three disinterested persons, not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent, or employe of such party, stating that the inhabitants of the county, or the judge, is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county, that he cannot obtain a fair trial;

4. By the written agreement of the parties, and their attorneys;

5. If the issue is one triable by jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained. *Provided, however*, that not more than two changes to either party of the place of trial shall be allowed for any of the causes enumerated in this section; nor shall a change of venue from the county be allowed in case of appeal from a justice of the peace; nor shall a change of the place of trial be allowed when the issue can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof, that he cannot obtain a fair trial; *and, provided*, that after any change of venue has been taken as herein provided, and a trial had and the jury been discharged or a new trial has been granted them, a subsequent change of venue may be taken for any of the causes mentioned in said section.

Number of changes limited.

[As amended by 17th G. A., ch. 118, which added the provisos.]

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IN GENERAL: Where a party seeking a change brings himself within the provisions of the statute, it is error to refuse the application. The court has not in civil cases the discretion confided to it in criminal cases by §§ 4368, 4374: *Turner v. Hitchcock*, 20–310; *Miller v. Laraway*, 31–538; *Jones v. C. & N. W. R. Co.*, 36–68; *Moorman v. Moorman*, 39–460. But the court may protect itself from imposition, and though the affidavit be in due form it may require the disinterested persons to be produced, and in a case where they were not found and information concerning them was refused and other suspicious circumstances were shown, *held*, that the application for change, though sufficient in form, was properly overruled: *Davis v. Rivers*, 49–435.

Unless the contrary appears from the record, the action of the court in granting a change will be presumed correct: *Ramsey v. Bush*, 27–17.

After an unconditional change is granted, the court in which the cause was pending has no further jurisdiction: *Campbell v. Thompson*, 4 Gr. 415; *Farr v. Fuller*, 12–83; but it may by consent of parties re-docket the cause and proceed to trial thereof: *Eckles v. Kinney*, 4–539.

Where a party has duly objected to a change of venue being granted, he does not waive such objection by appearing in the court to which the cause is changed and going to trial: *Jones v. C. & N. W. R Co.*, 36–68; *McCracken v. Webb*, 36–551; *Ferguson v. Davis Co.*, 51–220.

Where a change is improperly granted, prejudice therefrom will be conclusively presumed: *Ferguson v. Davis Co., supra.*

A change of venue cannot be granted on application of a stranger to the action, who has applied for, but not yet obtained leave to intervene: *Barkdull v. Callanan*, 33–391.

The provisions of this section are applicable in a special proceeding to disbar an attorney: *The State v. Clark*, 46–155.

PAR. 1. The fact that under section 3370 the penalty recovered in an action on a bail bond goes into the county school fund does not make the county a party to such action so as to be a ground for change of venue: *The State v. Merrihew*, 47–112.

PAR. 3. An affidavit of witnesses that they "verily believe" that prejudice on part of the judge exists, is sufficient: *Jones v. C. & N. W. R. Co.*, 36–68; and the facts showing such prejudice need not be stated: *Turner v. Hitchcock*, 20–310.

An application for change on the ground of prejudice of the judge not made until after a continuance is had, is too late when it does not appear that the grounds therefor were not known prior to the continuance: *Finch v. Billings*, 22–228; and see cases under next section.

Where the application is not supported by affidavits of "three disinterested persons" as here required it should be overruled: *Ferguson v. Davis Co.*, 51–220.

Counter affidavits cannot be presented as provided in criminal cases: *Jones v. C. & N. W. R. Co*, 36–68.

PAR. 4. The written agreement referred to in this paragraph will be sufficient if signed by the parties *or* their attorneys. The signatures of both parties and attorneys is not essential: *Oltrogge v. Schutte*, 51–279.

To whom and when made. R. § 2804. C. 51, § 1708.

SEC. 2591. The application for a change of place of trial may be made either to the court or to the judge in vacation, and, if made in term time, shall not be awarded until issue be made up unless objection be to the court; nor shall such application be allowed after a continuance, except for a cause not known to the affiant before such continuance; and after one change, no party is entitled to another for any cause in existence when the first change was obtained.

A change cannot be allowed after a continuance: *Dean v. White*, 5–266; *Ferguson v. Davis Co.*, 51–220, unless the affidavit of the change state that the cause for which it was asked was not known to the applicant before such continuance: *McCracken v. Webb*, 36–551; *Finch v. Billings*, 22–223.

After one change a party cannot have a second, except for a cause not existing when the first was granted: *Schaentgen v. Smith*, 48–359.

A change should not be granted in vacation unless notice of the application therefor has been given the opposite party as provided in § § 2914, 2915: *Preston v. Winter*, 20–264; *Loomis v. McKinzie*, 31–425.

It cannot be determined until the

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issues are made up whether "the issue can only be tried to the court," and an application for change on account of prejudice of the people of the county cannot therefore be made even in vacation until the issues are made up: *Gibson v. Abbott*, 50–155.

SEC. 2592. The place of trial shall be changed to some other county in the same district or circuit, unless the objections are to the judge, or the objections made appear from the affidavits to exist as to all the other counties in the district, and shall be to the most convenient county to which no objection is made. Whenever the change shall be granted on account of the prejudice or disability of the judge, the action shall be transferred to the district or circuit court of the same county, unless objections exist as to both the judges, in which case it shall be transferred to the most convenient county in some other district or circuit.

To what county or court. R. § 2805. C. '51, § 1707. 12 G. A. ch. 86, § 7. 14 G. A. ch. 167, § 14.

The "most convenient county" is not necessarily the one nearest in point of distance. The question as to which county is most convenient must be determined to some extent by the peculiar circumstances of each case, taking into account the distance of parties and witnesses, the convenience of attorneys, and the prospect of reaching a speedy trial, as well as the relative distance of different counties. And where nothing is shown to the contrary, it will be presumed that the county selected was, within the meaning of the law, the most convenient: *Allen v. Skiff*, 2-433.

When the objection is to the judge, the change should be to the district or circuit court of the same county: *Polk Co. v. Hierb*, 37–361.

SEC. 2593. If an application for the change is made in vacation, five days notice of the same, with a copy of the affidavit, shall be served on the adverse party or his attorney; and if the judge grant the change, he shall forthwith transmit his order to the clerk, together with all the papers used before him.

How made during vacation. R. § 2806. C. '51, § 1709.

SEC. 2594. If the order for the change is granted in vacation, the same must be perfected by noon of the second day after the order is received by the clerk, and, if granted during term time, the same must be perfected by the morning of the second day thereafter or before the cause is reached for trial, if sooner reached, or such change, whether granted in term or vacation, will be deemed waived and the cause tried as though no such order had been granted. When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court, strongly enveloped and sealed, a transcript of the record and proceedings, with all the original papers, having first made out and filed in his office authenticated copies of such original papers; but, if less than all of several plaintiffs or defendants take such change, the original papers shall not be so transmitted, but a copy thereof. And as to those who take no change, the cause shall proceed as if none had been taken, except that if the place of trial is changed to a court in the same county, no transcript or copies shall be made out, but the original papers shall be transmitted.

When deemed perfected: consequences of failure. R. §§ 2807, 2810. C. '51, § 1710.

If costs are not paid within the time provided, a subsequent payment will not effect the change: *Stryker v. Rivers*, 47–108, 110.

In case of a change granted during term, the payment of costs during the second day after the granting of the order, though not by the morning of that day, will be sufficient, provided they are paid before any action is taken by the court to vacate the order: *Bacon v. Block*, 38–162.

The provisions of this section as to the time within which the change is to be perfected, do not apply to cases where the venue is changed by agreement of the parties: *Carroll Co. v. Am. Em. Co.*, 37–371.

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A garnishee is such a party as to be entitled to change of venue, and where he does not join in an application for the change, the cause will proceed against him in the court where commenced: *Westphal v. Clark*, 42-371.

Docketed. R. § 2808. C. '51, § 1711.

SEC. 2595. Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed without fee and proceeded in as though it had originated therein.

Costs of change. R. § 2809. C. '51, § 1712.

SEC. 2596. Unless the change be granted under subdivision two, four, or five, of section two thousand five hundred and ninety of this chapter, all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court, or judge, at the time of making the order, shall designate in general terms such costs, and no change shall be deemed perfected until such costs are paid.

The applicant should be charged not only with the costs of the transcript but also with the costs of the term: *Allen v. Skiff*, 2-433.

The clerk's fee for entering order of change is part of the cost to be paid by the applicant: *Stryker v. Rivers*, 47-108.

Jury to be paid by county from which change is taken. 14 G. A. ch. 9, § 1.

SEC. 2597. Where the place of trial in any civil action is changed to any county other than that in which the same was properly commenced, where the trial thereof takes place at a regular term, and occupies more than one calendar day, the judge trying said case shall certify the number of days so occupied, and the county in which the case was originally commenced shall be liable to the county where the same is tried for the sum of two dollars per day for each juryman engaged in the trial thereof.

In case special term is held. Same, § 2.

SEC. 2598. Where a special term of any court is held for the trial of any action contemplated in the preceding section, the court trying the same shall make out and certify the amount of county expenses incurred in the trial of each case, and the same shall be a legal and valid claim against the county in which the same was properly commenced.

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

Notice. R. §§ 2811, 2812. C. '51, §§ 1714, 1715.

SECTION 2599. Actions in a court of record shall be commenced by serving the defendant with a notice signed by the plaintiff or his attorney, informing the defendant of the name of the plaintiff, and that on or before a date therein named, a petition will be filed in the office of the clerk of the court wherein suit is brought, naming it, and stating in general terms the cause or causes of action, and if the action is for money, the amount thereof, and that unless he appears thereto and defends before noon of the second day of the term at which defendant is required to appear, naming it, or at such other time as may be by rule of such court prescribed, default will be entered against him and judgment rendered thereon. In all cases where the time for the

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commencement of the term has been changed after the notice has been served, the defendant shall be held to appear at the time to which such term has been so changed.

The original notice should fix, *by name*, the term at which defendant is required to appear. (Explaining *Lemonds v. French*, 4 Gr. 123, and *Butcher v. Brand*, 6-235): *Des Moines Branch, etc., v. Van*, 12-523; *Van Vark v. Van Dam*, 14-232; and a notice requiring defendant to appear "on or before noon of the second day of the next regular term, etc.," but not *naming* the term, is defective: *Decatur Co. v. Clements*, 18-536; but a notice requiring defendant to "appear and answer on or before noon of the 15th day, etc.," it appearing that the day named was the second day of the next term, was held sufficient, although the term was not named: *Knapp v. Haight*, 23-75; and where a notice required defendant to appear "on or before the 29th day, etc., being the second day of the next term," etc., whereas that day was, in fact, the fourth day of the term, *held*, that it was not error to refuse to set aside a default rendered on the 29th, there being no showing that defendant had been misled: *Burr v. Wilcox*, 19-31; also, a notice giving the date of the commencement of the term, but not otherwise naming it, *held* sufficient: *Farmers' Ins. Co. v. Highsmith*, 44-330.

Notice requiring defendant to appear on the second day of the April term, "commencing April 12th," *&c.*, when the term really commenced April 18th, *held* insufficient: *Boales v. Shules*, 29-507; a notice requiring an appearance at a date prior to the term is void and confers no jurisdiction: *Haws v. Clark*, 37-355.

After proper service of notice is made, a subsequent change in the time of holding the term of court will not render the notice insufficient, and defendant must appear at the term as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28-274.

A notice which does not state when or where (i. e., in what court) defendant is required to appear, is fatally defective, and a judgment rendered thereon is void, and may be collaterally attacked: *Kitsmiller v. Kitchen*, 24-163; but it is not necessary that the name of the city or town in which the court is to be held should be stated: *Bond v. Epley*, 48-600.

The notice is not to set forth the cause of action in detail, but the defendant should be informed with reasonable certainty as to the nature of plaintiff's claim, or the remedy sought, as well as of the amount of recovery asked: *Harkins v. Edwards*, 1-296; *Moody v. Taylor*, 12-71.

Notice of an action to foreclose a mortgage, without claiming any specific sum, *held*, sufficient to warrant a personal judgment for the amount due, as provided in § 3321: *York v. Boardman*, 40-57.

In an action upon a note and mortgage, the note being given by one defendant, and the mortgage to secure it by another, *held*, that a notice directed to both of them stating that plaintiff claimed of *them* judgment on the note and foreclosure of the mortgage, etc., was sufficient: *Hickman v. Chambers* 10-391.

A notice stating the claim as upon a promissory note, when it was in fact upon a guaranty of a non-negotiable instrument, *held*, sufficient: *Peddicord v. Whittam*, 9-471.

In the original notice in an action for divorce, it is not necessary to state that alimony is claimed. It is allowed as an incident of the main action: *McEwen v. McEwen*, 26-375; *Darrow v. Darrow*, 43-411.

Where a notice was placed in the hands of the officer for service on the 1st day of a month, but not actually served until the 3d, and the debt came due on the 2nd, *held*, that the action was not actually commenced until the 3d and not until after the debt became due, § 2532 not being applicable in such a case: *Parkyn v. Travis*, 50-436.

Though the notice be irregular and insufficient, yet, if the court takes jurisdiction to render judgment, the error can only be taken advantage of on appeal. The judgment is not thereby rendered void: *Moody v. Taylor*, 12-71; *Woodbury v. McGuire*, 42-339; *De Tar v. Boone Co.*, 34-488, and cases therein cited, and see, also, notes to § 2604. Such defect cannot be taken advantage of on appeal, unless a motion to correct the irregularity has been made in the court below: See notes to § 3168.

The original notice is not a *process* of the court and need not be in the style of "The State of Iowa" (Const. art. 5, § 8): *Nichols v. Burlington, etc., Plank Road Co.*, 4 Gr. 42; *Klingel v Palmer*, 42-166.

A process in the nature of a summons or subpœna in chancery, *held*, not sufficiently in compliance with the

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requirements of the statute to be good as an original notice: *McKee v. Harris*, 1–364.

As to effect of misnomer of defendant in the notice, see note to § 2603.

Discontinuance.
R. § 2813.
C. '51, § 1716.

SEC. 2600. If the petition is not filed by the date thus fixed, and ten days before the term, the action will be deemed discontinued.

The petition must be filed by the date fixed in the notice or the action will be deemed discontinued, (explaining previous cases decided under § 1716 of Code of '51 differing slightly from this sect on): *Hudson v. Blanfus*, 22–323; see, also, *Webster v. Hunter*, 50–215; but where the petition was not filed by the date fixed in the notice and it appeared that no prejudice resulted to defendant by that fact, *held*, that a judgment by default was not rendered void on account of such irregularity: *Brown v. Mallory*, 26–469. And where the date fixed for the filing of the petition was previous to that on which the notice was served and the petition was filed at the time of such service but not at the time fixed, *held*, that the defendant suffered no prejudice and the action should not be deemed discontinued: *Smith v. Shaw*, 49–294.

An appearance to move for a discontinuance for failure to file petition by time fixed in notice, does not waive the right to such discontinuance: *Cibula v. Pitts, etc., Mfg. Co.*, 48–528.

This section is not applicable to actions in justices' courts. Even when a petition must be filed in an action in such court, it is sufficient to file it on the return day: *Duffy v. Dale*, 42–215.

SERVICE OF NOTICE.

Who may serve.
R. § 2814.
C. '51, § 1718.

SEC. 2601. The notice may be served by any person not a party to the action.

If the notice is served by a constable, the fees allowed him in such cases by § 3805 may be taxed up as costs: *DuBoise v. Babcock*, 42–233; but where notice is served by a person not an officer, his charges cannot be so taxed: *Conway v. McG. & M. R. Co.*, 43–32.

Defendant to appear: when.
R. § 2815.
C. '51, § 1720.

SEC. 2602. The defendant shall be held to appear at the next term after service, provided:

1. He be served within the county where suit is brought, in such time as to leave at least ten days between the day of service and the first day of the next term;

2. He be served without the county, but within the judicial district, so as to leave at least fifteen such days;

3. He be served elsewhere, so as to leave twenty such days for every one thousand miles, or fraction thereof, extending between the places of trial and service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term after service.

In the computation of the periods of time here mentioned, the day of service and the first day of the term are both excluded. The last day of service for a term commencing on Monday falls on Thursday. Sunday is not to be excluded in the computation: *Robinson v. Foster*, 12–186.

A change of the time of holding the next term of court made subsequently to the service of notice will not affect the notice. Defendant will be held to appear at the next term as so changed: *Peoria M. & F. Ins. Co. v. Dickerson*, 28–274, and see notes to § 2599.

Personal service outside of the state upon a person not a resident or citizen of the state is only equivalent to service by publication. See § 2621 and notes.

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Notice: how served. R. § 2816. C. '51, § 1721. C. '51, § 1732.

SEC. 2603. The notice shall be served as follows:

1. By reading the notice to the defendant, or offering to read it in case he neglects or refuses to hear it read, and, in either case, by delivering him personally a copy of the notice, or if he refuses to receive it, offering to deliver it;

2. If not found within the county of his residence, by leaving a copy of the notice at his usual place of residence with some member of the family over fourteen years of age;

3. By taking an acknowledgment of the service indorsed on the notice, dated and signed by the defendant.

Of these methods of service, the first and third constitute *personal* service; the second, *substituted* service, while that by publication is *constructive*. If the defendant is misnamed in a notice served by personal or actual service, it seems that he can only take advantage thereof by appearing and pleading that fact in abatement; and if he fail to do so he cannot afterwards question the regularity of the judgment. But where the defendant was misnamed in a notice served by leaving a copy, etc., and had no actual notice of the action, and was not in debt to the plaintiff in the amount claimed, *held*, that he was not bound by the judgment: *Journey v. Dickerson*, 21–308.

Where service is authorized on an agent or officer of a corporation (or a member or agent of a partnership as under Rev. § 28–6), personal service is necessary and service by leaving copy at the usual place of residence of such person, will not be sufficient: *Brydolf v. Wolf*, 32–509.

A waiver of service indorsed on the notice is equivalent to an acknowledgment of service: *Johnson v. Monell*, 13–300, and see notes to next section.

Return when personally served. R. § 2817. C. '51, § 1723.

SEC. 2604. If served personally, the return must state the time and manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town, or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age, and was a member of the family.

The return should show a strict compliance with the law, as nothing will be presumed in its favor when it appears that the requirements of the statute have not been observed: *Diltz v. Chambers*, 2 Gr., 479. Therefore, *held*, that a return was defective which did not state the time of service, and that the fact that part of the paper containing the return was torn off, or that the return was sworn to more than the required length of time before the return day, would not cure the defect: *Hakes v. Schupe*, 27–465.

That the return does not state the time of making service will not be a fatal defect in a collateral attack: *Wilson v. Call*, 49–463.

A return must show the manner of service—the acts done—that the court may judge of their sufficiency. A return, stating that the notice was *duly served*, is not sufficient: *Hodges v. Hodges*, 6–78; *Farris v. Powell*, 10–553, and a return "served on John Long on the 29th day of August, 1857," *held* insufficient: *Park v. Long*, 7–414.

A return stating that service of notice was made "by reading the same *in the presence and hearing of*" defendant, *held*, insufficient. Service should be by reading *to* defendant: *Hynek v. Englest*, 11–210; but, *held*, that such defect was cured by a recital in the return that defendant demanded and received a copy of the notice: *Anderson v. Kerr*, 10–233; and a recital in the return in such a case that a true copy was left with defendant, also, *held*, sufficient to cure the defect: *Grosvenor v. Henry*, 27–269.

A party may waive the reading of the notice to him, and such waiver can be properly proved by recitals in the return of the officer: *Gregory v. Harmon*, 10–445.

A statement that a copy was refused by defendant sufficiently indi-

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cates that one was offered: *Farmers' Ins. Co. v. Highsmith*, 44–330.

It is essential to the sufficiency of service by leaving copy, etc., that it appear from the return that the defendant was not found: *Davis v. Burt*, 7–56; *Chittenden v. Hobbs*, 9–417; *Nosler v. Githens*, 9–295; *Grant v. Harlow*, 11–429; *Bonsall v. Isett*, 14–309; but the return of the sheriff need not state what diligence was used to obtain service upon defendant in person. A return that he was not found is sufficient: *Neally v. Redman*, 5–387; *Farris v. Ingraham*, 34–231; and so is a return, "the defendant not being found." It is not necessary to state that defendant *could* not be found: *Wilson v. Call*, 49–463.

A return that "defendant was not found" will be presumed to mean that he was not found within the county of his residence, and the same presumption arises in favor of a return made by a person other than the sheriff, when properly proven: *Macklot v. Hart*, 12–428.

It should appear from the return that the person with whom the copy was left was a member of the family of the defendant. A statement that she was the mother of defendant, *held*, not sufficient: *Lyon v. Thompson*, 12–183.

A return stating that the notice was served on defendant Call by copy left, etc., "with *Mrs. Call*, she being a member of *the* family," etc., *held*, sufficient: *Wilson v. Call*, 49–463.

A party may have more than one residence, though but one domicile. Question as to residence discussed in a particular case: *Love v. Cherry*, 24–204.

Returns of service by leaving copy with a member of the family, *held*, insufficient in particular cases: *Pilkey v. Gleason*, 1–85; *Converse v. Warren*, 4–158; *Tarenor v. Reed*, 10–416.

If the record shows that no jurisdiction was acquired by the court, the judgment is void, and may be collaterally attacked, but where there is service, though defective, the judgment can only be attacked in a direct proceeding. The presumption is in favor of the correctness of the proceedings of a court of general jurisdiction, and that a public officer properly discharged his duty: *Boker v. Chapline*, 12–204. So *held*, where judgment was rendered upon substituted service which was defective in not showing that defendant was "not found:" *Bonsall v. Isett*, 14–309; and see *Muscatine Turnverein v. Funck*, 18–469; *Pratt v. Western Stage Co.*, 27–363; *Gregg v. Thompson*, 17–107.

If it appear that there was notice, though defective, or the service thereof imperfect, and the court, as shown by the record, determines in favor of the sufficiency of such notice and service, even though such determination be erroneous, it will have jurisdiction, and its judgment cannot be held void in a collateral proceeding: *Shawhan v. Loffer*, 24–217; *The Farmers' Ins. Co. v. Highsmith*, 44–330, and cases cited. And see also notes to § 2599.

Sheriff to note when received. R. § 2819. C. 51, 1717.

SEC. 2605. If the notice is placed in the hands of a sheriff, he must note thereon the date when received, and proceed to serve the same without delay in his county, and must file the same with his return thereon in the office of the clerk, or return the same by mail or otherwise to the party from whom he received it.

The failure of the sheriff to indorse on the notice the time it was received by him, will not vitiate the service thereof: *Cobb v. Newcomb*, 7–43.

Penalty for defective return: amendment of. R. § 2820.

SEC. 2606. If a notice be not duly filed or returned to the person from whom it was received by the sheriff, or if the return thereon is defective, the officer making the same may be fined by the court not exceeding ten dollars, and shall also be liable to the action of any person aggrieved thereby. But the court may permit an amendment according to the truth of the case.

How served on Sunday. R. § 2821.

SEC. 2607. Notice shall not be served on Sunday, unless the plaintiff, his agent, or attorney, make oath thereon that personal service will not be possible unless then made; and a notice endorsed with such affidavit shall be served by the sheriff, or may be served by another as on a secular day.

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SEC. 2608. The plaintiff may set forth in the notice the general object of the action, a brief description of the property affected by it, and that no personal claim is made against any defendant, naming him, and if such defendant unreasonably defends he must pay costs. Notice of no personal claim. R. § 2822. C. '51, § 1721.

SEC. 2609. If service be made within the state, the truth of the return is proven by the signature of the sheriff, or his deputy, and the court shall take judicial notice thereof. If made without the state, or by one not such officer within the state, the return may be proven by the affidavit of him making the same. Return: how proven. R. § 2823. C. '51, § 1732.

Service by a constable may be proven by his affidavit: *Moss v. Blinn*, 7–261.

SEC. 2610. If a county is defendant, service may be made on the chairman of the board of supervisors or county auditor. But no action shall be brought against any county on any unliquidated demand, until the same has been presented to such board and payment demanded. Service on county: how made. R. § 2824. C. '51, § 1726. 9 G. A. ch. 93.

Whether service upon the chairman of the board, made outside of his county, would confer jurisdiction, *quære: Gross v. Sioux County*, 2 Dillon (U. S. C. C.), 509.

If the creditor presents his demand to the board, and it is not allowed after a reasonable time, he may bring action. It is not necessary that the fact of the refusal to allow the claim should appear from the records of the board. They cannot defeat the claim by a failure to take action: *White v. Polk Co.*, 17–413. The creditor is not obliged to appeal from the action of the board in refusing to allow his claim: *Armstrong v. Tama Co.*, 34–309. It is only unliquidated demands that must be presented to the board: *Sanford v. Lee Co.*, 49–148.

Held, that the action under § 1358 for relief furnished by one county to a pauper having a residence in another, could not be maintained until the claims had been presented, etc., to the board of the latter as here contemplated: *County of Cerro Gordo v. County of Wright*, 50–439.

The statute of limitations commences to run as against an unliquidated claim against a county, from the time it accrues, and not from the time it is presented to the board: *Baker v. Johnson Co.*, 33–151; *Kinsey v. Louisa Co.*, 37–438.

ON CORPORATIONS.

SEC. 2611. If the action is against any corporation, or person owning or operating any railway, telegraph line, canal, stages, coaches, or cars, or any express company, service may be made upon any general agent of such corporation, or person, wherever found, or upon any station, ticket, or other agent of such corporation, or person transacting the business thereof in the county where the suit is brought; if there is no such agent in said county, then service may be had upon an agent thereof transacting said business in any other county. How served on railway corporations. C. '51, § 1727. 14 G. A. ch. 95, § 4.

SEC. 2612. When the action is against a municipal corporation, service may be made on the mayor or clerk, and if against any other corporation, on any trustee or officer thereof, or on any agent employed in general management of its business, or on any of the last known or acting officers of said corporation, and if no person can be found on whom service can be made as provided in this and the preceding section, service may be made by publication as provided in other cases. On municipal. R. § 2824. C. '51, § 1726. 13 G. A. ch. 137, § 15.

["On" in the third line of this section, between "corporation" and "any" is "or" in the printed Code, but the Code Commissioners' report, and the evident meaning of the section show that it should be as here given.]

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Service upon an agent employed in the general management of the business of a corporation may be made in all actions, without regard to the place where brought. The provisions of this section are not limited, as are those of the section following: *Centennial, etc., Ass'n v. Walker*, 50–75.

Service upon the treasurer of an independent school district is a good service upon the district: *Kennedy v. Ind. Sch. Dist. of Derby Grange* 48–189.

A notice in a garnishment proceeding directed to A. B., Mayor of Iowa City; C. D., Recorder of Iowa City, and E. F., Treasurer of Iowa City, *held*, not to give the court any jurisdiction of the city, the notice not being directed to, nor served upon such persons *as officers*: *Claflin v. Iowa City*, 12–284.

Agents: service on. R. § 2827. C. '51, § 1705.

SEC. 2613. When a corporation, company, or individual, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency.

Service on an agent of an insurance company whose business is to solicit and forward risks and whose residence is in the county, is sufficient to constitute service upon the company. It is not necessary that he should be a general agent, have an office, or transact all business of the company in the county: *Farmer's Ins. Co., v. Highsmith*, 44–330.

As to service on insurance companies see § 1144.

MINORS—INSANE—PRISONERS.

Minors: how served. R. § 2828. C. '51, § 1705.

SEC. 2614. When the defendant is a minor under the age of fourteen years, the service must be made on him, and also on his father, or mother, or guardian, and if there be none of these within the state, then on the person within this state having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. When the minor is over fourteen years of age, service on him shall be sufficient.

Where the service is not upon the father, mother, or guardian, it should appear from the return that neither father or mother is within the state, and that there is no guardian on whom service could be made: *Allan v. Saylor*, 14–435. The judgment of a court as to the sufficiency of such notice can only be questioned on appeal, and cannot be attacked collaterally: *Tharp v. Brenneman*, 41–251.

Insane. R. § 2829. C. '51, § 1729.

SEC. 2615. When a defendant has been judicially declared to be of unsound mind, or who is confined in any state lunatic asylum, service may be made upon him and upon his guardian, and if he have no guardian, then upon his wife or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he may be confined.

When confined in state lunatic asylum. 13 G. A. ch. 109, § 50.

SEC. 2616. When it becomes necessary to serve personally with a notice or process of any kind, a person who is confined in any state lunatic asylum, the superintendent thereof shall acknowledge service of the same for such person, whenever, in the opinion of such superintendent, personal service would injuriously affect such person, which fact shall be stated in the acknowledgment of service. A service thus made shall be deemed a personal one on the defendant.

Prisoner in penitentiary. R. § 2830.

SEC. 2617. When the defendant is a prisoner in the penitentiary, a copy of the petition must be delivered to the prisoner at the time the notice is served, and a copy of the notice must be

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delivered to the husband or wife of the defendant, if any such there be within this state.

SERVICE BY PUBLICATION.

In what actions and when made. R. §§ 2831, 2832. C. '51, § 1725.

SEC. 2618. Service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein;

2 In an action for the partition of real property;

3. In an action for the sale of real property under a mortgage, lien, or other encumbrance or charge;

4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where, in such cases, any or all of the defendants reside out of this state and the real property is within this state;

5. In actions brought against a non-resident of this state or a foreign corporation, having in this state property or debts owing to such defendant sought to be taken by any of the provisional remedies, or to be appropriated in any way;

6. In actions which relate to, or the subject of which is real or personal property in this state, when any defendant has, or claims, a lien or interest, actual or contingent therein, or the relief demanded consists wholly, or partly, in excluding him from any interest therein, and such defendant is a non-resident of this state, or a foreign corporation;

7. In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent;

8. Where the action is for a divorce, if the defendant is a non-resident of the state of Iowa, or his residence is unknown.

Where an action is commenced as for an attachment on service by publication, but no property is attached, or garnishee charged, a judgment rendered thereon is void: *Cooper v. Smith*, 25–269.

Service by publication upon a non-resident minor is to be made in the same manner as upon an adult, and when the service is so made, the court will have authority to appoint a guardian *ad litem*, under § 2567: *Judd v. Mosely*, 30–423.

In an action for divorce, upon service by publication, an order as to alimony may be made: *Harshberger v. Harshberger*, 26–503; and see notes to § 2599.

Where, in an action by attachment against a non-resident defendant, publication of notice was completed before the petition was filed, or the writ of attachment issued, *held*, that there was no authority to serve by publication until after action was fully brought by filing a petition, etc., and that the service of the notice before that time did not confer jurisdiction: *Billings v. Kothe*, 49–34; but this case *overruled*, and *held* not essential to the jurisdiction in such case that petition should have been filed before publication: *Foster v. Henderson*, 54–220, (on rehearing). (But now see 18th G. A., ch. 124, inserted following § 2620.)

Jurisdiction through service by publication is only acquired by compliance with the statute authorizing such service and judgments in such cases stand upon the same footing as those of courts of limited jurisdiction: *Bradley v. Jameson*, 46–68.

Where jurisdiction is acquired only by service by publication, presumption as to the fact of publication will not be indulged to support it: *Miller v. Corbin*, 46–159.

Under the Code of 1851 providing

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that default should not be entered against a defendant served by publication until proof was made that a copy of the petition and notice had been mailed to his address, *held*, that judgment by default without such proof was void, and that the fact that such proof was made should appear of record, and would not be presumed: *Broghill v. Lash*, 3 Gr. 357. Also, *held*, that a judgment so rendered might be attacked collaterally, and evidence introduced to show that such copy was not sent, although the decree recited that it appeared to the court that defendant had been served with notice as required by law: *McGahen v. Carr*, 6-331. Also, *held*, that a sale under an attachment proceeding in which there was such a defect in the service, was void, and that the judgment could not be made valid by supplementing defects in the service and proofs after the default was rendered: *Hodson v. Tibbets*, 16-97. See, also, notes to § 2620.

Under 6th G. A., ch. 240, *held*, that the affidavit required as a basis for an order for publication was essential to confer jurisdiction and must appear of record, and that a defect in that respect would not be cured by presumption of regularity: *Bardsley v. Hines*, 33-157; also, *held*, that a statement in the affidavit that defendant was not *a resident of the state* was sufficient proof that "defendant could not be found within the state" (as required by that statute): *Byrne v. Roberts*, 31-319.

An objection to the sufficiency of the service of notice can be made only by the parties as to whom the service is claimed to be defective: *Semple v. Lee*, 13-304.

How made.
R. § 2833.
12 G. A. ch. 165.
15 G. A. ch. 142.

SEC. 2619. The publication must be made by publishing the notice required in section two thousand five hundred and ninety-nine of this chapter, four consecutive weeks in some newspaper printed in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall in either case be determined by the plaintiff or his attorney.

Under 6 G. A., ch. 240, which provided that the notice should be published for a time not less than "once a week for four consecutive weeks," *held*, that the notice was completed at the last publication: *Banta v. Wood*, 32-469.

It would seem that the publication of the notice in a paper *published* in the county, but *printed* in another county, would not be good, unless there was no paper *printed* in the county, and the county in which the paper was printed was the *next nearest* county: *Cooke v. Tallman*, 40-133.

For similar provision as to the right of plaintiff to select paper for publication, see § 3832.

The paper for publication of notice on unknown defendants is to be selected by the court: § 2624.

Defendant held to appear: proof of publication.
R. § 2834.
C. 51, § 1732.
9 G. A. ch. 174, § 2.

SEC. 2620. When the foregoing provisions have been complied with, the defendant so notified shall be required to appear as if personally served within the county in which the petition is filed, on the day of the last publication. Proof thereof being made by the affidavit of the publisher, or his foreman, and filed before default is taken.

The provision that proof of publication shall be made by affidavit of the publisher or foreman, is only applicable to publication of original notices in the actions specified in this chapter. In other cases proof of publication may be made by any one having knowledge of the fact. (See § 3697): *Farrell v. Leighton*, 49-174.

A judgment upon service by publication cannot be attacked in a collateral proceeding for mere insufficiency in the notice or service, if the court has held it sufficient: *Gregg v. Thompson*, 17-107; and see cases cited under § 2604; but see, also, notes to § 2618.

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[Eighteenth General Assembly, Chapter 124.]

Service by publication before filing of petition legalized.

SEC. 1. In all cases where an action has been begun in any of the courts of record of this state, by serving the original notice by publication as by law provided, and said publication of the original notice has been begun or completed prior to the time of the filing of the petition in the cause, that in each and all said cases the court in which said cause or action is pending, shall be deemed to have acquired as full and complete jurisdiction thereof as though said petition had been on file at the time said publication of the original notice therein was begun, or at the time the affidavit provided for in section two thousand six hundred and eighteen of the code of 1873, was filed, and the service of the orignal notice in all said causes, shall be deemed a full compliance with said section two thousand six hundred and eighteen, and sections two thousand six hundred and nineteen, two thousand six hundred and twenty and two thousand six hundred and twenty-one of the code of 1873.

Actual service. R. § 2835.

SEC. 2621. Actual personal service of the notice, either within or without the state, supersedes the necessity of publication.

Actual personal service without the state, upon a person not a resident or citizen of the state, merely stands in the place of notice by publication, and does not confer jurisdiction to render a personal judgment: *Weil v. Lowenthal*, 10-575; *Bates v. C. & N. W. R. Co.*, 19-260; *Hakes v. Shupe*, 27-465; *Darrance v. Preston*, 18-396; *Lister v. Kelley*, 47-307.

To authorize personal service without the state it is not necessary to file an affidavit that such service cannot be made within the state as in case of publication (§ 2618): *Miller v. Davison*, 31-435.

UNKNOWN DEFENDANTS.

Petition verified: statements of. R. § 2836.

SEC. 2622. In actions where it shall be necessary to make an unknown person defendant, the petition shall be sworn to, and shall state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as exactly as possible, that the name and residence or such person is unknown to plaintiff, and that he had sought diligently to learn the same, and thereon proceedings may be had against such person without naming him, as follows:

Court to approve notice. R. § 2837.

SEC. 2623. The court shall approve a notice collected from the averments of the petition, which notice shall contain the name of the plaintiff, a description of the property, and all the allegations of the petition concerning the interest of the unknown person, and the mode of devolution thereof, the relief demanded, also the name of the court and the term at which appearance must be made. Said notice must be entitled in the full name of the plaintiff against the unknown claimants of property, and shall be signed by the plaintiff's attorney.

Make order of publication. R. § 2838.

SEC. 2624. The court, on its approval of said notice, shall endorse the same thereon, and order that the said notice be published in some newspaper of this state, designating such paper as shall be most likely to give notice to such unknown person.

How, and for what time published. R. § 2839.

SEC. 2625. Such notice shall be filed in the cause, and its contents, without more, shall be published in the paper designated, at least, weekly, for six successive weeks, and at the end of said time service shall be deemed complete, and such unknown person in court at the next term thereafter.

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APPEARANCE.

Mode of defined. R. § 2840.

SEC. 2626. The mode of appearance may be:

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person, or his attorney, dated the day of its delivery, and to be filed in the case;

2. By announcing to the court an appearance, which shall be entered of record;

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause; or for any purpose connected with the service or insufficiency of the notice. And an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary; but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required of the substantial cause of action stated in the petition.

Members of General Assembly not required to answer civil proceedings, during session.

Nor any person on holidays.

4. No member of the general assembly shall be held to appear or answer any civil action or special proceeding, in any court of record, or inferior court, while such general assembly is in session, nor shall any person be so held to answer or appear, in any such court, on the 1st day of January, the 4th day of July, the 25th day of December, or *on* any day of thanksgiving appointed by the president of the United States or by the governor of this state.

[As amended by 15th G. A., ch. 10, adding the fourth subdivision.]

The memorandum in writing need not in terms state that the defendant appears. If he files a pleading in the action, it will be sufficient. Such an appearance will be an appearance in court, although the court be not in session: *Conklin v. Johnson*, 34–266.

A written memorandum of appearance in a particular case *held* sufficient: *Shaw v. Nat'l State Bk.*, 49–179.

Appearance to object to the service of notice is a general appearance to the action: *McFarland v. Lowry*, 40–467.

Appearance waives any defect in service: *VanVark v. VanDam*, 14–232; *Childs v. Limback*, 30–395.

Appearance of defendant to cross-examination plaintiff's witnesses, even though a general appearance is disclaimed, is sufficient to give jurisdiction: *Rahn v. Greer*, 37–627; so is an appearance to object to the sufficiency of a service upon a director of a corporation: *Robertson v. Eldora R. & C. Co.*, 27–245; so is the filing of a motion for continuance: *Stockdale v. Buckingham*, 11–45; so is the filing of a motion to dissolve an attachment in attachment proceedings: *Chittenden v. Hobbs*, 9–417.

The rule that a special appearance to object to the notice confers jurisdiction, is applicable in proceedings before a justice: *Church v. Crossman*, 49–414.

Where the court has jurisdiction of the subject matter mere irregularity in the process, or its service, will be cured by voluntary appearance; so *held* in case of an appeal from a justice of the peace: *Wilgus v. Gettings*, 19–82. But a want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction *Spurrier v. Wertner*, 48–486; (and see note to § 960):

An appearance does not waive the right to have an action discontinued if the petition is not filed by the time fixed in the notice as provided in § 2600: *Cibula v. Pitt's, etc., M'f'g Co.*, 48–528.

An appearance after default, to have the default set aside as being rendered on insufficient notice, is not such an appearance as will cure the defect in entering default without proper notice, such a case being different from an appearance before the default to object to the insufficiency

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of the notice: *Boales v. Shules*, 29–507.

An appearance by motion to set aside a sheriff 's sale is not an appearance to the original action: *Osborn v. Cloud*, 21–238.

An appearance of a party to testify as a witness, is not an appearance to the action: *Nixon v. Downey*, 42–78.

Defendant is not entitled to a continuance unless for cause shown when he has appeared in response to a notice, defective only in not naming the term: *Des Moines Branch, etc., v. Van*, 12–523.

The presumption is that an attorney who appears for a party is authorized to do so: *Potter v. Parsons*, 14–286; *Harshey v. Blackmar*, 20–161; but if the attorney is in fact not authorized, the party may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21–329.

As to appearance after default to cross-examine witnesses, see § 2873.

WHEN ALL DEFENDANTS ARE NOT SERVED.

Mode of procedure. R. § 2841.

SEC. 2627. When the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly, or jointly and severally, or severally liable only, he may, without prejudice to his rights in that or any other action against those not served, proceed against those served in the same manner as if they were the only defendants; if he recover against those jointly liable only, he may take judgment against all thus liable, which may be enforced against the joint property and separate property of those served, but not against the separate property of those not served, until they have had opportunity to show cause why judgment should not be enforced against their separate property; or,

2. The plaintiff may continue till the next term, and proceed to bring in the other defendants; but at such second term the suit shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such a delay.

REAL ESTATE.

Pending of petition; notice to third parties. R. § 2842.

SEC. 2628. When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed.

An action to foreclose a mortgage is notice to the world of the rights of the mortgagee in the mortgaged premises: *Knowles v. Rablin*, 20–101.

The purchaser at a foreclosure sale is affected with notice of another foreclosure proceeding then pending as to the same property: *Cooley v. Brayton*, 16–10.

A purchaser of real property is not charged with notice of a suit with respect thereto, to which neither he nor his grantor is a party: *Parsons v. Hoyt*, 24–154.

The purchaser at tax sale of land on which a University fund mortgage is being foreclosed is bound by the decree therein: *Crum v. Cotting*, 22–411.

A purchaser, *pendente lite*, takes subject to an action pending against his grantor, affecting the title, and the fact that the suit is subsequently dismissed without prejudice, and a new suit commenced, will not relieve him of notice: *Ferrier v. Buzick*, 6–258.

The fact that the grantor fraudulently conceals from the grantee the

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pendency of the action will not affect the force of the judgment as between the opposite party and the grantee: *Blanchard v. Ware*, 37-305.

Section applied: *Sowden v. Craig*, 26-156.

When property is situated in another county. R. § 2843. 13 G. A. ch. 167, § 16.

SEC. 2629. When any part of real property, the subject of an action, is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with constructive notice of the pendency of the action, file with the clerk of the district court of such county, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, and from the time of such filing only shall the pendency of the action be constructive notice to subsequent vendees or encumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if a party to the action, and the clerk of such county must, immediately on receipt of such notice, index and record the same in the encumbrance book. And within two months after the determination of such action, there shall be filed with such clerk a certified copy of the final order, judgment, or decree, who shall enter and index the same in the manner as though rendered in that county, or such notice of pendency shall cease to be constructive notice.

CHAPTER 7.

OF JOINDER OF ACTIONS.

Ordinary and equitable cannot be. R. § 2844. C. '51, § 1751.

SECTION 2630. Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof.

Two causes of action which may be prosecuted by the same proceeding may properly be joined: *Reed v. Howe*, 28-250. So *held* in case of an action on tort and one on contract: *Turner v. First Nat'l B'k of Keokuk*, 26-562.

A cause of action upon a note may be joined with one upon an account: *Thorpe v. Dickey*, 51-676.

Distinct causes of action in favor of two different parties, as for slanderous words spoken at the same time, cannot be joined in one action: *Hinkle v. Davenport*, 38-355.

As to joint action against a saloon-keeper and the owner of premises used for such purpose, see §§ 1557, 1558, and notes.

Plaintiff may strike out cause. R. § 2845.

SEC. 2631. The plaintiff may strike from his petition any cause of action or any part therof, at any time before the final submission of the case to the jury or to the court, when the trial is by the court.

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SEC. 2632. The court, at any time before the defense, shall, on motion of the defendant, strike out of the petition any cause or causes of action improperly joined with others. So may court. R. § 2846.

Where the misjoinder is of causes of action against different parties this section and the following one are not applicable: *Cogswell v. Murphy*, 46–44.
Section applied: *Wilson v. Baker*, 52–423.

SEC. 2633. All objections to the misjoinder of causes of actions shall be deemed to be waived, unless made as provided in the last section. Misjoinder waived. R. § 2847.

A misjoinder not taken advantage of by motion before answer, cannot be made the ground of a motion in arrest: *Grant v. McCarthy*, 38–468.

SEC. 2634. When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and action shall be docketed for each of said petitions, and the same shall be proceeded in without further service, and the court shall determine, by order, the time of pleading therein. What done when dismissed for misjoinder. R. § 2848.

CHAPTER 8.

OF PLEADING.

SECTION 2635. The defendant shall, in an action commenced in a court of record, demur, answer, or do both as to the original petition before noon of the second day of the term. Demur or answer: when. R. § 849. C. '51, § 1757.

The filing of a counter claim in proper time is equivalent to the filing of an answer: *Town v. Bringolf*, 47–133.

SEC. 2636. Each party shall demur, answer, or reply to all subsequent pleading, including amendments thereto and substitutes therefor, before noon of the day succeeding that on which the pleading is filed. But all pleadings must be filed by the time the cause is reached for trial. Same. R. § § 2850, 2851, 2858.

The plaintiff may file a reply later than the time here fixed, upon such reasonable terms as the court may impose: *Williams v. Niagara Fire Ins. Co.*, 50–561.

SEC. 2637. The day on which the judge actually opens court shall be, for the purpose of timing the pleading, considered the first day of the term. Time of pleading. R. § 2857.

SEC. 2638. The court may extend the time of filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day possible. Extension of. R. § 2859.

The extension by the court of the time for filing an answer does not deprive defendant of his right to demur, nor does it extend the time for filing such demurrer. A demurrer filed at the time fixed by the court for filing an answer, should be stricken from the files: *Dist. Tp. of Newton v. White*, 42–608.

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Motions assailing pleading. R. § § 2864, 2865, 2866.

SEC. 2639. All motions assailing a pleading shall be in writing, and filed before an answer or reply has been filed to the pleading assailed, except as provided in section two thousand six hundred and fifty of this chapter, and shall specify the causes on which they are founded, and none other shall be argued or considered. But one motion and one demurrer assailing such pleading shall be filed, unless such pleading be amended after the filing of a motion or demurrer thereto.

The filing of a demurrer waives any error in overruling a motion to strike or to require a more specific statement: *Stineman v. Beath*, 36–73.

A motion after a motion or a demurrer after a demurrer to the same pleading is not allowable: *Riddle v. Backus*, 36–430.

Demurrer or motion suspends other pleadings. R. § 2867.

SEC. 2640. A demurrer or motion assailing any pleading or count thereof, suspends the necessity of filing any other pleading to such pleading or count until the same has been determined, and the next pleading shall be filed by noon of the day succeeding such determination.

[The printed Code has the words "the morning" in the fourth line, preceding the words "of the day," etc., instead of the word "noon" as in the original and here.]

Demurrers and motions when required. R. § 2869.

SEC. 2641. All motions and demurrers shall be argued and submitted when filed, unless the adverse party is absent or desires time, in which case it shall be extended until the morning of the succeeding day unless the cause is sooner reached for trial.

Not withdrawn. R. § 2870.

SEC. 2642. A motion or demurrer once filed, shall not be withdrawn without the consent of the adverse party entered thereon, or of the court.

Appearance docket. R. § 2871. 9 G. A. ch. 75, § 1.

SEC. 2643. The filing of a pleading or motion in the clerk's office during a term, and a memorandum of such filing made in the appearance docket within the time allowed, shall be equivalent to filing the same in open court.

Forms of action abolished. R. § 2872. C. '51, § 1733.

SEC. 2644. All technical forms of action and pleading, all common counts, general issues, and all fictions are abolished, and hereafter the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this code.

Section applied: *Halloway v. Griffith*, 32–409, 413.

For somewhat similar provision, see § 2507.

Pleadings defined. R. § § 2873-4.

SEC. 2645. Pleadings are the written statements by the parties of their respective claims and defenses, and are:

1. The petition of the plaintiff;
2. The demurrer or answer of the defendant;
3. The demurrer or reply of the plaintiff;
4. The dumurrer of the defendant.

PETITION.

What to contain. R. § 2875. C. '51, § 1736.

SEC. 2646. The petition must contain:

1. The name of the court and county in which the action is brought;
2. The names of the parties to the action, plaintiffs and defendants, followed by the word "petition" if the proceedings are

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ordinary, and by the words "petition in equity," if the proceedings are equitable;

3. A statement of the facts constituting the plaintiff's cause of action;

4. A demand of the relief to which the plaintiff considers himself entitled, and if such demand be for money, the amount thereof must be stated;

5. Where the petition contains more than one cause of action, each must be stated wholly in a count or division by itself, and must be sufficient in itself; but one prayer for judgment may include a sum based on all counts looking to a money remedy;

6. In a petition by equitable proceedings, each division shall also be separated into paragraphs, numbered as such for more convenient reference, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement.

PAR. 1. The caption determines what court the petition is in: *Morgan v. Small*, 33–118.

PAR. 2. Where a petition was addressed "to the judge of the District Court," etc., but did not contain in the heading the names of the parties, nor the word "petition," *held*, that it was merely defective in form, and that the court did not err in refusing, on account of such defect, to dismiss the action, on motion of defendant: *Smith v. Watson*, 28–218.

PAR. 3. Facts, and not the evidence of facts are to be pleaded: *Davenport G. L. & C. Co. v. City of Davenport*, 15–6.

In an action on a note payable to blank *or bearer*, the plaintiff may simply allege that it is his property without stating whether he acquired title by delivery or assignment: *Dabney v. Reed*, 12–315.

Our system of pleading requires a direct, frank statement of the facts themselves in ordinary language, so that the opposite party may know what he is to answer; therefore, *held*, that, under an allegation of due notice in case of a promissory note, evidence could not be introduced to show facts amounting to a waiver of such notice: *Lumbert v. Palmer*, 29–104; nor, under an allegation of due diligence in the prosecution of action, can plaintiff show that such diligence would have been unavailing: *Woolsey v. Williams*, 34–413.

A plaintiff cannot, in an action upon a contract in which he alleges performance thereof, or of conditions precedent, etc., prove or recover upon a waiver of such performance. The evidence must correspond with the allegations: *Edgerley v. Farmers' Ins. Co.*, 43–587; *Fauble v. Davis*, 48–462.

PAR 4. Where the petition prays judgment for a certain sum "with interest and costs," recovery may be had for interest on the sum so claimed, from the commencement of the action, but not for interest accrued prior to that time: *Haren v. Baldwin*, 5–530; *Butcher v. Brand*, 6–235; *Anderson v. Kerr*, 10–233; S. C., 10–236; but interest accruing after the commencement of the action may be included in the judgment, although the amount for which judgment is asked in the petition is not large enough to include such interest: *Dawson v. Graham*, 48–378.

PAR. 5. The same cause of action may be stated in different counts and in different forms. The practice prescribed in the Revision has been changed in this respect by the Code, Rev. § § 2934, 2936, being omitted: *Vanbrunt v. Mather*, 48–503.

It is not necessary to state that the different counts relate to the same cause of action, though such statement does not vitiate the pleading: *Pearson v. M. & St. P. R. Co.*, 45–497.

Different causes of action should not be mingled in one count: *Sands v. Wood*, 1–263; but two or more notes may be sued on in one count; they do not necessarily constitute more than one cause of action: *Stadler v. Parmlee*, 10–23; *Merritt v. Nihart*, 11–57; *Ragan v. Day*, 46–239, 241.

PAR. 6. A paragraph alone is not subject to demurrer. If taken with the other paragraphs a cause of action or a defense is stated, that will be sufficient: *Benedict v. Hunt*, 32–27; *Delaware Co. Bk. v. Duncombe*, 48—488.

Whatever is numbered as a distinct paragraph should contain something more than a mere conclusion of law, based upon statement of facts in other paragraphs, otherwise it may be stricken out on motion: *Cooper v. French*, 52–531.

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Amended before answer. R. § 2975.

SEC. 2647. The plaintiff may amend his petition without leave at any time before the answer is filed, without prejudice to the proceedings already had; but a notice of such amendment shall be served on the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as he had to the original petition.

DEMURRER.

Causes of. R. § § 2876, 2918, 2920, 2961, 2963, 2964.

SEC. 2648. The defendant may demur to the petition only where it appears on its face, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect of parties, plaintiffs or defendants; or,

5. That the facts stated in the petition do not entitle the plaintiff to the relief demanded.

6. That the petition on the face thereof shows that the claim is barred by the statute of limitations; or fails to show it to be in writing where it should be so evidenced or, if founded on an account, or writing as evidence of indebtedness, and neither of such writings, account, or copy thereof is incorporated into or attached to such pleading, or a sufficient reason stated for not doing so.

IN GENERAL: A demurrer can only properly be interposed to controvert the legal sufficiency of the matter stated in the entire count or petition, and not to assail a portion of a count, or improper, foreign, redundant, or irrelevant matter therein. If the count contains sufficient statements to constitute a cause of action or defense, it is not vulnerable to demurrer: *Hayden v. Anderson*, 17–158.

In such cases a motion is the proper remedy: *Shulte v. Hennessy*, 40–352. And see notes to § 2719.

A separate paragraph is not subject to demurrer; see notes to § 2646, ¶ 6.

It is error to sustain a demurrer which strikes at the whole of the pleading or a division thereof, when some of the causes of action therein stated are well pleaded: *Zapple v. Rush*, 23–99; but where distinct defenses were improperly joined in one count of an answer, *held*, that a demurrer might be directed against one of them alone: *Wright v. Connor*, 34–240.

A general demurrer to a petition containing two counts should be overruled, if either count is sufficient: *Darr v. Lilly*, 11–4; *Edmonds v. Cochran*, 12–488.

That there is an adequate remedy at law, is not a ground of demurrer to a petition in equity. The proper remedy where an action is brought by the wrong kind of proceeding, is a motion to change into the proper proceeding: See § 2514 and notes.

An alternative allegation in the petition, of a material fact is not a ground of demurrer. The remedy for such defect is by motion. (§ 2720): *Turner v. First Nat'l Bk. of Keokuk*, 26–562.

A demurrer admits the facts which are well pleaded in the pleading attacked, but not conclusions of law therein stated: *Lyon v. O'Kell*, 14–233; *Smith v. Henry Co.*, 15–285; nor allegations which are inconsistent with the facts pleaded: *Schofield v. McDowell*, 47–129. It only admits facts *well* pleaded: *Harkins v. Edwards*, 1–426; *Bailey v. Landingham*, 52–415.

A demurrer can be interposed only for matters appearing on the face of the petition: *Polk Co. v. Hierb*, 37–361; and an exhibit cannot be attached to a demurrer in order to take advantage of grounds therefor which would not otherwise appear: *Ruddick v. Marshall*, 23–243.

Neither the interrogatories attached

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to a pleading (under § 2693), nor the answers thereto, can, on demurrer, aid a defective pleading: *Lane v. Krekle*, 22–399.

Where a demurrer assigns several causes, and is sustained as to one and overruled as to others, such ruling will not be reversed on appeal, if any of the causes assigned are good, although as to the particular ground on which it was sustained the ruling be found erroneous: *Jeure v. Perkins*, 29–262.

PAR. 3. A demurrer on the ground of another action pending, can only be sustained when that fact appears on the face of the petition: *Mosher v. Ind. Dist. of Steamboat Rock*, 42–632, 635.

PAR. 4. If the defect of parties appears on the face of the petition, it will be held waived, unless taken advantage of by demurrer: *McCormick v. Blossom*, 40–256. The defect of parties here contemplated is a non-joinder of parties who should have been joined, either as plaintiffs or defendants. A misjoinder or uniting of parties who should not be joined, is not a ground of demurrer: *Turner v. First Nat'l B'k. of Keokuk*, 26–562; *Mornan v. Carroll*, 35–22; *King v. King*, 40–120; *Dubuque Co v. Reynolds*, 41–454; *Dist. Tp. of White Oak v. Dist. Tp. of Oskaloosa*, 44–512, 517; *Bort v. Yaw*, 46–323; *Ind. School Dist's of Graham Tp. v. Ind. School Dist. No. 2* 50–322.

PAR. 5. Any of the causes of demurrer relied on, excepting the one specified in this paragraph, should be stated in a demurrer to a petition in equity, with the same precision as though the case were at law: *Hanna v. Hawes*, 45–437, 441.

If causes of act on against different parties are joined, the defendant may demur under this paragraph: *Cogswell v. Murphy*, 46–44.

Under Rev. *held* that a petition was not vulnerable to demurrer, simply because it asked relief to which its averments did not entitle the pleader: *Byers v. Rodabaugh*, 17–53; *Orman v. Orman*, 26–361; *Harwood v. Case*, 37–92; but the phrase "relief demanded," used in the present Code is broader than "cause of action," used in the corresponding section of the Rev., and a demurrer will lie in an action on a judgment brought within fifteen years from its rendition, when leave of court, as specified in § 2521, is not alleged: *Wattse. Everett*, 47–269.

PAR. 6. Where a pleading is founded upon breach of covenants in a deed, a copy of the deed should be incorporated into or attached to such pleading: *Nosler v. Hunt*, 18–212; and so *held*, in case of action on a subscription paper: *Hudson v. Plank Road Co.*, 4 Gr. 152.

In declaring upon a contract written in a foreign language, it is sufficient to attach a translation to the petition; a copy in the foreign language need not be set out: *Christenson v. Gorsch*, 5–374; *Bower v. Deideker*, 38–418, 421.

It is not the evidence in the case that plaintiff is to attach to his petition, but a copy of the instrument or account on which he brings his suit: *Lattourett v. Cook*, 1–1; and a copy of a written instrument is only necessary where the action is *founded on* such instrument: *Barney v. Buena Vista Co.*, 33–261.

Plaintiff is not required to attach to his petition copies of instruments which he intends to introduce in evidence: *McLott v. Savery*, 11–323. Therefore, in an action for damages for right of way, *held*, that the deed for such right of way might be introduced as evidence, without having set it out in the answer: *Taylor v. C. R. & St. P. R. Co.*, 25–371.

Where a record is not the foundation of an action, it need not be set out: *Ruddick v. Marshall*, 23–243; and where a petition in equity sought to have set aside a judgment by confession, *held*, that it was not necessary to attach a copy of the statement on which such judgment was rendered: *Vannice v. Green*, 14–262.

In an action for balance due on settlement of account, a copy of the account need not be set out: *Buehler v. Reed*, 11–182.

In an action of right it is not necessary to attach copies of title papers; (see § 3251): *Boardman v. Beckwith*, 18–292.

Where, in an action against a county treasurer for wrongfully seizing and selling plaintiff's property, defendant justified under a tax list and warrant, setting out the warrant, *held*, that the answer was not demurrable for not setting out a copy of the tax list: *Games v. Robb*, 8–193.

To enable a party by demurrer to insist on the bar of the statute of limitations, the pleading must show affirmatively that the cause of action is barred by the laws of this state, or of some other state where defendant has resided: *Moulton v. Walsh*, 30–361; *Brown v. Rockhold*, 49–282.

Where a party seeks to recover upon a contract not in writing, upon the

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testimony of the person making it (under § § 3666, 3667), he should so state in his petition. Otherwise it would be subject to demurrer: *Babcock v. Meek*, 45–137.

The objection that a bill of particulars, or a written instrument, is not set out or attached, must be taken by demurrer; it cannot be interposed as a ground for the exclusion of evidence: *Farwell v. Tyler*, 5–535; *Peterson v. Allen*, 12–366; *Smith v. McLean* 24–322.

Objection that written notice of loss of stock (provided for in § 1289) is not attached to the petition, should be taken advantage of on demurrer, and not by objection to the introduction of such notice in evidence: *McKinley v. C. R. I. & P. R. Co.*, 47–76, 78.

As to bills of particulars, see § 2713.

Specify causes and number same. R. § 2877. C. '51, § 1754.

SEC. 2649. A demurrer must specify and number the grounds of objection to the pleading, or it will be disregarded; and it shall not be sufficient to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of said section may be stated in the terms thereof.

Demurrer in an action at law, that the matters stated in the petition "are not sufficient to constitute a cause of action," should be disregarded as not sufficiently specific: *McLaughlin v. Bascomb*, 36–593; *Singer v. Cavers*, 26–178.

A party will not be allowed to state one ground of demurrer, and argue and obtain judgment upon another: *Middleton Savings' Bank v. City of Dubuque*, 15–394; and an objection not pointed out cannot be raised thereunder: *Allen v. Cerro Gordo Co.*, 34–54.

While a demurrer should point out the ground upon which it is founded, as, that the court has no jurisdiction, or, that there is no cause of action, or such like, it need not give the reasons leading to those conclusions: *Davenport G. L. & C. Co. v. City of Davenport*, 15–6.

The general demurrer is abolished: *Ibid*, and a demurrer not distinctly stating the ground on which it is based, should not be regarded: *Jones v. Brunskill*, 18–129.

Demurrer *held* too indefinite: *McKellar v. Stout*, 13–487; sufficiently specific: *Davenport v. Whisler*, 46–287.

Waiver of: answer: arrest of judgment. R. § 2878.

SEC. 2650. When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived. If the facts stated by the petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment, before judgment is entered.

Section applied in case of defect of parties: *McCormick v. Blossom*, 49–256; *Ryan v. Mullinix*, 45–631. So also in case of the statute of limitations, and *held*, that the exception contained in the last sentence of this section did not apply to such case: *Robinson v. Allen*, 37–27; but a misjoinder of parties is not waived by failure to demur or answer, and may be taken advantage of by motion in arrest: *Cogswell v. Murphy*, 46–44; *Bort v. Yaw*, 46–323; and *held*, in case of a defect of parties in a proceeding in equity, when such defect was vital to the character of the petition and the relief asked, that it might be first insisted on at the final hearing: *Swan v. Clark*, 36–560.

Section applied generally: *Crossen v. White*, 19–109; *Murphy v. Creighton*, 45–179, 183; *Boude v. M. E. Church*, 47–705.

The fact that a necessary party is not served need not be set up in the answer, and is not waived by failure so to do: *Miller v. Mahaffy*, 45–289.

If the motion in arrest is not made in the trial court, it cannot be taken advantage of on appeal: *Smith v. Warren Co.*, 49–336; *Melick v. First National Bank of Tama City*, 52–94.

Where the facts stated in the petition do not entitle plaintiff to any relief, although no demurrer on that ground is interposed, the court may instruct the jury to find for defendant: *Seaton v. Hinneman*, 50–395.

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SEC. 2651. The defendant may demur to one or more of the several causes of action alleged in the petition, and answer as to the residue. Demur to part: answer. R. § 2879. C. '51, § 1738.

If defendant both demur and answer to the same cause of action, his answer will be held as waiving his demurrer: *Fisher v. Scholte*, 30–221.

SEC. 2652. The opposite party shall be deemed to join in a demurrer, whenever he shall not amend the pleading to which it is addressed. Joinder in. R. § 2900.

See notes to § 2654.

SEC. 2653. Upon a demurrer being overruled, the party demurring may answer or reply. Answer after. R. § 2976. C. '51, § 1755.

See notes to following section.

SEC. 2654. Upon a decision of a demurrer, if the unsuccessful party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, as the case may be. Failure to amend: effect of. R. § 3086. C. '51, § 1771.

By amending his pleading after a demurrer thereto has been sustained, a party waives any error in such ruling: *Duncan v. Hobart*, 8–337; *Franklin v. Twogood*, 18–515; *City of Muscatine v. Keokuk N. L. P. Co*, 47–350, 352; *Lane v. B. & S. W. R. Co.*, 52-18.

A party pleading over by filing an answer or reply after his demurrer has been overruled thereby waives any error in such ruling: *Harmon v. Chandler*, 3–150; *Mitchell v. Wiscotta Land Co.*, 3–209; *Ayers v. Campbell*, 3–582; *Abbott v. Striblen*, 6–191; *Paukett v. Livermore*, 5–277; *Cameron v. Armstrong*, 8–212; *Wilcox v. McCune*, 21–294; *Coakley v. McCarty*, 34–105; *Jones v. Marcy*, 49–188; *Westphall v. Henney*, 49–542; *Smith v. Warren Co.*, 49–336.

When a demurrer to an answer to which a reply is not necessary is overruled, if the party wishes to stand on such demurrer, he must have that fact entered of record; a mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21–294.

Where defendant, upon the overruling of his demurrer, took time to answer, but no answer was filed, and judgment went against him by default, *held*, that he did not waive objection to the ruling on demurrer: *Watts v. Everett*, 47–269.

Where a defendant stands upon his demurrer after it has been overruled, the court may properly render judgment as upon the finding of the facts alleged in the petition: *Brown v. Mallory*, 26–469; and judgment upon demurrer is a bar to any other action upon the facts, the sufficiency of which was put in issue by such demurrer: *Felt v. Turnure*, 48–397.

Where a demurrer is interposed to the petition on an account, on the ground that no copy thereof is set out or attached, and is overruled, the defendant should not be held as admitting the averments of the petition, and on failure to answer, plaintiff's claim should be established by evidence as on default: *Buehler v Reed*, 11–182.

Where a party stands on his demurrer, and appeals from the judgment overruling it, judgment should be rendered against him, and on affirmance of the judgment on appeal, he cannot be permitted to withdraw his demurrer, and proceed to trial on the merits: *Dunlap v. Cody*, 31–260.

Section applied: *Grimes v. Hamilton Co.*, 37–290, 299.

ANSWER.

SEC. 2655. The answer shall contain:

1. The name of the court, of the county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants, it shall only be necessary to give the first name of each class, with the words, and others; Statements of. R. § 2880.

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2. A general denial of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief;

3. A specific denial of each allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief;

4. A statement of any new matter constituting a defense;

5. A statement of any new matter constituting a counter claim;

6. The defendant may set forth in his answer as many causes of defense, counter claim, whether legal or equitable, as he may have.

A denial of any *information*, etc., is not sufficient. It must be of any "knowledge or information": *Manny v. French*, 23–250. So *held*, also, as to an allegation that the party had "no knowledge sufficient to form a belief": *Cutter v. McCormick*, 48–406, 415.

An answer simply denying any knowledge or information with respect to a note, upon which action is brought, cannot be held frivolous. An answer will not be so held, unless its insufficiency is so clear that it is apparent on a mere inspection: *McFarland v. Lester*, 23–260.

A denial that "There is due on said note the sum of, etc., as claimed by plaintiff," *held*, not sufficient as an answer and assailable by demurrer: *Stucksleger v. Smith*, 27–286.

Where plaintiff averred a written assignment to him of the cause of action, *held*, that a denial of the assignment was not sufficient, and that defendant should have denied the *execution* thereof: *Cottle v. Cole*, 20–481.

Under our system of pleading there is no *general issue*, and a defendant should plead any defense he intends to interpose: *Hagan v. Burch*, 8–309; and under an answer by simple denial in an action for trespass, *held*, that the defendant could not excuse the trespass by proving the right of possession or title in a third person: *Patterson v. Clark*, 20–429.

An answer which purports to respond to the whole petition, if bad as to any one count, is bad as to all. A partial defense, or matter in mitigation, must be pleaded and proved *as such* and not as a *complete* defense. Where the matter set up is neither by way of denial nor of confession and avoidance, a demurrer will lie: *Davenport G. L. & C. Co. v. City of Davenport*, 15–6; *Peck v. Parchen*, 52–46. And matter in defense, cannot be pleaded hypothetically, nor can a party plead to the whole cause of action, and also aver matter which shows only a partial defense: *Martin v. Swearingen*, 17–346.

A party pleading new matter in avoidance must first confess, either expressly or by implication, that which he proposes to avoid: *Ibid; Anson v. Dwight*, 18–241; *Morgan v. Hawkeye Ins. Co.*, 37–359.

A counter claim is an answer: *Town v. Bringolf*, 47–133.

No notice need be served on plaintiff of the filing of an answer, asking affirmative relief: *Treiber v. Schafer*, 18–29.

The right of a defendant to avail himself of an equitable defense is not limited to any particular kind of action, but is general: *Thompson v. Hurley*, 19–331.

And such defense may be set up to defeat a legal title in an action at law: *Shawhan v. Long*, 26–488; *Van Orman v. Spafford*, 16–186; *Rosierz v. Van Dam*, 16–175; *Kramer v. Conger*, 16–434.

Affirmative defenses, equitable in their nature, are to be viewed in the same manner as to substance as though the same facts had been made the basis of a petition in chancery: *Penny v. Cook*, 19–538.

In an action on a judgment, the defendant may set up as an equitable defense any matter which he might have made the ground of an equitable suit directly assailing the judgment: *Rogers v. Gwinn*, 21–58.

Where the answer to a petition at law set up both legal and equitable defenses, and the cause was tried by a referee without any separation of the issues, *held*, that although one of the parties served separate notice of appeal as from two cases, it would be treated on appeal as one case, and tried as an equitable action: *Van Orman v. Merrill*, 27–476.

An equitable defense being interposed, it may be sustained by such

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proof as is properly admissible on the trial of such an issue. The proper practice is to try the equitable issues first, afterwards the other issues, if any remain: *Byers v. Rodabaugh*, 17–53; and see notes to § 2517.

SEC. 2656. The guardian of a minor, or person of unsound mind, or attorney for a person in prison, must deny in the answer all the material allegations of the petition prejudicial to such defendant. Of guardian. R. § 2893.

Section applied: *Bickel v. Erskine*, 43–213.

SEC. 2657. Each affirmative defense shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to that part of the petition to which it is intended to apply. Divisions of. R. § 2882.

Each count must in itself be sufficient for the purposes for which it is pleaded, otherwise, it will be subject to demurrer: *National Bank of Mich. v. Green*, 23–140.

Several distinct defenses should not be pleaded in the same count of the answer: *Donahue v. Prosser*, 10–276; nor should contradictory defenses be pleaded in the same count: *Morgan v. Hawkeye Ins Co.*, 37–359.

SEC. 2658. In the defense part of an answer or reply, it shall not be necessary to make any prayer of judgment. No prayer. R. § 2883.

COUNTER CLAIM.

SEC. 2659. Each counter claim must be stated in a distinct count or division, and must be: How stated. R. § § 2884, 2886, 2889, 2891. C. '51, § 1749.

1. When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or,

2. A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action; or,

3. Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced or which was then held, either matured or not, if matured when so plead.

The provisions of this section as to stating each counter claim in a distinct count, etc., refer to pleadings in an action at law. The following section refers to pleadings in equity in similar cases: *Pond v. Waterloo Agr'c'l Works*, 50–596.

In a suit by an administrator to collect a claim due decedent in his life-time, the defendant may set up as a counter claim a demand existing in his own favor against decedent, but if the counter claim exceeds the original claim, the balance can only be enforced as other claims against the estate: *Lucore v. Kramer*, 22–287, but under Code of '51, *held*, that in such case the defendant could not set off a claim against the estate acquired by him subsequently to the death of the intestate: *Cook v. Lovell*, 11–81.

Where plaintiff is liable jointly with others to defend on contract, such liability may be set up as a counter claim (§ 2550): *Redman v. Malvin*, 23–296.

Under Rev. § 2886, an account against a firm, of which plaintiff was a member, was allowed to be pleaded as a set off by the defendant in an action to foreclose a mortgage brought by plaintiff in his individual right: *Allen v. Maddox*, 40–124.

In an action for divorce, a cross-petition may be brought in the same action for a divorce by the opposite party for causes arising after the com-

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mencement of the original action: See § 2225.

It is not required that the facts constituting a counter claim (under ¶ 2 of this section,) should exist at the commencement of the action: *Wilson v. Wilson*, 40–230.

A claim sounding in damages, as well as one arising on contract, may be used as a set-off: *Campbell v. Fox*, 11–318.

Under Code of '51, *held*, that defendant might set up a claim for damages for the wrongful sueing out of an attachment, as a counter claim in the original action, independently of the bond: See note to § 3017.

Where a husband and wife were sued jointly, *held*, that the husband could not set up, by way of counter claim, a cause of action in his favor alone, for malicious prosecution: *Musselman v. Gallagher*, 32–383.

Equitable matter. R. § 2885.

SEC. 2660. An equitable division must also be separated into paragraphs, and numbered as required in regard to an equitable cause of action in the petition.

Co-maker or surety. R. § 2887.

SEC. 2661. A co-maker, or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counter claim, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal, but the plaintiff may meet such counter claim in the same way as if made by the co-maker or principal himself.

New party. R. §§ 2888, 2890.

SEC. 2662. When a new party is necessary to a final decision upon a counter claim the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action.

Cross petition when filed. R. § 2892.

SEC. 2663. When a defendant has a cause of action affecting the subject matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross petition against the co-defendant or other person. The defendants thereto may be notified as in other cas s, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same right of obtaining provisional remedies applicable to the case. The prosecution of the cross petition shall not delay the trial of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross petition.

The dismissal of the original petition after the filing of a cross-petition will not operate as a dismissal of such cross-petition: *Spearing v. Chambers*, 25–99.

Cross-petition of one defendant against another, *held* proper in a particular case: *Rose v. Schaffner*, 58–483.

Demurrer to answer. R. § 2894.

SEC. 2664. When the facts stated in the answer, or any count or division thereof, are not sufficient to constitute a defense or counter claim, the adverse party may demur, and shall be held to the same certainty in the statement of the grounds therefor as obtains in a demurrer to the petition.

In cases where no reply to an answer is necessary, the party demurring thereto, whose demurrer has been overruled, if he elects to stand thereon, must so state, and have the fact shown of record. A mere exception to the ruling will not be sufficient: *Wilcox v. McCune*, 21–294.

Where two defenses are improperly joined in one count of the answer, the plaintiff may demurr to one of them only, and the defendant will not be allowed to object thereto on the ground that the demurrer does not go to the whole count: *Wright v. Connor*, 34–240.

As to demurrers generally, see §§ 2648, 2649 and notes.

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REPLY.

When necessary. R. § 2895. C. '51, § 1741.

SEC. 2665. There shall be no reply except:

1. Where a counter claim is alleged; or,

2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense, by the reason of the existence of some fact which avoids the matter alleged in the answer.

The allegations of an answer are deemed denied without a reply unless a counter claim is pleaded. (§ 2712 and notes); but if plaintiff expects to introduce evidence of matter to avoid the facts pleaded in the answer (as that an assignment set up in the answer is a forgery) he should plead such fact by way of reply: *Hay v. Frazier*, 49–454.

Under the Revision, however, no reply to affirmative matter in an answer not setting up a counter claim was necessary, and it was held that where defendant set up a release or other affirmative matter, the plaintiff might meet the issue raised by operation of law by proving fraud, etc., without having set up such fraud either in his petition or in a reply: *Barger v. Farris*, 34–228; *Noble v. Steamboat, etc.*, 23–109; *Corbin v. Beebe*, 36–336: and as other cases under the Revision, see *Stuart v. Hines*, 33–60, 101; *Guyer v Figgins*, 37–517. It was to obviate this construction that the second paragraph of the section as it stands in the Code was added: *Code Com'rs' Rep.* p. 95.

Plaintiff cannot be required to file a pleading, confessing and avoiding, or denying the allegations in the answer or cross-petition: *Cassidy v. Caton*, 47–22.

Where facts, which might be set out by way of reply, appear affirmatively in the answer, no reply is necessary: *Scott v. Luther*, 44–570.

Statements of. R. § 2896.

SEC. 2666. When a reply must be filed, it shall consist of:

1. A general or specific denial of each allegation or counter claim controverted, or any knowledge or information thereof sufficient to form a belief; or,

2. Any new matter not inconsistent with the petition constituting a defense to the matter alleged in the answer; or the matter in the answer may be confessed, and any new matter alleged, not inconsistent with the petition, which avoids the same.

[The word "petition," in the first line of the second subdivision, as it stands in the original, is "position" in the printed code.]

Any number of defenses stated. R. §§ 2897-8.

SEC. 2667. Any number of defenses, negative or affirmative, are pleadable to a counter claim, and each affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered as required in case of such matter in the answer.

Demurrer to. R. § 2899.

SEC. 2668. When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statements of grounds thereof as obtain in demurrer to the petition.

VERIFICATION.

When pleading verified, subsequent pleadings must be. R. § 2904.

SEC. 2669. Every pleading must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also; and in all cases of verification of a pleading, the

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affidavit shall be to the effect that the affiant believes the statements thereof to be true.

Provisions as to verification are applicable in equity as well as at law: See note to § 2679.

An affidavit referring to "the foregoing petition," without giving the title of the action, *held*, sufficient: *Lery v. Wilson*, 43–605; so *held*, also, where the affidavit was that the *facts* set forth in the petition were true: *Sherrill v. Fay*, 14–292.

Plaintiff may be allowed to amend his petition by adding a verification, and, although defendant has already answered, he will be in default unless he respond with a sworn answer: *Wilson v. Preston*, 15–246.

Corporation. R. § 2905.

SEC. 2670. Where a corporation is a party, the affidavit may be made by any officer thereof.

United interest. R. § 2906.

SEC. 2671. When there are several parties united in interest, the affidavit may be made by any one of them.

By agent or attorney. R. § 2907. 13 G. A., ch. 167, § 18.

SEC. 2672. If the pleading be founded on a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney, the affidavit may be made by such agent or attorney, so far as relates to the statement of the cause of action thereon; but when relief is asked other than a money judgment or decree of foreclosure, the affidavit must contain averments showing competency as herein provided.

By any person knowing the facts. R. §§ 2908-9

SEC. 2673. If the statements of a pleading are known to any person other than the party, such person, may make the affidavit, which shall contain averments showing affiant competent to make the same.

Where the person making the affidavit states that "he knows the facts therein stated to be true," the competency of such person to make the affidavit sufficiently appears. Why he thus "knows" is not required to be stated: *Zoe v. Nichols*, 51–330; but where an attorney did not state in his affidavit that he had any knowledge as to the truth of the allegations of the pleading verified by him, *held*, that it was properly stricken from the files: *Chute v. Hazleton*, 51–355.

Verification by the agent of the plaintiff, both as to the cause of action and the grounds for attachment, *held*, sufficient in a particular case: *Rausch v. Moore*, 48–611.

Counter claim may be.

SEC. 2674. Where the petition is not verified, and the answer contains a counter claim, the same may be verified apart from the defense part of the answer, and the foregoing provisions are applicable to the counter claim as if the same were a separate pleading.

Where an answer is required to be verified, a counter-claim may be set up which is not verified: *Innes v. Krysher*, 9–295.

Guardian, executor, prisoner. R. §§ 2910, 2912.

SEC. 2675. Verification shall not be required to any pleading of a guardian, executor, or prisoner in the penitentiary, nor to any pleading controverting the answer of a garnishee, nor to one grounded on an injury to the person or the character.

When cannot be required. R. § 2911.

SEC. 2676. When it can be seen from the pleading to be answered, that an admission of the truth of its allegations might subject the party to a criminal prosecution, no verification shall be required.

Effect if not verified. R. § 2916

SEC. 2677. If a pleading be not duly verified, it may be struck out on motion; but such defect will be deemed waived if the other party respond thereto, or proceed to trial without such motion.

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[The word "duly" in the first line, as it stands in the original, is omitted in the printed code.]

An unverified petition, even in a case where verification is made necessary is not a nullity, and advantage of the defect can only be taken by motion to strike: *Rush v. Rush*, 46–648.

Filing a demurrer to a petition waives any error in the ruling of the court on motion to strike out for want of verification: *Stineman v. Beath*, 36–73.

SEC. 2678. The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. When applicable to amount claimed. R. § 2914.

SEC. 2679. The verification shall not make other or greater proof necessary on the side of the adverse party. Proof. R. § 2915.

The provisions as to verification apply equally to pleadings in ordinary and equitable proceedings: *Shepard v. Ford*, 10–502, (discussing and explaining previous cases,) and the rule as to the amount of testimony necessary to overcome a sworn answer in a chancery proceeding, is abrogated: *Wilson v. Holcomb*, 13–110; *Mitchell v. Moore*, 24–394.

SEC. 2680. Courts may permit the amendments authorized by this chapter to be made without being verified, unless a new and distinct cause of action or counter claim is thereby introduced. Amendments not verified. R. § 2981.

Section applied: *Tegler v. Shipman*, 33–194, 197.

SLANDER—LIBEL.

SEC. 2681. In an action for slander or libel, it shall not be necessary to state any extrinsic facts for the purpose of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, or that the matter was used in a defamatory sense; but it shall be sufficient to state the defamatory sense in which such matter was used, and that the same was spoken or published concerning the plaintiff. Statements of petition. R. § 2925.

When words have a libelous meaning on their face, it is sufficient to set them out without alleging such meaning, but if they are not actionable on their face, plaintiff must allege the defamatory sense in which they were used, and that they were so used in relation to him: *Kinyon v. Palmer*, 18–377; but the extrinsic facts showing that they were so used need not be alleged but are matter of proof: *Ibid; Clarke v. Jones*, 49–474; *Swearingen v. Stanley*, 23–115.

Words are to be taken in their plain and natural import and in the sense in which they would be understood by those to whom they were addressed: *Truman v. Taylor*, 4–424; *Wilson v. Beighler*, 4–427; and explanatory circumstances known to both parties will be considered as part of the words: *De Moss v. Haycock*, 15–149.

Words imputing to a woman want of chastity are actionable *per se; Cox v. Bunker*, Mor. 269; *Daily v. Reynolds*, 4 Gr. 354; *Abrams v. Forshee*, 3–274, 281; so are words charging her with being a whore: *Smith v. Silence*, 4–321; or charging an unmarried woman with having had a child: *Beardsley v. Bridgman*, 17–290; but not words charging a woman with procuring an abortion upon herself: *Hatfield v. Gano*, 15–177.

SEC. 2682. In any action brought to recover damages for an injury to person, character, or property, the defendant may set forth in a distinct division of his answer, any facts of which evidence is legally admissable to mitigate or otherwise reduce the damages, whether a complete defense or justification be pleaded or not, and he may give in evidence the mitigating circumstances Of answer in and for other torts. R. § 2929.

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whether he prove the defense or justification or not, and no mitigating circumstances shall be proved unless plead, except such as are shown by, or grow out of, the testimony introduced by the adverse party; and in actions for slander or libel, an unproved allegation of the truth of the matter charged, shall not be deemed proof of malice, unless the jury on the whole case find that such defense was made with malicious intent.

[The word "prove" in the seventh line, as in the original, is "provoke" in the printed code.]

All mitigating circumstances, certainly all contemporaneous with the act which might at common law have been given in evidence under the general issue, may still be given under an answer in denial. But all which tend to show the truth of the charge must be pleaded. It is the safest rule, to state every fact relied on in mitigation: *Beardsley v. Bridgman*, 17–290.

Facts relied upon as mitigating circumstances must be pleaded as such, and not by way of defense or justification: *Ronan v. Williams*, 41–680.

That slanderous words were spoken through heat of passion, under provocation, may be shown in mitigation, but not in complete defense: *McClintock v. Crick*, 4–453.

It is no justification that defendant *believed* the words to be true. To justify, he must prove they were, *in fact*, true. But the belief may be given in evidence in mitigaton: *Fountain v. West*, 23–9.

Under Rev. § 2929 it was held proper for defendant to allege mitigating circumstances without confessing the speaking of the words, and that it was not necessary to deny malice, or aver belief in the truth of the words spoken: *Desmond v. Brown*, 35–13.

To justify the charge of a crime, the truth of the charge, *i. e.*, the commission of the crime, must be established by such evidence as would justify the conviction of plaintiff if he were on trial therefor under indictment: *Bradley v. Kennedy*, 2 Gr., 231; *Forshee v. Abrams*, 2–571; *Fountain v. West*, 23–9; *Mott v. Dawson*, 46–533.

Section referred to in *Barton v. Thompson*, 46–30.

The bad character of plaintiff may be shown in mitigation of damages: *Armstrong v. Pearson*, 8–29; but defendant cannot plead either in defense or mitigation that the plaintiff has been guilty of a specific crime in no way connected with the alleged defamatory words, or the occasion on which they were used: *Fisher v. Tice*, 20–479. Nor can defendant prove specific offenses or particular acts of dishonesty not connected with the transaction under investigation, nor set up in the pleadings; nor that the plaintiff was in the habit of committing such offenses: *Fountain v. West*, 23–9.

Section construed generally: *Kinyon v. Palmer*, 18–377.

INTERVENTION

By person having an interest. R. § 2930.

SEC. 2683. Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause and before the trial commences.

A tax payer, as such, has not such an interest in the matter in litigation as to entitle him to intervene in a suit against his county to enforce the payment of a claim—at least in the absence of a showing that the board of supervisors, acting in bad faith, are failing properly to defend against such claim: *Cornell College v. Iowa County*, 32–520; but where the board aid, collude and conspire with the opposite party to procure judgments against the county, a tax payer may intervene: *Greeley v. County of Lyon*, 40–72.

In a proceeding to enjoin the collection of a tax in aid of a railway, the railway company may intervene,

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although it be not yet entitled to the tax: *Brown v. Bryan*, 31–556.

A party claiming to be the equitable owner of a promissory note may intervene, and have his rights established in a suit brought by the possessor and holder of the legal title against the owner: *Taylor v. Adair*, 22–279.

The purchaser at a foreclosure sale is subrogated to the rights of the mortgagee, and may intervene in the foreclosure suit which is still pending, as to other defendants: *Dyer v. Harris*, 22–268.

A party, *held*, entitled to intervene under the facts of a particular case: *Young v. Tucker*, 39–596.

Where a verdict has been rendered, or the parties have agreed upon the judgment to be entered, it is too late to intervene: *Henry v. Cass Co. Mill, etc. Co.*, 42–33; *First National Bank of Leon v. Gill*, 50–425.

A judgment in an action where a third party has intervened as defendant, is conclusive both upon the original defendant and the intervenor: *Witter v. Fisher*, 27–9.

SEC. 2684. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention. Cannot delay main action. R. § 2931.

It is not intended that one not a party shall be allowed to interpose and open up a controversy which has been settled between the parties to the record by verdict or by agreement: *Henry v. Cass Co. Mill, etc. Co.*, 42–33.

SEC. 2685. The intervention shall be by petition, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings provided for in this chapter. But if such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto. How effected. R. § 2932.

AMENDMENTS.

SEC. 2686. No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just. Variance. R. § 2972. C. '51, § 1758.

No variance is material unless the adverse party has been mislead to his prejudice: *Bower v. Deideker*, 38–418.

SEC. 2687. When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. Same. R. § 2973. C. '51, § 1757.

SEC. 2688. When, however, the allegation of the claim or defense to which the proof is directed is unproved in its general meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. When material. R. § 2974.

SEC. 2689. The court may, on motion of either party at any time, in furtherance of justice, and on such terms as may be proper, permit such party to amend any pleadings or proceedings by adding or striking out the name of a party, or by correcting a Amendments made at any time. R. § 2977. C. '51, § 1759.

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mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved.

[The word "pleadings" in the last line, as in the original, is "pleading" in the printed code.]

RIGHT TO AMEND GENERALLY: So far as substantial rights are not prejudiced the court should allow amendments on proper terms rather than dismiss the action and compel the party to commence anew: *Harkins v. Edwards*, 1–296; *Seevers v. Hamilton*, 11–66.

The rule is to allow amendments; to refuse them, the exception: *Pride v Wormwood*, 27–257; *Hinkle v. Davenport*, 38–355.

Amendments within the limits of the statute should always be allowed when substantial justice will thereby be promoted: *Dixon v. Dixon*, 19–512; *Tegler v. Shipman*, 33–194; *Miller v. Perry*, 38–301.

The right to amend is not absolute and unconditional, but rests within the sound discretion of the court: *Brockman v. Berryhill*, 16–183; *Hays v. Turner*, 23–214; *The State v. Mayor, etc., of Keokuk*, 18–388; and such discretion will not be interfered with on appeal unless substantial prejudice is shown: *Fulmer v. Fulmer*, 22–231.

Before the discretion exercised in granting leave to amend can be held erroneous, satisfactory evidence must be furnished of abuse thereof: *Phœnix Ins. Co. v. Dankwardt*, 47–432.

The court in the exercise of its discretion must see that the amendment is substantial, and not a repetition of the former pleading: *Harvey v. Spaulding*, 7–423; and if a mere repetition, it should be rejected: *Mayer v. Woodbury*, 14–57.

The terms upon which an amendment may be made rest within the discretion of the court, and its action with respect thereto, will not be reviewed unless abuse of discretion is shown: *Harrison v. Colton*, 31–16.

WHAT MAY BE AMENDED: A demurrer may be amended, as other pleadings: *Morrison v. Miller*, 46–84; so may a motion for new trial: *Sowden v. Craig*, 20–477; so may the return of an alternative writ of mandamus: *The State v. Mayor, etc., of Keokuk*, 18–388; and where the verification of a pleading is defective, the court may allow a new verification to be made by way of amendment: *Hughes v. Feeter*, 18–142.

As to amending petition for injunction, see note to § 3386.

WHAT AMENDMENTS ARE PERMISSIBLE: Where suit was brought by an individual partner, when it should have have been by the firm, *held*, proper to allow an amendment making the other partner a joint plaintiff: *Hodges v. Kimball*, 49–577; and in such case where a new action would have been barred, *held*, error to refuse such amendment: *Dixon v. Dixon*, 19–512.

A petition may be amended by striking out the name of a party improperly joined as plaintiff: *Butcher v. Carlton*, 11–47; *Hinkle v. Davenport*, 38–355.

It is not error to allow an amendment to a petition so as to increase the amount claimed: *McDonald v. C. & N. W. R. Co.*, 26–124, 138.

TIME WITHIN WHICH AMENDMENTS MAY BE FILED: Amendments may be allowed in a proper case after the jury are sworn (overruling *Cole v. Swan*, 4 Gr. 320): *Williams v. Miller*, 10–344; and, in such case, the jury need not be re-sworn: *Hinkle v. Davenport*, 38–355. So, they may be allowed during the progress of the trial, on proper terms: *Arnold v. Arnold*, 20–273; or, after the evidence is received, for the purpose of adapting the pleading to the case made by the evidence: *Ellis v. Lindley*, 37–334; or, after the commencement of argument to the jury, where the claim is not changed by the amendment: *Hammond v. S. C. & P. R. Co.*, 49–450. And, where an amendment was allowed while the second argument was being made, the Supreme Court held that they would not interfere with the discretionary power of the trial court in such matters, unless satisfied that the order made was not in furtherance of justice: *Smith v. Howard*, 23–51.

Where leave to amend was granted after the conclusion of the argument to the jury, and the amendment was filed after the return of verdict, it being slight and only for the purpose of conforming the petition to the proof, *held*, that it was properly allowed: *Correll v. Glasscock*, 26–83; so *held*, also, where the allowance of the amendment was made after the

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decision of the court was announced, but before decree was formally entered: *Spink v. McCall*, 52–432; so, also, where an amendment was allowed after the issue on a plea in abatement had been tried and determined: *Hunt v. Collins*, 4–56.

Amendments after verdict and before judgment to conform the pleadings to the proofs, are generally allowed. It is also allowable, for the purpose of remedying an error, to amend pleadings after judgment, within the sound discretion of the court: *O'Connell v. Cotter*, 44–48.

After a referee's report has been filed, a party ought not to be allowed to file an amended petition tendering a new issue, and have the case re-submitted to the referee without showing proper excuse for the delay: *Newell v. Mahaska Co. Savings Bank*, 51–178.

Where leave to amend was asked just as the jury was called, for the purpose of interposing a cross action, and was refused, *held*, that such ruling was not erroneous: *Brockman v. Berryhill*, 16–185.

Where an amendment to an answer was offered after defendant had made his argument and submitted his cause to the jury, and it did not appear but that it might have been filed sooner, *held*, not error to strike it from the files: *Bays v. Herring*, 51–286.

To allow an amendment on a second trial withdrawing a denial previously made by the pleading, and thus securing for the party so amending, the opening and closing, *held*, not erroneous: *Bates v. Bates*, 27–110.

It is too late to amend after a cause is pending in the appellate tribunal: *Johnson v. Chaplin*, 28–570.

A party may be allowed to amend after the case has been appealed to the supreme court, and been sent back for a new trial: *Rebb v. Preston*, 3–325; *Scott v. County of Chickasaw*, 53–47.

Where a demurrer is overruled in the court below, and the ruling is reversed on appeal, final judgment can not be rendered in the supreme court; but the party whose pleading is thus assailed, has a right to amend in the court below: *Ware v. Thompson*, 29–65.

After trial of an equity cause *de novo* on appeal and the filing of a procedendo in the court below, it is error to allow the filing of an amended pleading setting up matter which might have been set up before the trial: *Reed v. Howe*, 44–300; *Sexton v. Henderson*, 47–131. But, in such case, upon a showing of newly discovered evidence, such as would entitle the party to a new trial after decree, amended or additional pleadings, rendered necessary by such evidence, may be filed, and another trial had: *Adams Co. v. B. & M. R. R. Co.*, 44–335.

Where, after a decree adjudging to a party the ownership of specific property had been affirmed in the supreme court, and the cause remanded, such party asked leave to amend his pleadings so as to allege that the property had been converted by the other party, and asking for the return of the property, or judgment therefor, it was held error to refuse leave to so amend: *Jones v. Clark*, 31–497.

In an action pending on appeal from a justice of the peace, new or amended pleadings cannot be filed as matter of right, but may be allowed upon proper terms and a showing of cause for failure to plead below: *Dunton v. Thorington*, 15–217; *Stanton v. Warrick*, 21–76; *May v. Wilson*, 21–79; *Warren v. Scott*, 32–22; *Ping v. Cockyne*, 37–211; *Adae v. Zangs*, 41–536; *Clow v. Murphy*, 52–695; but they cannot be filed as matter of right: *Packard v. Snell*, 35–80.

Leave to file, even upon cause shown, is a matter of discretion: *Griswold v. Bowman*, 40–367.

PRACTICE: An amendment filed without leave of court, or notice to the opposite party, may be stricken from the files on motion. Amendment can only be made by leave of court, except as specified in § 2647: *Allen v. Bidwell*, 35–86. But an amendment filed without leave should not be stricken out where it would be error to refuse leave to file it: *Miller v. Perry*, 38–301.

The filing of an amendment which takes the opposite party by surprise, so that he cannot go to trial, may be a good ground for continuance, but the amendment can not for that reason be stricken from the files: *Snediker v. Poorbaugh*, 29–488.

The sufficiency of an amendment cannot properly be questioned by way of resistance to a motion for leave to file; but if such motion be overruled, the supreme court, on appeal from such decision, will look into the sufficiency of the amendment to see whether the refusal to allow it worked any prejudice to the party: *The State v. Mayor, etc., of Keokuk*, 18–388.

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An amended petition should refer to matters existing previously to the commencement of the action. Those matters arising subsequently thereto should be set up in a supplemental petition (§ 2731): *Seevers v. Hamilton*, 11–66.

As to the right to amend in attachment proceedings, see § 3021.

Errors disregarded. R. § 2978.

SEC. 2690. The court must, in every stage of an action, disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

A defect in the pleadings will not be regarded where no prejudice could have been wrought thereby: *Coates v. City of Davenport*, 9–227; *Doniphan v. Street*, 17–317.

Section applied in case of a motion in arrest of judgment for defects in the petition not affecting the substantial rights of the parties: *Smith v. Milburn*, 17–30.

An error will not be regarded on appeal unless the ruling is upon a material point: See § 2836.

Does not entitle the party to continuance. R. § 2979. C. '51, § 1756.

SEC. 2691. When either party shall amend any pleading or proceeding, the case shall not be continued in consequence thereof, unless the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment. But if the court is thus satisfied, a continuance may be granted to some day in the same term, or the next term of said court.

The continuance here contemplated should not be granted unless some showing is made: *The State v. Tieman*, 39–474.

Amendments: how made. R. § 2983.

SEC. 2692. All matters of supplement or amendment, whether of addition or subtraction, shall not be made by erasure or interlineation of the original, or by addition thereto, but upon a separate paper which shall be filed and constitute, with the original, but one pleading. But if it be stated in such paper that it is a substitute for the former pleading intended to be amended, in that case, it shall be deemed such substitute, but the pleading superseded by the substitute shall not be withdrawn from the files.

The petition and an amendment thereto constitute but one pleading, and the prayer for relief in the original is applicable to the amendment: *Montgomery v. Shockey*, 37–107.

An amendment to a pleading will not be considered as a substitute therefor: *Cooley v. Brown*, 35–475; and if the new pleading does not specify that it is a substitute, it will be construed with the original pleading: *Kostendader v. Pierce*, 37–645.

A pleading headed "third amended answer," *held*, to be a substitute for previous answers, and not an amendment to them: *Bates v. Kemp*, 12–99.

The pleading to which a substitute is filed still remains as a solemn admission of the facts therein stated by the party pleading them: *Mulligan v. I. C. R. Co.*, 36–181, 189.

INTERROGATORIES.

May be annexed to pleading. R. § 2985.

SEC. 2693. Either party may annex to his petition, answer, or reply, written interrogatories to any one or more of the adverse parties concerning any of the material matters in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering.

Neither the interrogatories nor the answers thereto will, on demurrer, aid a defective pleading: *Lane v. Krekle*, 22–399.

Section applied: *Greene v. Woods*, 34–573.

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SEC. 2694. The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition. What response must state. R. § 2986.

Section applied: *Gwyer v. Figgins*, 137–517.

SEC. 2695. The interrogatories shall be answered at the same time the pleading to which they are annexed is answered or replied to, unless they are excepted to by the adverse party; in which event the court shall determine as to the propriety of the interrogatories propounded, and which of them shall be answered, and within what time such answer shall be made. Time of responding. R. § 2987.

SEC. 2696. The trial of an action by ordinary proceedings, shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in the court at the trial, so that he may be orally examined; nor in case of absence, unless an affidavit be filed showing the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause. To cause no delay when. R. § 2988.

Where interrogatories were filed by the defendant just before going to trial, although the petition had been on file for several months, *held* that they were, on motion, properly stricken from the files: *Jones v. Berryhill*, 25–289; and that where there was no affidavit made and the cause was reached for trial, the counts containing the interrogatories were properly stricken out: *Courtright v. Deeds*, 37–503, 516.

SEC. 2697. The party, in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge, and what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge. Particularity required. R. § 2989.

SEC. 2698. The answer to the interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made of his own personal knowledge are true, and those made from the information of others he believes to be true. How verified. R. § 2990.

Where there was no verification, except the usual certificate of the notary, "subscribed and sworn to before me," *held*, that the answer was not sufficiently verified as here required: *Averill v. Boiles*, 52–672.

SEC. 2699. Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answer thereto, if truly made from such knowledge, will sustain the claim of defense, or any part thereof, and the opposite party shall fail to answer therein within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly. Upon failure to answer when taken as true. R. § 2991.

This section establishes a rule of evidence, and the interrogatories unanswered and the affidavit constitute proof of the claim or defense, and on trial, judgment should be given accordingly; but, they do not entitle the party to judgment without trial, and, after the filing of the affidavit, the opposite party may dismiss: *Perry v. Heighton*, 26–451.

Section applied: *Sulley v. Wilson*, 44–394.

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Answer compelled. R. § 2992.

SEC. 2700. The court may compel answers to interrogatories by process of contempt, and may, on the failure of the party to answer them, after reasonable time allowed therefor, dismiss the petition, or quash the answer of the party so failing.

GENERAL PRINCIPLES OF PLEADING.

Time: sum: quantity: place: denial of. R. § 2901.

SEC. 2701. In all cases in which a denial is made by answer or reply, concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, quantity, or place, and if not, what time, sum, quantity, or place, he admits.

Time when material: how stated. R. § 2955.

SEC. 2702. When time is material, the day, month, and year, or when there is a continued act, its duration must be alleged. When time is not material, it need not be stated, and if stated, need not be proved.

Place: allegation. R. § 2957.

SEC. 2703. It shall be necessary to allege a place, only when it forms a part of the substance of the issue.

Evidence: denial of allegation. R. § 2944.

SEC. 2704. Under a denial of an allegation, no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove.

Counts: divisions numbered. R. § 2902.

SEC. 2705. The counts of the petition must be consecutively numbered as such, and so must the divisions of the answer as such, and of the reply as such.

Correction of bad pleading. R. § 2903.

SEC. 2706. If any pleading do not conform to the foregoing requirements as to form, divisions, or numbering, or the distinct or separate statements of its cause of action or defense, the court may, on its own motion, or that of the adverse party, order the same to be corrected on such terms as it may impose.

Sham defenses stricken out. R. § 2961.

SEC. 2707. Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may, in its discretion impose.

Statute: how plead. R. § 2926.

SEC. 2708. In pleading a statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Rules of court. R. § 2927.

SEC. 2709. Every court of this state shall take judicial notice of the rules of any other court thereof, if published as directed by law.

Inconsistent defenses plead. R. § 2937.

SEC. 2710. Inconsistent defenses may be stated in the same answer or reply, and when a verification is required, it must be to the effect that the party believes one or the other to be true, but cannot determine which.

Admissions in one defense are not to be construed as affecting a different and inconsistent defense: *Barr v. Hack*, 46–308, 310.

Inconsistent defenses may be stated in the same answer: *Morgan v. Hawkeye Ins. Co.*, 37–359.

Exceptions to general law stated. R. § 2940.

SEC. 2711. Whenever a party claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading.

Allegations not controverted admitted. R. § 2917. C. '51, § 1742.

SEC. 2712. Every material allegation in a pleading not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true. But the allegations of the answer, not

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relating to a counter claim, and of the reply, are to be deemed controverted. But an allegation of value, or amount of damage, shall not be deemed true by a failure to controvert it. A party desiring to admit any allegations which by this section would be deemed controverted, may, at any time, file a written admission thereof.

Material allegations, not denied, are to be taken as true: *Alexander v. Doran*, 13–283; *Bolander v. Atwell*, 14–35; *Singer Manuf. Co. v. Billings*, 39–347. But the failure to deny the allegations of a pleading only admits such facts as are well pleaded: *Alston v. Wilson*, 44–130.

A party is not bound or estopped by allegations as to value, made in his pleadings: *Reilly v. Ringland*, 39–106, 111.

Allegations of value, or amount of damages, not to be deemed true: *C. & S. W. R. Co. v. N. W. U. Packet Co*, 38–377, 382; *Zoe v. Nichols*, 51–330.

Under the Rev. (which did not contemplate a reply confessing and avoiding new matters of defense set up in the answer), *held*, that where an admission of any averments of the answer as here provided, was filed, and the party intended to rely upon matter in avoidance of the matter so admitted, such matter in avoidance should be set up by some statement or notice that it would be relied upon, which properly might be embodied in the written admission itself: *Viele v. Germania Ins. Co.*, 26–9, 42.

Where the defendant answered, but did not controvert the substantial portion of the petition, *held* that plaintiff was entitled to a judgment when the cause came on for trial, and that there was no need of a formal *default* being entered as for want of an answer, and that defendant would not, in such case, be entitled to a jury: *Mann v. Howe*, 9–546.

Allegations of an answer not relating to a counter claim, deemed controverted without reply: *Davis v Payne*, 45–194.

As to when a reply is necessary, see notes to § 2665.

SEC. 2713. If a pleading is founded on an account, a bill of particulars thereof must be incorporated into or attached to such pleading, verified as the pleading, and deemed a portion thereof, subject to be made more specific on motion, and shall define and limit the proof, but may be amended as other pleadings. The items of such bill of particulars shall be consecutively numbered. Bill of particulars. R. § 2918.

These provisions as to bills of particulars are applicable in cases before justices of the peace: *McKenney v. Hopkins*, 20–495.

Failure to attach a copy of an account is ground for demurrer: See § 2648, ¶ 6.

[Sixteenth General Assembly, Chapter 36.]

SEC. 1. In all actions for money due upon an open account when the defendant has been personally served with the original notice therein and the petition is duly verified, and where a bill of particulars of said account is incorporated into or attached to the petition, if the defendant makes default or fails to controvert or deny the same or any of the items thereof, by pleading duly verified, the account or so much thereof as is not so controverted or denied, shall be taken as true and admitted. In action on open account: petition taken as true.

SEC. 2714. In pleading a judgment, or the determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. Judgment: how pleaded. R. § 2921.

SEC. 2715. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part. Conditions precedent. R. § 2922.

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When action is brought in a representative capacity. R. § 2923.

SEC. 2716. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation a plaintiff may aver such capacity or relation in the same general way.

Where a city has been incorporated by special charter, its corporate existence need not be averred; but judicial notice may be taken thereof. But when incorporated under general incorporation acts, its corporate existence must be averred, and, when properly put in issue, proved: *Hard v. City of Decorah*, 43–313.

Where a school district sues, it need not set out the manner in which it was formed. The presumption is, that it was constituted properly: *Fort Dodge Sch. Dist. v. Dist. T'p. of Wahkansa*, 15–434.

Where the plaintiff alleged a consolidation, etc., on the part of a corporation defendant, *held*, that such allegation was not within the provisions of this and the following sections, and was put in issue by a general denial: *Koons v. C. & N. W. R. Co.*, 23–493.

A general denial does not put in issue the existence of a corporation and its capacity to sue: *Blackshire v. Iowa Homestead Co.*, 39–654; nor the validity of the appointment of a guardian: *Gates v. Carpenter*, 43–152; nor the power of a bank to purchase a note: *Com. Bank of Keokuk v. King*, 47–64; nor the existence of a municipal corporation: *Stier v. City of Oskaloosa*, 41–353.

Facts must be stated. R. § 2925.

SEC. 2717. If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated.

See notes to preceding section.

Matters that must be specially pleaded. R. § 2942.

SEC. 2718. Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or that the instrument was delivered to a person as an escrow, or showing matter of justification, excuse, discharge, or release, and any defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded.

Fraud relied upon as a defense must be specially pleaded: *Root v. Schaffner*, 39–375.

An agreement to arbitrate should be specially pleaded in abatement. A motion to dismiss the action is not the proper remedy in such case: *Hynes v. S. A. & D. Railway Co.* 38–258.

The statute of limitations must be specially pleaded: See notes to § 2529.

Irrelevant matter stricken out. R. § 2946. C. '51, § 1753.

SEC. 2719. The court may, on motion of any person aggrieved thereby, cause irrelevant or redundant matter to be stricken from any pleadings, at the cost of any party whose pleading contains them.

Where the whole statement of a cause of action is irrelevant or redundant matter, a demurrer would be proper, but if the petition is good in part and only objectionable in containing whole statements of irrelevant or redundant matter which cannot be made the subject of a material issue, such matter should be purged by motion: *Bolinger v. Henderson*, 23–165; *Douglass v. Bishop*, 27–214.

A paragraph in an answer, setting up matter which does not constitute a defense, may be striken out on motion: *Evans v. Robbins*, 29–472.

Certain matter in a pleading *held* redundant and properly stricken out: *Davis v. C. & N. W. R. Co.*, 46–389.

It is not error to overrule a motion to strike out redundant matter, where it does not appear that the opposite party is aggrieved thereby: *Cate v. Gilman*, 41–530.

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When pleading made more specific. R. § 2948.

SEC. 2720. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain. No pleading which recites or refers to a contract shall be deemed sufficiently specific unless it states whether it is in writing or not. Such motion shall point out wherein the pleading is not sufficiently specific or it shall be disregarded, and if the reason for such demand exists outside of the pleadings, the motion must state the same and be supported by affidavit.

A motion for more specific statement will lie for indefiniteness in the statement of facts, etc., but not for indefiniteness in the prayer for judgment: *Sieberling v. Dujardin*, 3[illegible]–403.

Where a matter of fact is alleged in the alternative, the remedy for the defect is by motion and not by demurrer: *Turner v. First Nat'l Bank, Keokuk*, 26–562.

Any error in overruling the motion of the defendant to have petition made more specific, is waived by answering: *Coakley v. McCarty*, 34–105; *Kline v. K. C. St. J. & C. B. R. Co.*, 50–656.

Title of cause not changed. R. § 2949.

SEC. 2721. The title of a cause shall not be changed in any of its stages of transit from one court to another.

Judicial notice. R. § 2950.

SEC. 2722. Matters of which judicial notice is taken need not be stated in a pleading.

Conveyance how plead. R. § 2952.

SEC. 2723 When a party claims by conveyance, he may state it according to its legal effect or name.

Estate: how plead. R. § 2954.

SEC. 2724. It shall not be necessary to allege the commencement of either a particular or a superior estate, unless it be essential to the merits of the case.

Same as to goods. R. § 2956.

SEC. 2725. In actions for injuries to goods and chattels, their kind or species shall be alleged.

Same as to real property. R. § 2958.

SEC. 2726. In actions for injuries to real property, the petition shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the numbers by which the property is designated in the national survey, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation certain enough to identify it.

Malice. R. § 2959.

SEC. 2727. When the party intends to prove malice to effect damages, he must aver the same.

Section applied: *Johnson v. C. R. I. & P. R. Co.*, 51–25.

Bond: breaches of. R. § 2960. C. '51, § 1813.

SEC. 2728. In an action on a bond with conditions, the party suing thereon shall notice the conditions and allege the facts constituting the breaches relied on.

The condition should be noticed in the pleading itself. Attaching a copy of the bond to the pleading as an exhibit is not a compliance with the requirements of the section: *Ryder v. Thomas*, 32–56.

To constitute a sufficient statement of the breach relied on, the non-payment of the damages provided for should be alleged: *Ibid.* So *held*, in case of an action on an attachment bond: *Horner v. Harrison*, 37–378.

Extent of proof required. R. § 2966.

SEC. 2729. A party shall not be compelled to prove more than is necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense.

Section applied: *Sweezey v. Collins*, 36–559; *Snyder v. Reno*, 38–329; *Little v. McGuire*, 38–560, 563; *Knott v. Tincher*, 39–6 8; *Edwards v. Cottrell*, 43–194; *Kearney v. Fitzgerald*, 43–589; *Moseley v. Shattuck*, 45–540, 543.

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When written instrument referred to in pleading deemed genuine.
R. § 2967.
9 G. A. ch. 28.
13 G. A. ch. 167, § 19.

SEC. 2730. When a written instrument is referred to in a pleading, and the same, or a copy thereof, is incorporated in or attached to such pleading, the signature thereto, and to any endorsement thereon, shall be deemed genuine and admitted, unless the person whose signature the same purports to be, shall, in a pleading or writing filed within the time allowed for pleading, denying the genuineness of such signature under oath. If such instrument be not negotiable, and purport to be executed by a person not a party to the proceeding, the signature thereto shall not be deemed genuine or admitted, if a party to the proceeding, in the manner and within the time before mentioned, state under oath that he has no knowledge or information sufficient to enable him to form a belief as to the genuineness of such signature. The person whose signature purports to be signed to such instrument, shall, on demand, be entitled to an inspection thereof.

Under this section a denial of the execution of the instrument (*Loomis v. Metcalf*, 30–382), or a denial of knowledge or information as to signing the instrument (*Hall v. Ætna M'f'g Co.*, 30–215), or that defendant ever signed or executed an instrument, of such tenor and effect, will not be sufficient to put in issue the genuineness of the signature: *Douglass v. Matheny*, 35–112; but under a denial of the execution, defendant may introduce evidence that the instrument, by reason of alterations or otherwise, is not such as he signed, without having denied the genuineness of the signature under oath: *Lake v. Cruikshank*, 31–395.

The object of the statute was to change the burden of proof in respect to the execution of the instrument, and cast it upon defendant, but defendant is not estopped from controverting the execution of the instrument, or his signature thereto, by proof, where he has denied the execution in his answer: *Sankey v. Trump*, 35–267; and defendant may, by answer not under oath, deny the genuineness of his signature and support such allegation by proper evidence, the burden of proof being upon him: *Brayley v. Hedges*, 52–623. So under chapter 108, Acts of 1853, providing that due execution would be presumed, unless specifically denied under oath, *held*, that a party might deny the execution, and support such denial by proof, without making it under oath: *Lyon v. Bunn*, 6–48; *Terhune v. Henry*, 13–99.

The denial under oath, contemplated in this section, must be by the party whose signature it purports to be: *Walker v. Sleight*, 3[illegible]–310; and a denial by the *maker*, of the genuineness of the signature of an *indorser*, is not sufficient to throw the burden of proving the genuineness of such signature upon the party claiming thereunder: *Robinson v. Lair*, 31–9.

The section does not apply to an administrator suing on the note of his decedent, and a denial by him of the execution puts in issue the genuineness of the signature: *Ashworth v. Grubbs*, 47–353.

When a signature is thus denied under oath, while the defendant must introduce some evidence to support his defense and overthrow the *prima facie* case made by the writing, yet, when he has done so, the *onus probandi* as to the genuineness of the signature rests upon plaintiff: *F. & M. Bank v. Young*, 36–44.

This section is applicable in case of city warrants: *Clark v. City of Des Moines*, 1[illegible]–199. 227, and also in case of county warrants: *Clark v. Polk Co.*, 1[illegible]–248; also in case of a deed of a corporation, purporting to be properly signed and sealed: *Blakshire v. Iowa Homestead Co.*, 39–624.

Supplemental pleading defined.
R. § 2968.
C. '51, § 1749.

SEC. 2731. Either party may be allowed, on motion, to make a supplemental petition, answer, or reply, alleging facts material to the case, which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings.

Where defendant alleged, by way of defense, that the claim sued on was only to become mature on a contingency which had not happened,

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held, that plaintiff might, in a supplemental petition, set up the happening of such a contingency, after suit was brought: *City of Davenport v. Mitchell*, 15–194.

Section applied: *Hynes v. S. A. & D. R. Co.*, 38–258.

SEC. 2732. Matter in abatement may be stated in the answer or reply, either together with or without causes of defense in bar, and no one of such causes shall be deemed to overrule the other; nor shall a party after trial, on matter of abatement, be allowed in the same action to answer or reply matter in bar. Matter in abatement: how plead. R. § 2969.

That defendant has been garnished for a debt due the assignor of plaintiff before assignment, if no judgment has yet been rendered in the garnishment proceedings, is pleadable in abatement and not in bar: *Clise v. Freeborn*, 27–280.

Where a plea of another action pending is set up, it should not be regarded if the other action is dismissed before the court has determined the sufficiency of the plea (overruling *Rawson v. Guiberson*, 6–507): *Rush v. Frost*, 49–183.

As to form of judgment on matter in abatement, see § 2851.

SEC. 2733. Any defense arising after the commencement of any action, shall be stated according to the fact, without any formal commencement or conclusion, and any answer which does not state whether the defense therein set up arose before or after action, shall be deemed to be of matter arising before action. Subsequent defenses: how plead. R. § 2970.

SEC. 2734. Whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause be shown the same shall be consolidated. Consolidation of actions. R. § 2980.

The same reason and necessity exists for allowing the relief here contemplated, in a proper case, upon motion of plaintiff, as upon that of defendant. The power of the court to consolidate actions has long been exercised, in the absence of any express statutory directions: *Viele v. Germania Ins. Co.*, 26–9, 46.

SEC. 2735. If an original pleading be lost or withheld by any one, the court may order a copy thereof to be substituted. Lost pleading. R. § 2982. C. '51, § 1760.

SEC. 2736. No record shall be amended or impaired by the clerk or other officer of the court, or by any person without the order of such court, or of some court of competent authority. Records cannot be altered. R. § 2984.

[The word "without," in the second line, as in the original, is "with" in the printed code.]

CHAPTER 9.

OF TRIAL AND JUDGMENT.

SECTION 2737. Issues arise in the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds: Issues: law and fact. R. § 2993.

1. Of law;
2. Of fact.

Issues arising in special proceedings must be tried either as an ordinary or equitable proceeding, and the mode of trial will be determined by

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assigning the proceeding to whichever class it appropiately belongs to: *Sisters of Visitation v. Glass*, 45–154.

Of fact. R. § § 2994, 2995.

SEC. 2738. An issue of fact arises:

1. Upon a material allegation of fact in the petition denied by the answer;

2. Upon a material allegation of new matter presented in the answer and denied by the reply;

3. Upon allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading. Any other issue is one of law.

ISSUES—HOW TRIED.

Trial defined. R. § § 2996-7. C. '51, § 1770.

SEC. 2739. Issues of law must be first tried. A trial is a judicial examination of the issues in an action whether they be issues of law or of fact.

Issues: how tried. R. § 2998. C. '51, § 1772.

SEC. 2740. Issues of fact, in an action in an ordinary proceeding, must be tried by jury, unless the same is waived. All other issues shall be tried by the court, unless a reference thereof is made.

An issue of fact in an equitable proceeding is to be tried by the court and cannot be submitted to a jury, even as formerly provided under Rev. § 2999 for the purpose of informing the conscience of the court. The reference contemplated in this section is not one to a jury but such an one as is provided for in § § 2815 *et seq.* (overruling in this respect: *Sherwood v. Sherwood*, 44–192, and *Howe Machine Co. v. Wooley*, 50–549;) *Hobart v. Hobart*, 51–512.

It is not error in the court to overrule motion of a party to submit to a jury certain issues in an equitable action: *Shontz v. Evans*. 40–139.

The right to trial by jury is not inalienable, but may be waived or forfeited: *Wilkins v. Treynor*, 14–391.

In equitable actions triable to the court, a reference may be made, even without consent. The parties are not entitled, as of right, to a trial by jury: *The State v. Orwig*, 25–280.

And as to the right of trial by jury, generally, see Const., art. 1, § 9, and notes.

A party in default is not entitled to a jury to assess amount of recovery. See § 2872 and notes.

Method of trial in ordinary actions: appeal. R. § 2999.

SEC. 2741. All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as now provided by law; and upon appeal no evidence shall go to the supreme court except such as may be necessary to explain any exception taken in the cause; and such court shall hear and try the case only on the legal errors so presented.

[A substitute for the original section; 18th G. A., ch. 83.]

[The following decisions were all made before the repeal of the original section. which read as follows: "All issues of fact, whether ordinary or equitable, shall be tried upon oral evidence taken in open court, except that depositions may be used as now provided in an action by ordinary proceedings; and, upon appeal, no evidence shall go to the supreme court, except such as may be necessary to explain any exception taken; and such court shall try only the legal errors duly presented."]

To warrant the supreme court in reviewing errors of law in the admission or exclusion of evidence, the record need not contain all the evidence in the case, but need only show the purport of the evidence passed upon: *Smith v. Johnson*, 45–308.

The supreme court, on appeal, will not consider any question not raised in the court below: *McNaught v. C. & N. W. R. Co.*, 30–336; *Trayer v. Reeder*, 45–272.

Special proceedings (such as probate of wills, etc.), are triable in the supreme court upon legal errors duly assigned, and not *de novo*: *Ross v. McQuiston*, 45–145; *Sisters of Visitation v. Glass*, 45–154.

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The rule is to try all causes on oral evidence, and, in the supreme court, on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired, the proper steps to secure it must be taken: *Finch v. Hollinger*, 47–173, 175.

Under Rev. § 2999, *held*, that in equity actions tried by the second mothod (as provided in that section) the supreme court could only consider questions of law properly assigned, as in actions by ordinary proceedings: *Snowden v. Snowden*, 23–457.

As to the meaning of the expression, "open court," as here used, see *Hobart v. Hobart*, 45–501, 504.

SEC. 2742. But in equitable actions wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence or any part thereof to be taken in the form of depositions, or either party at pleasure may take his testimony or any part thereof by deposition. All the evidence so taken shall be certified by the judge in term or vacation, be made a part of the record and go on appeal to the supreme court, which shall try the case anew.

In equitable actions: evidence taken in writing: depositions: appeal. R, § 2999.

[A substitute for the original section; 17th G. A., ch. 145.]

[The original section was as follows: "But in equitable actions, other than actions to foreclose mortgages or instruments in writing whereby liens or charges on property are created, not including trusts, to enforce mechanics' liens, or for divorce or nullity of marriages, if any party shall, at any time during the appearance term, move the court for a trial upon the written evidence, the court shall either order all the evidence to be taken in the form of deposition, or shall cause all the evidence offered on the trial to be taken down in writing, to be certified by the judge and made a part of the record according to the requirements of the motion. In either of such cases, all the evidence so taken shall go on appeal to the supreme court, which shall try the case anew."]

DECISIONS UPON THE SUBSTITUTE: This act does not affect proceedings on appeal from a judgment rendered before the act took effect, although the appeal was not taken until after that time: *Simondson v. Simondson*, 50–110; *Trebon v. Zuraff*, 50–180; *Joliet Iron and Steel Co. v. C. C. & W. R. Co.*, 50–455.

Whether, under the substitute, chancery cases may be tried in the supreme court, upon errors, *quære;* but the substitute does not affect the method of trial in the court below, in cases commenced before its enactment: *Schmeltz v. Schmeltz*, 52–512.

The substitute does not repeal the provisions of §§ 2744, 2745, but when an order is made to take the evidence in the form of depositions, the cause is necessarily continued, and the appearance term is not the trial term, even in actions for foreclosure, divorce, etc.; but if the evidence is ordered to be taken down in writing, there need be no continuance, unless for cause, and the appearance term is the trial term for those classes of equitable actions: *Holbrook v. Fahey*, 51–406.

AS TO RIGHT OF TRIAL DE NOVO: While the Legislature can not take away the right of trial *de novo* in the supreme court on appeal in equity cases, yet the manner of its exercise may be regulated as is here done: *Richards v. Hintrager*, 45–253.

The constitution guarantees the right of trial *de novo*, on appeal to the supreme court, and this section, in so far as it did not allow a trial *de novo* in divorce and foreclosure cases, was unconstitutional: *Sherwood v Sherwood*, 44–192; *Howe Machine Co. v. Woolly*, 50–549.

Under Rev. § § 2999, 3000, *held*, that in an equitable action tried by the first method (on written evidence), the supreme court would try the case on appeal *de novo*, and that alleged errors in interlocutory proceedings would not be considered, and that in such cases an assignment of errors would not be necessary: *Hackworth v. Zollars*, 30–433; but that where an equitable action was tried by the second method (in the same manner as a law action), although it was such an action as might have been tried by the first method, it would be heard in the supreme court only upon errors: *Lynch v. Lynch*, 28–326; *Mallory v. Luscombe*, 31–269; and that to bring up for review an equitable case, triable by the second

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method, the same steps must be taken as in an action at law: *Buckwalter v. Craig*, 24–215.

Although a law action is tried on written evidence, and on appeal to the supreme court all the evidence is taken up, the case can still only be tried upon errors, and not *de novo*: *Dore v. Ind. Dist. of Keokuk*, 41–689.

PRACTICE: Where an equitable action is set down for hearing upon written testimony and so tried, the case upon appeal must be tried *de novo* and not upon assignment of errors, and the method of trial in the supreme court is dependent upon the manner in which it was tried below, and not upon the nature of the case. If all the evidence offered on the trial below is admitted, subject to objection, and is brought before the supreme court, as is the better practice, it will decide upon its competency, etc, without reference to the ruling thereon of the lower court; but if any evidence has been excluded and is not of record, the supreme court will review the ruling of the lower court in that respect: *Blough v. Van Hoorebeke*, 48–40.

Where the court has ordered an equity cause to be tried on written evidence, oral testimony cannot be presented. The trial in the supreme court is final, and nothing remains for the court below, but to enforce the decision of the supreme court by proper decree, a new trial on amended pleading not being allowable: *Sexton v Henderson*, 47–131; and as to right to amend pleadings in such cases, see notes to § 2680.

Where the necessary steps to secure a trial *de novo* have not been taken, errors of law properly assigned may be considered: *Jordan v. Wimer*, 45–65; *Lutz v Kelley*, 47–307; but no ruling will be considered, which has not been properly excepted to: *Schmeltz v. Schmeltz*, 52–512; *Krapfel v. Pfiffner*, 24–176.

An equity cause cannot be tried *de novo* in the supreme court unless the testimony is all embodied in the record: *Krapfel v. Pfiffner*, 24–176. As to what is sufficient certificate, etc., to show that the evidence is all in the record, see notes to § 3184.

If the evidence is not all in the record, the same presumption obtains as to the correctness of the judgment of the court below as in an ordinary action: *The State v. Orwig*, 27–528.

[Since the repeal of the original section the decisions as to the method of securing a trial *de novo*, as there provided, have little or no application, but a few of the leading cases are preserved.]

Unless there is a motion, order, or express agreement at the appearance term for trial upon written evidence, the cause cannot be tried *de novo*: *Saunders v. Halliday*, 48–81: but a motion is not essential; an order to that effect made by the court by consent of parties will be sufficient: *Robinson v. First Nat'l Bank of Cedar Rapids*, 48–354.

An agreement of the parties at the appearance term to try a case upon written evidence supersedes the necessity of a motion or order: *VanBogart v. VanBogart*, 46–359. But the consent of parties that an order be made for trial upon written evidence does not amount to a consent to such trial *de novo*, in the supreme court: *County of Woodbury v. Lambert*, 51–698.

The appearance term is that term at which it is first ascertained that an issue of fact is to be tried: *Ibid; Vinsant v. Vinsant*, 47–594.

The motion should be in writing and filed, and a *nunc pro tunc* order at a subsequent term will not make good the want of such motion: *Trescot v. Barnes*, 46–644.

So the order must be in writing and made before the trial: *Berryhill v. Smith*, 51–127; and where there is neither motion nor order, there can be no trial *de novo: Ibid; Ashcraft v. DeArmond*, 44–229; and, generally, as to the steps necessary to be taken, see *Vinsant v. Vinsant*, 47–594; *Hammersham v. Faircall*, 44–462; *Altman v. Farrington*, 45–620; *Clark v. Reynolds*, 46–674.

Court to find facts.
R. § 3088.
C. '51, § 1793.

SEC. 2743. In all trials of fact by the court, other than those contemplated in the preceding section, the court shall, if either party request it, give its decision in writing, stating, separately, the facts found and the legal conclusion founded thereon; and the whole decision shall be a part of the record, and the finding shall have the effect of a special verdict.

The court is to find the facts, and not the evidence of the facts: *Myers v. Smith*, 15–181; And such facts should be stated with the same certainty and definiteness that would be required in a pleading: *Van Riper v.*

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Baker, 44–450.

Where a decision in writing is not requested, the final judgment is the only finding necessary to be made by the court: *Gallinger v. Vale*, 6–387.

A finding of fact by the court is regarded, on appeal, in the same light as a verdict of a jury, and will only be disturbed where it is clearly and palpably against the weight of evidence: *Pearson v. Minturn*, 18–36; *Goldsmith v. Boersch*, 28–351; *Leighton v. Orr*, 44–679. It will not be set aside as against evidence, when the evidence is conflicting: *Smith v. Walker*, 49–287.

Where no finding of facts is made, the supreme court on appeal will determine whether the testimony is sufficient to support a conclusion of fact, which, in law, authorized the judgment as rendered: *Vogel v. Wadsworth*, 48–28.

Where there is no finding of fact by the court, a judgment upon the evidence cannot be reviewed, unless upon motion for a new trial. (Decided prior to the enactment of the provisions contained in § § 3169 and 3170): *Warner v. Pace*, 10–391; *Corner v. Gaston*, 10–512; *Allman v. Gilbert*, 14–538.

Provisions in case of trial by jury applicable to a trial by the court, see § 2863.

As to what is necessary to secure a review in the supreme court of a case tried by the court, see § 3170.

SEC. 2744. Except where otherwise provided, causes shall be tried at the first term after legal and timely service has been made. Tried at first term. R. § 3007. C. 51, § 1762. 13 G. A. ch. 1-7, § 20.

SEC. 2745. The appearance term shall not be the trial term for equitable actions, except those brought for divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' liens. Exception as to equitable issues. R. § 2856. Same, § 17.

The provision excepting actions for divorce or for foreclosure, etc., from the general rule as to trial term of equitable actions, would seem to be abrogated by the decision in *Sherwood v. Sherwood*, 44–192; *Palmer v. Call*, 4 Dillon (U. S. C. C.), 566.

As to the effect upon this, and the following section, of the substitute for § 2742, see notes to that section.

SEC. 2746. The court may, in its discretion, allow separate trials between the plaintiff and any defendant, or of any cause of action united with others, or of any issue in an action; and such separate trials may be had at the same or different terms of the court, as circumstances may require. Separate trials, when granted. R. § § 3024-5. C. 51, § 1768.

Granting separate trials is discretionary with the court: *Kilbourn v. Jennings*, 42–473.

Where a husband and wife brought a joint action for slander, *held*, not error to allow plaintiffs to sever their causes of action: *Blades v. Walker* 36–266.

SEC. 2747. The clerk shall keep a calendar distinguishing, first, criminal causes, and next, civil causes, and arranging each in the order of their commencement, and shall, under the direction of the court or judge, apportion the same to as many days as is believed necessary, and, at the request of any party to a cause, or his attorney, shall issue subpœnas accordingly. The clerk shall furnish the court and the bar with a sufficient number of printed copies of the calendar. Calendar and arrangement of causes. R. § 3005. C. 51, § § 1761-2.

CONTINUANCES.

SEC. 2748. When time is asked for making application for continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor; for which cost, judgment may at once be entered by the clerk unless the contrary be agreed between the parties. When time is asked to apply for. R. § 3008. C. 51, § 1764

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Not granted when party in fault.
R. § 3000.
C. '51, § 1765.

SEC. 2749. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained.

A continuance should not be granted for a cause growing out of the fault of a party: *Connor v. Griffin*, 27-248.

It is not sufficient to state that due diligence has been used; the facts constituting such diligence must be shown: *Thurston v. Cavenor*, 8-155; as to what showing of diligence was necessary in particular cases, see *Ibid*; *Walker v. Scofield*, 39-96.

A continuance on the ground of the absence of a witness, should not be granted to defendant in default, who offers no defense, nor when the residence of the witness is not given, and diligence in ascertaining it is not shown: *James v. Arbuckle*, 8-272.

In a particular case, *held*, that a continuance should have been granted on application of defendants to allow them to procure testimony as to their general character: *The State v. Nash*., 7-347, 373.

A continuance may be granted in a particular case, on account of absence of counsel, but if such application is refused, the supreme court would require very strong circumstances, manifesting a clear abuse of discretion, before it would interfere: *Brady v. Malone*, 4-146; and while the absence of a party's attorney on account of sickness might be a ground for continuing a cause to a later day in the same term, under the circumstances of a particular case, *held*, that it was not sufficient to require a continuance over the term: *State v. Ostrander*, 18-435, 445.

The granting of a continuance on the application of a *guardian ad litem*, newly appointed, to enable him to prepare a cause for trial, may be proper: *Blythe v. Blythe*, 25-266.

Facts in a particular case, *held*, not sufficient to warrant a continuance: *Finch v. Billings*, 22-228.

The application for a continuance is addressed peculiarly to the sound legal discretion of the judge, and his ruling thereon will not be interfered with on appeal, unless the supreme court is clearly satisfied that this discretion has been abused and injustice thereby done: *Widner v. Hunt*, 4-355; *Childs v. Heaton*, 11-271; *The State v. Rorabacher*, 19-154; *Boone v. Mitchell*, 33-45. This discretion, however, is not arbitrary, but is to be governed and controlled by legal rules: *Purington v. Frank*, 2-565; and see, generally, notes to next section.

For want of evidence: affidavit: statements of.
R. §§ 3010-11.
C. '51, § 1766.

SEC. 2750. Motions for continuance on account of the absence of evidence, must be founded on the affidavit of the party, his agent, or attorney, and must state:

1. The name and residence of such witness, or, if that be not known, a sufficient reason why not known, and also, in either case, facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term;

2. Efforts, constituting due diligence, which have been used to obtain such witness, or his testimony;

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved.

Where an affidavit fully complies with the requirements of the statute, it is error to refuse a continuance: *The State v. Barrett*, 8-536.

Counter affidavits cannot be filed to contradict the affidavits for continuance: *The State v. Dakin*, 52-395; *The State v. Bowers*, 17-46.

The provision that the affidavit shall show reasonable grounds of belief as to the attendance of witnesses at the next term, etc., contemplates more than a mere statement of a belief that the testimony can be procured: *The State v. Rorabacher*, 19-154.

The party seeking a continuance on the ground of the absence of a witness, must show that he has availed himself of the means given by the statute to procure the attendance of such witness, or to obtain his deposition: *The State v. Cross*, 12-66.

The facts constituting due diligence

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must be shown, and from such facts the court will determine whether the necessary diligence has been exercised: *Brady v. Malone*, 4–146.

A party must show, not only that he made proper efforts to obtain the desired evidence after he knew that it might be obtained, but also that he used due diligence in discovering it: *The State v. Bell*, 49–440.

An affidavit for continuance on the ground of the absence of a witness, *held*, insufficient in that it did not show that his absence was unknown for a sufficient length of time previous to the term to admit of his deposition being taken: *Widner v. Hunt*, 4–355.

A party is held to greater diligence in procuring the deposition of a non-resident than that of a resident witness: *Peck v. Parchen*, 52–46

Where a commission issued in December to take the deposition of a witness, and was not returned before trial in the following June, *held* that sufficient diligence was not shown: *Cole v. Strafford*, 12–345.

As to whether sufficient deligence was used under particular circumstances, see *Fiske v. Berryhill*, 10–203; *The State v. Scott*, 44–93; *The State v. Spurbeck*, 44–667; *The State v. Dakin*, 52–395; *Brandt v. McDowell*, 52–230.

The affidavit as to what affiant believes witness will prove, must state facts, as distinguished from legal conclusions: *The State v. Felter*, 25–67, and a statement that the party expects to prove by the witness "all the material allegations contained in his answer" is not sufficient: *Olds v. Glaze*, 7–86; and the affidavit must show that the witness would, if present, testify to facts material and relevant to the issue: *The State v. Bennett*, 52–724; *The State v. Williams*, 8–533.

The affidavit must show that there are no other witnesses by whom the facts stated can be proved: *Thompson v. Abbott*, 11–193; but where a party stated in his affidavit that he knew of no person by whom the same facts could be "as fully proved as by said" witness, *held* that the affidavit was sufficient: *Welsh v. Savery*, 4–241.

Where, in a prosecution for murder, defendant asked a continuance on account of the absence of a witness by whom he expected to prove that he (witness) did the killing, *held* that the improbability that the witness would thus subject himself to a criminal prosecution, was not sufficient ground for refusing a continuance: *The State v. Farr*, 33–553.

SEC. 2751. If the application is insufficient, it shall be overruled; if held sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated.

Overruled or party may admit facts. R. § 3012; C. '51, § 1767.

Where the opposite party admits that the witness, if present, would testify to the facts stated, the affidavit may be read to the jury as the basis of such admission: *Strong v. Hart*, 7–484; but it can be read only in so far as it states facts which the witness, if present, would be allowed to testify to: *The State v. Suter*, 8–420. The admission does not preclude legal objections, which might be made to the testimony, if the witness was present: *The State v. Gedlis*, 42–264.

The statements of the affidavit, if admitted and read, are to be taken as the testimony of the witness in court, and cannot be impeached by proof of different statements made out of court, unless a proper foundation therefor has been laid, even though such outside statements were under oath: *The State v. Shannehan*, 22–435.

The affidavit and admission are not admissible as evidence at a subsequent term: *The State v. Felter*, 32–49.

SEC. 2752. The motion must be filed on the second day of the term, if it is then certain that it will have to made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered, and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time

Motion for: when filed. R. § 3014.

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is taken when the case is called to make such motion, the motion shall be made and determined as soon as the court opens after the next ordinary adjournment.

The motion should be filed as soon after the second day of the term as it becomes certain that it will have to be filed: *Bays v. Herring*, 51–286.

If the affidavit is not made on the second day, a sufficient excuse therefor should be stated in the affidavit: *Randall v. Fockler*, 52–618. If filed after the second day, and no reason for the delay is shown, the motion should be overruled: *Lucas v. Casady*, 12–267.

Section applied: *C. & S. W. R. Co. v. Heard*, 44–358.

Amendment. R. § 3015.

SEC. 2753. The application shall be amended but once, unless by permission, to supply a clerical error.

Before the enactment of this provision, *held*, that the practice of suffering affidavits for continuance to be amended, or new ones to be filed, was one which might be productive of much evil, and which should be permitted with great caution, if at all: *Widner v. Hunt*, 4–355.

Written objections to. R. § 3016.

SEC. 2754. To such motion, both as original and as amended, the adverse party may, at once, or within such reasonable time as the court shall allow, file written objections stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desire it.

Part of record. R. § 3017.

SEC. 2755. Such motion and objections shall be a part of the record, and error in refusing a continuance or in compelling an election may be reviewed.

Notice book. R. § 3018.

SEC. 2756. No copy need be served of a motion for continuance or of objections thereto, but a notice of such motion shall be entered on the notice book.

Costs. R. § 3019.

SEC. 2757. Every continuance granted upon the application of either party, shall be at the costs of such party, unless otherwise ordered by the court.

Parties may agree. R. § 3020.

SEC. 2758. The court shall grant continuance whenever the parties agree thereto, and provide as to costs as may be stipulated.

Case remains on docket. R. § 3022.

SEC. 2759. A case continued remains for all purposes except a trial on the facts.

One of several parties. R. § 3023.

SEC. 2760. Where the defenses are distinct, any one of several defendants may continue as to himself.

SELECTION OF JURY.

How done R. § 3026. C. '51, § 1773.

SEC. 2761. When a jury trial is demanded, the clerk shall select twelve jurors by lot from the regular panel.

Where the jury consisted of but eleven jurors, it appearing that the parties had no knowledge of that fact until after verdict, *held*, that the defect was fatal and could not be considered as waived: *Cowles v. Buckman*, 6–161.

Challenge. R. § 3027. C. '51, § 2972.

SEC. 2762. A challenge is an objection made to the trial jurors and is of two kinds:

1. To the panel;
2. To an individual juror.

Parties cannot sever in. R. § 3028.

SEC. 2763. Where there are several parties plaintiffs or defendants, and no separate trial is allowed, they are not allowed to sever their challenges, but must join in them.

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To the panel. R. § 3029. C. '51, § 2974.

SEC. 2764. A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury.

A challenge to the panel should be sustained where the requisite number of trial jurors has not been summoned: *Baker v. Steamboat Milwaukee*, 14–214.

When made. R. § 3030. C. '51, § 2975.

SEC. 2765. A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge.

How tried. R. § 3031. C. '51, § 2976.

SEC. 2766. A challenge to the panel may be taken by either party and upon the trial thereof, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Allowance of: discharge of jury. R. § 3032. C. '51, § 2977.

SEC. 2767. If the facts of the challenge be allowed by the court, the jury must be discharged and its members disqualified from sitting as jurors so far as the trial in question is concerned; if it be disallowed, the court shall direct the jury to be empanelled.

To jurors. R. § 3033. C. '51, § 2978.

SEC. 2768. A challenge to an individual juror is either peremptory or for cause.

When made. R. § 3034. C. '51, § 2979.

SEC. 2769. It must be taken when the juror appears and before he is sworn, but the court may, for good cause, permit it to be taken at any time before the jury is completed.

Peremptory. R. § 3035.

SEC. 2770. A peremptory challenge is an objection to a juror for which no reasons need be given, but upon which the court shall exclude him.

Number of: how made. R. § 3036. C. '51, § 1774. 9 G. A. ch. 174, § 3.

SEC. 2771. Each party shall have the right to challenge peremptorily, five jurors and no more; and the parties shall challenge alternately, commencing with the plaintiff, and the challenges for cause being first exhausted or waived, the parties shall then, in turn, in the same order, exercise the right of peremptory challenge.

An error in overruling a challenge to a juror for cause, is waived if the party making such challenge afterward waives a peremptory challenge to the jury containing such juror: *The State v. Elliott*, 45–486; *Barnes v. Town of Newton*, 46–567.

A waiver of peremptory challenge by a party only counts as one of the number to which he is entitled, and, after a challenge by the other party, he may use any remaining right of challenge, even as to a juror in the box when the waiver was made: *Fountain v. West*, 23–9.

Causes of: vacancy filled. R. §§ 2271, 3037 40. C. '51 § 1775.

SEC. 2772. After each challenge, the vacancy shall be filled before further challenges are made, and any new juror thus introduced may be challenged. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction for felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Inability to understand the English language, unsoundness of mind, or such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror;
4. Consanguinity or affinity within the ninth degree to the adverse party;
5. Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or being a member of the family, or in the employment of the adverse party;
6. Being a party adverse to the challenging party in a civil

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action, or having complained against, or been accused by him in a criminal prosecution;

7. Having already sat upon the trial of the same issues;

8. Having served as a grand or trial juror in a criminal case based on the same transaction;

9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict;

10. Being interested in a like question with the issue to be tried.

Questions as to the qualification of jurors are submitted to the sound discretion of the court, and its action will not be reviewed unless an abuse thereof is shown: *Anson v. Dwight*, 18–241; *May v. Elam*, 27–365.

Cases of express and implied bias (as the terms are used in Rev. § 3939) discussed: *May v. Elam*, 27–365.

A motion for a new trial, on the ground that one of the jurors had already sat on the trial of the same issues, should not be sustained in the absence of a showing that the party complaining was ignorant of that fact: *Hurtert v. Weines*, 27–134.

In an action against a city for damages, a citizen and tax payer of the city is not a competent juror: *Davenport G. L. & C. Co. v. City of Davenport*, 13–229; *Direly v. City of Cedar Falls*, 21–565; *Cramer v. City of Burlington*, 42–315.

Where a juror was a partner of one of the parties, *held* that he was properly excused upon challenge for cause: *Stumm v. Hummell*, 39–478.

Challenge: how tried.
R. § 3042.
C. '51, § 2988.

SEC. 2773. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon; and other evidence may also be heard.

Same.
R. § 3043.
C. '51, § 2990.

SEC. 2774. In all challenges, the court shall determine the law and the fact, and must either allow or disallow the challenge.

See notes to § 2772.

Talesmen.
R. § 3044.
C. '51, § 1777.

SEC. 2775. When the requisite number of jurors cannot otherwise be obtained, the sheriff shall select talesmen to supply the deficiency from the body of the county.

The fact that a jury is filled up by talesmen is no ground of objection, unless abuse of discretion on the part of the court is shown: *Emerick v. Sloan*, 18–139.

Persons who keep the seventh day of the week as Sunday protected.
R. § 4112.
C. '51, § 2504.

SEC. 2776. A person whose religious faith and practice are to keep the seventh day of the week as a day set apart by divine command, and dedicated to rest and religious uses, cannot be compelled to attend as a juror on that day, and shall, in other respects, be protected in the enjoyment of his opinions to the same extent as those who keep the first day of the week.

Exemption not cause of challenge.
R. § 3041.
C. '51, § 2987.

SEC. 2777. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

The section applied; *The State v. Adams*, 20–486.

As to what persons are exempted, see § 228.

Sec. 4406 is identical with this section.

Majority verdict: struck jury.
R. § 3045.
C. '51, § 1776.

SEC. 2778. The parties may at any time, either before the jury is sworn, or after, agree to take the verdict of the majority, which agreement being stated to the court and stated on the record to have been made, shall bind the parties, and, in such case, a verdict signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall, in every particular,

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be as binding as if made by a full jury; or, when both parties require it, a struck jury may be ordered, whereupon eighteen jurors shall be called into the box, and the plaintiff first, and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the cause.

ORDER OF TRIAL.

SEC. 2779. When the jury has been sworn, the court shall proceed in the following order: Procedure after jury is sworn. R. § 3046.

1. The party on whom rests the burden of proof, may briefly state his claim and the evidence by which he expects to sustain it;

2. The other party may then briefly state his defense, and the evidence by which he expects to sustain it;

3. The party on whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party must then produce his evidence;

4. The parties then will be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence in their original case;

5. But one counsel on each side shall examine the same witness, and upon interlocutory questions, the party moving the court or objecting to testimony shall be heard first; the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to respondent's argument. Debate on the questions shall then be closed, unless the court request further argument.

When the jury have been sworn, as usual, to try the issues between the parties, the subsequent allowance of an amendment presenting a new issue will not, it seems, make it necessary to re-swear the jury: *Arnold v. Arnold*, 20–273.

The question as to who has the burden of proof is properly a matter of practice, and the ruling of the court thereon will not be reviewed unless there is evidence of an abuse of discretion: *Viele v. Germania Ins. Co.*, 26–9.

The true test, to determine upon whom is the burden of proof, is to consider which party would be entitled to the verdict if no evidence were offered on either side. The burden is upon the party against whom, in such case, the verdict ought to be: *Ibid; Vieths v. Hagge*, 8–163, 192.

Further, as to burden of proof, see notes to the next section.

The number of witnesses on a particular point may be limited by the court in the exercise of its discretion: *Kesee v. C. & N. W. R. Co.*, 30–78; *Bays v. Herring*, 51–286.

The order of the introduction of testimony is a matter resting in the discretion of the trial court: *Boals v. Shields*, 35–231; *Cannon v. Iowa City*, 34–203.

A decision of the court in such matter will not be overruled on appeal, unless manifest abuse of such discretion is shown: *Samuels v. Griffith*, 13–103; *Donaldson v. M. & M. R. Co.*, 18–280.

Evidence may be received out of its regular order for other reasons than "to correct an evident oversight or mistake," as provided in § 2799: *Huey v. Huey*, 26–525; and the action of the court in permitting plaintiff to introduce evidence not strictly rebutting, after the close of defendant's evidence, will not be disturbed when no abuse of discretion is shown: *Crane v. Ellis*, 31–510. So *held* where plaintiff had omitted to prove title necessary to make out his case, and was allowed to introduce proof thereof after the evidence had been closed: *McNichols v. Wilson*, 42–385.

SEC. 2780. The parties may then either submit or argue the case to the jury. In the argument the party having the burden of the issue, shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the Argument: order of. R. § 3047.

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close he should refer to any new material, point, or fact not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case.

While the right of review of the decision of the court as to who has the affirmative is not absolutely denied, there must be a clear case of prejudice arising from error in the decision of the court upon that point to justify a reversal on such ground: *Fountain v. West*, 23–9; *Preston v. Walker*, 26–205; *Woodward v. Laverty*, 14–381; *Smith v. Coopers*, 9–376; *Ashworth v. Grubbs*, 77–353; and cases cited.

Where a defendant admits the allegations of plaintiff's petition he is entitled to open and close the argument: *Hallowell v. Fawcett*, 30–491; and where, upon the material issues in a case, the burden was upon defendant, *held*, not error to give him the opening and closing, although the allegation of the petition were not, in terms, admitted by the answer: *Delaware Co. Bank v. Duncombe*, 48–488.

As to the right of adverse counsel to reply to any reference made by counsel in closing to new matter, see *Cross v. Garrett*, 35–480.

Waiver of opening. R. § 3048.

SEC. 2781. If the party holding the affirmative waive the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument.

Number of attorneys allowed: court to arrange order. R. § 3049.

SEC. 2782. Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant, he may appear by two, and where there are several defendants having the same or separate defenses and appearing by the same or different attorneys, the court shall, before argument, arrange their order.

Argument restricted. R. § 3050.

SEC. 2783. The court may restrict the time of any attorney in any argument to itself, but shall not do so in any case before a jury.

INSTRUCTIONS.

To be in writing. R. § 3051.

SEC. 2784. When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court shall be in writing.

See notes to § 2789.

Modification of: how made. R. § 3053.

SEC. 2785. If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded.

See notes to § 2789.

Only those given to be read: how given or refused. R. § 3054.

SEC. 2786. The court must read over all the instructions which it intends to give, and none other, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury all those which are refused, and must write the words "given" or "refused," as the case may be, on the margin of each instruction.

See notes to § 2789.

No reason stated. R. § 3055.

SEC. 2787. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

See notes to § 2789.

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Charge of the court. R. § § 3057, 3058, 3060.

SEC. 2788. After argument the court may, also, of its own motion, charge the jury. Such charge shall be written in consecutively numbered paragraphs; and no oral explanation thereof shall be allowed. The provisions of this section shall also apply to the instructions asked by the parties.

See notes to § 2789.

Exceptions to: how and when taken. R. § 3059.

SEC. 2789. Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instruction objected to and the ground of the objection.

INSTRUCTIONS TO BE GIVEN BUT ONCE: It is not error to refuse an instruction which has already been substantially given: *Raver v. Webster*, 3–502; *Rusch v. City of Davenport*, 6–443; *Mills v. Mabon*, 9–4^4; *Rindskoff v. Barrett*, 14–101; *Russ v. Steamboat War Eagle*, 14–363; *Harper v. Madren*, 21–407.

When the law of the case has once been stated to the jury, all further instructions should be refused: *Wilson S. M. Co. v. Bull*, 52–554.

INSTRUCTIONS NOT PERTINENT: An instruction which is not pertinent to the pleading or evidence should be refused, although containing correct propositions of law: *Cutter v. Fanning*, 2–589; *Gover v. Dill*, 3–337; *Conger v. Dean*, 3–463; *Wisner v. Brady*, 11–248.

But the court should give the instructions asked, if they are correct and there is any basis for them in the testimony: *The State v. Gibbons*, 10–117.

The giving or refusal of an instruction upon a mere abstract proposition of law, not referring in any way to the evidence, is not sufficient to warrant a reversal, unless it may be fairly inferred that the jury was thereby misled to the prejudice of the party complaining: *McGregor v. Armill*, 2–30; but in such case the fact that the jury was left without any guide as to the application of the propositions of law stated, may amount to error: *The State v. Thompson*, 45–414. It may also be error to give such instructions, where they have a tendency to make an erroneous impression upon the jury, and mislead them: *Moffett v. Cressler*, 8–122; *Van Tuyl v. Quinton*, 45–459; *Williamson v. Reddish*, 45–550.

INSTRUCTIONS TO BE UPON MATTERS OF LAW AND NOT UPON THE FACTS: The instructions must state rules of law only, leaving to the jury the decision of the facts and the application of the rules of law given them by the court: *Muldowney v. Ill. Cent. R.*, 32–176; and it is not proper for the court to comment upon the evidence, and tell the jury what facts are proven and what are not proven thereby: *Russ v. Steamboat War Eagle*, 9–374; nor should the judge assume that certain facts are not proven of which there is some evidence: *Napper v. Young*, 12–450; nor should he assume that to be true of which there is no proof: *Howes v. Carver*, 3–257.

It is error for the court to charge the jury as to the weight and sufficiency of the testimony before them: *Houston v. The State*, 4 Gr. 437; but it may charge them as to whether or not a paper or writing introduced in evidence is a contract: *Eyser v. Weissgerber*, 2–463. And it may instruct them as to who holds title to real estate from the deeds introduced, or when the question of title is one of law upon the testimony: *The State v. Delong*, 12–453.

The grouping together in one instruction of legitimate facts which the evidence tends to prove, and charging that such facts constitute circumstantial evidence, is not necessarily erroneous: *Pritchett v. Overman*, 3 Gr. 531; *The State v. Carnahan*, 17–256.

When there is some evidence upon the point, an instruction which is applicable to that point and correct in law should be given, without regard to the weight of such evidence: *DeCamp v. M. & M. R. Co.*, 12–348.

WHEN COURT MAY TAKE CASE FROM JURY: Where there is no evidence, or where essential or integral elements of a cause of action or defense are wholly without proof, the court may properly refuse to let the case go to the jury, or it may direct the jury as to the verdict to be re-

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turned: *Allen v. Pegram*, 16–163; *Powers v. City of Council Bluffs*, 45–652; *Murphy v. C. R. I. & P. R. R. Co.*, 45–661. This is true where there is no controversy as to the facts, and especially where the evidence thereof is documentary: *Thorp v. Craig*, 10–461; but when there is evidence tending in any degree to establish a cause of action or defense, it is error to take the case from the jury: *Crawford v. Burton*, 6–476; *Hall v. Ætna Mfg. Co.*, 30–215, or pronounce an opinion upon the sufficiency or weight of evidence, except where the proof is documentary: *Muldowney v. Ill. Cent. R. Co.*, 32–176, and see *Greanleaf v. Ill. Cent. R. Co.*, 29–14.

Where, on an issue of fact raised by petition and answer in denial, all evidence was ruled out, *held*, error to direct a verdict for plaintiff, as plaintiff was bound to prove the substance of his complaint, and whether he had done so was a question for the jury: *Oleson v. Hendrickson*, 12–222.

When there is nothing for the jury to do but determine the amount of a note, the court may direct their verdict: *Potter v. Wooster*, 10–534.

Where the court is asked by defendant to instruct the jury to find in his favor, the plaintiff is entitled to have everything regarded as established which the testimony tended to prove: *Stone v. C. & N. W. R. Co.*, 47–82, 84.

The direction by the court to the jury to find a verdict for either party is not such an instruction as need be in writing: *Ibid.*

It is the province of the court, and not that of the jury, to determine the nature of the action, or what issues are made by the pleadings: *McKinney v. Hartman*, 4–154; *Beebe v. Stutsman*, 5–271; *Fannon v. Robinson*, 10–272; *Reid v. Mason*, 14–541; *Pharo v. Johnson*, 15–560; *Hempstead v. City of Des Moines*, 52–303; and a failure of the court to fully state the issues made in the pleadings constitutes error: *Potter v. C. R. I. & P. R. R. Co.*, 46–399.

AS TO FORM OF INSTRUCTIONS: Instructions should be brief and perspicuous, and where they are confused or in conflict, to the probable prejudice of the complaining party, a new trial should be granted: *Eyser v. Weissgerber*, 2–463; *Hoben v. B. & M. R. R. Co.*, 20–562. But, *held*, that it was not a good excuse for refusal to give instructions asked, that they were unnecessarily lengthy and numerous, nor that they were not passed up in time to allow their examination by the court without keeping the jury waiting, where they were submitted during the opening and only argument in the case: *McCaleb v. Smith*, 22–242.

The whole charge as given should be consistent, and so framed as not only to state the law correctly, but in such manner as not to confuse the jury: *Hoben v. B. & M. R. R. Co.*, 20–562

MODIFICATIONS: Modifications of instructions asked should not be by interlineation or erasure: *Phillips v. Starr*, 26–349.

In giving instructions the court is not limited to the language adopted by the party requesting them, but may modify them to meet its views; but if, as so modified, they do not express the law, they are subject to objection: *The State v. Gibbons*, 10–117; *Abbott v. Striblen*, 6–191.

It is not error to refuse an instruction which could not be properly given without modification: *Grimes v. Martin*, 10–347; *Morrison v. Myers*, 11–538.

MUST BE IN WRITING: It is error to orally explain any instruction given, or to charge the jury verbally: *Head v. Langworthy*, 15–235.

Where the jury sent questions to the judge, in response to which he told them orally that their questions had nothing to do with the case, and that it was their duty to determine the case under the evidence and instructions given, *held* that such action was not erroneous, it not being an instruction to the jury, but a refusal to instruct: *Sullivan v. Collins*, 18–228.

CONSTRUCTION: The language of instructions should be given its usual and ordinary meaning, and a case should not be reversed because an instruction is susceptible of a forced and unusual construction, or which would make it erroneous: *The State v. Huxford*, 47–16.

Instructions must always be considered with reference to the circumstances of the case in which they are given: *The State v. Johnson*, 8–525.

Instructions should be considered and construed together, and in connection with the case made be the record: *Burrows v. Lehndorf*, 9–86, 104; *Brown v. Bridges*, 31–138; *The State v. Maloy*, 44–104; *Locke v. S. C. & P. R. Co.*, 46–109, 114; *The State v. Stanley*, 48–221; *Albertson v. K. & D. M. R. Co.*, 48–292; *The State v. Golden*, 49–48; and, although one of such instructions is too broad in its statements, if properly limited

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by a subsequent one, the charge will not be considered erroneous: *Ruble v. McDonald*, 18–493; nor is it ground for objection that one instruction omits to charge as to a specific point, if other portions of the charge cover that point: *Hamilton v. The State Bank*, 22–306, 311.

If a series of instructions states the law in such a manner as to enable a person of common understanding to know what is intended, that will be sufficient: *Smothers v. Hanks*, 34–286.

EXCEPTIONS TO INSTRUCTIONS: When the exceptions are made at the time the instructions are given, they may be general and without a reason being stated therefor: *Johnson v. C. R. I. & P. R. R. Co.*, 51–25.

If exceptions are not taken when the instructions are given, such exceptions must specify the ground of objection: *Hale v. Gibbs*, 43–380, 384; and the ground of objection that "they are not applicable" is not sufficiently specific where it is urged that the instructions are essentially erroneous: *Miller v. Gardner*, 49–234.

A party who urges specific objections in the court below, cannot abandon them and raise new ones for the first time in the supreme court: *Price v. B. C. R. & M. R. Co.*, 42–16.

It is not sufficient to assign the giving of instructions as error in motion for a new trial. The instructions should be excepted to: *Snyder v. Eldridge*, 31–129; *Same v. Nelson*, 31–238.

A general exception *en masse* to all the instructions is sufficient if no portion of the charge is correct: *Eddy v. Howard*, 23–175; but if any portion of it is correct, such exception will not be regarded: *Loomis v. Simpson*, 13–532; *Jack v. Naler*, 15–450; *Armstrong v. Pierson*, 15–476; *Cousins v Westcott*, 15–253; *Lyons v Thompson*, 16–62; *Shephard v. Brenton*, 20–41; *Spray v Scott*, 20–473; *Verholf v. Van Houweulenger*, 21–429; *Carpenter v. Parker*, 23–470; *Redman v. Malvin*, 23–296; *McCaleb v. Smith*, 24–591; *Mershon v. Natl. Ins. Co.*, 34–87; *Moore v. Gilbert*, 46–508; *Ruter v. Foy*, 46–152; *Pitman v. Molsberry*, 49–339; so *held*, where the exception was in the words "to the giving of each of which instructions the defendant excepted" (overruling *Eyser v. Weissgerber*, 2–463); *Davenport G. L. & C. Co. v. City of Davenport*, 13–229.

An exception to all the instructions between certain numbers "and to each of them" is sufficiently specific when taken at the time the instructions are given: *Mann v. S. C. & P. R. Co.*, 46–637.

An exception to instructions, which specifies them by number, is sufficiently definite as to the part objected to: *Miller v. Gardner*, 49–234.

If the ruling of the court upon an instruction, with the proper exception thereto, is noted on the margin thereof, it is sufficient and a formal bill of exceptions is not necessary, though the better practice: *Cadwallader v. Blair*, 18–420; *Phillips v. Starr*, 26–349

Where exceptions are not properly taken, instructions will not be reviewed on appeal: *Morse v. Close*, 11–93.

WHAT EVIDENCE MUST BE SET OUT IN THE RECORD: So much of the evidence should be set out in the record as relates to the exceptions, that their applicability may appear, but it is not absolutely essential that all the evidence should be set out. Instructions which are erroneous and misleading in any possible view, will be reviewed, although the record does not present all the evidence: *Sterenson v. Greenlee*, 15–96.

Where instructions are founded on evidence they will not be reviewed unless all the evidence is before the court: *Reid v. Mason*, 14–541.

The refusal of instructions which might have been proper under a certain state of the proof, will nevertheless not be held erroneous on appeal when the evidence is not all before the court: *Shephard v. Brenton*, 20–41.

ERROR WITHOUT PREJUDICE IN GIVING INSTRUCTIONS: A case will not be reversed for the giving of an erroneous instruction which could not have worked any prejudice to the complaining party: *Eyser v. Weissgerber*, 2–463, 478; *McKay v. Leonard*, 17–569; *Claggett v. Conlee*, 16–487; *Ocheltree v. Carl*, 23–394; *Hunt v. C. & N. W. R. Co.*, 26–363.

DUTY TO INSTRUCT: Where no instructions were presented by either party, and the case was one in which there was a special necessity for a clear presentation of the law to the jury, *held*, that the failure of the judge on his own motion to instruct the jury was error: *Owen v. Owen*, 22–270.

If the instructions asked by counsel are defective and insufficient, and the case is complicated, or, the law applicable to it not supposed to be within the knowledge of jurymen, and, particularly, if the charge is of a high criminal offense, it is the duty of the court to point out to the jury contro-

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verted questions of fact, and state the law applicable to them, and a failure to do so will be error: *The State v. Brainard*, 25–572.

AS TO WHAT QUESTIONS MAY BE RAISED BY INSTRUCTIONS: Where evidence has been admitted without objection, it cannot be excluded from the consideration of the jury by an instruction: *The State v. Pratt*, 20–267; *Becker v. Becker*, 45–239; *Collins v. Collins*, 46–60.

It is error to raise the question as to the sufficiency of a pleading in an instruction: *Nolen v. Wisner*, 9–190; *McIntyre v. McIntyre*, 48–511.

The court cannot be required to instruct the jury upon the facts which are proper for their consideration: *Kline v. K. C. St. J. & C. B. R. Co.*, 50–656.

INSTRUCTIONS PART OF RECORD: Before the enactment of the provision that the instructions shall become a part of the record, it was held that they were not so by law, and unless embodied in the record by order of the court, would not be considered on appeal: *Pierce v. Locke*, 11–454.

RULES REGARDING JURIES.

View by jury. R. § 3061. C. '51, § 1779.

SEC. 2790. Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

The purpose of viewing the premises, as here provided, is to enable the jury to better understand the testimony of witnesses, respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. Therefore, *held*, that it was error to instruct them to "determine from all the evidence in the case, and all the facts and circumstances disclosed on the trial *including your personal examination*, whether," etc.: *Close v. Samm*, 27–593.

For similar provision in criminal cases, see § 4432.

Kept together in charge of officer. R. § 3062. C. '51, § 1781.

SEC. 2791. When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they shall be kept together, under charge of an officer, until they agree upon a verdict, or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

As to the separation of the jury where a sealed verdict is returned, see § 2805 and notes.

Court to advise jury when separating. R. § 3063. C. '51, § 1780.

SEC. 2792. If the jury are permitted to separate during the trial, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person on any subject of the trial, and that during the trial it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them.

Juror sick: when discharged. R. § 3064. C. '51, § 1782.

SEC. 2793. If, after the empanelling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, he may be discharged. In such case the trial shall proceed with the remaining jurors, provided the number has not been

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reduced below ten, or the court may, in its discretion, order the jury to be discharged.

Discharge: when. R. § 3665.

SEC. 2794. The jury may be discharged by the court on account of any accident or calamity requiring their discharge, or by the consent of both parties, or, when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

Cause re-tried: when. R. § 3666.

SEC. 2795. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct.

Adjournment: after trial began. R. § 3067.

SEC. 2796. The court may also, at any time after having entered upon the trial of any cause, where it may deem it right for the purposes of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just.

What jury may take with them. R. § 3068. C. '51, § 1783.

SEC. 2797. Upon retiring for deliberation, the jury may take with them all books of accounts, and all papers which have been received as evidence in the cause, except depositions, which shall not be so taken, unless all the testimony is in writing, and none of the same has been ordered to be struck out.

The jury may take with them the instructions of the court: *Head v. Langworthy*, 15–235; also papers admitted in evidence: *Peterson v. Haugen*, 34–395.

A party cannot be heard to complain that the jury took a deposition with them to their room, unless he objected at the proper time, and under the circumstances of a particular case, *held*, that he could not have been prejudiced: *Shields v. Guffey*, 9–322. So, where they took with them a deposition attached to the pleadings, with the presumed consent of the appellant, and no prejudice was shown, *held*, that there was not sufficient error to warrant a reversal: *The State v. Delong*, 12–453.

But where a deposition which was material to the issue, but which had not been offered in evidence, was taken by the jury to their room without the knowledge or consent of the party, *held*, that it was error in the court below to refuse a new trial: *Coffin v. Gephart*, 18–256. So *held*, also, where the jury took with them and considered a deposition not in evidence, and favorable to the successful party: *Stewart v. B. & M. R. R. Co.*, 11–62; but such misconduct would not vitiate the verdict if the deposition was favorable to the party complaining, or could not have prejudiced him: *Ibid; Abel v. Kennedy*, 3 Gr. 47.

Court always open until verdict. R. § 3069. C. '51, § 1784.

SEC. 2798. When the jury is absent, the court may adjourn from time to time in respect to other business, but it is to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

Further testimony to correct mistake. R. § 3070. C. '51, § 1778.

SEC. 2799. At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege.

The provision here made is not limited in its application to the period of examining witnesses, and where, after a case had been partially argued to the jury, plaintiff was allowed to introduce testimony as to a certain point claimed to have been omitted by oversight, *held*, that the discretion of the court in such matters was not abused: *McManus v. Finan*, 4–283. So *held*, also, where a party was allowed to introduce evidence after the conclusion of the argument of one of the counsel for the opposite party, for the purpose of correcting an evident oversight or mistake: *McCormick v. Holbrook*, 22–487.

The provisions of this section do

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not operate to deny the power of the court to receive evidence out of its regular order in other cases where there is no surprise and justice is promoted: *Huey v. Huey*, 26–525; and see notes to § 2779.

This section applies alone to civil cases, but in a criminal case, under some circumstances and for some purposes, after the evidence is closed, a witness may be recalled, and in the absence of a showing to the contrary, it will be presumed that he was properly recalled: *The State v. Shean*, 32–88.

Information given after retirement of. R. § 3071.

SEC. 2800. After the jury has retired for deliberation, if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the information required shall be given in the presence of, or after notice to, the parties or their counsel.

Additional instructions should always be given in open court. It is error to send them to the jury in their room: *O'Connor v. Guthrie*, 11–80; nor should additional instructions be given without notice to counsel: *Davis v. Fish*, 1 Gr. 406.

How given. R. § 3072.

SEC. 2801. Such information shall be in writing, and shall be held approved unless it be excepted to in the same way as the charge, and no discussion thereon shall be allowed to either party.

Food and lodging. R. § 3076.

SEC. 2802. If, while the jury are kept together, either during progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable food and lodging, they must be provided by the sheriff, at the expense of the county.

VERDICT.

How signed and rendered. R. § 3073 C. '51, § 1789.

SEC. 2803. The verdict must be written and signed by a foreman chosen by the jury itself, and when agreed, the jury must be conducted into court, their names called, and the verdict rendered by him and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.

The verdict of the jury may be put in form by the court, if it can by definitely ascertaining from the data given by them, for whom and in what amount they intended to render a verdict: *Stevens v. Campbell*, 6–538; *Cassell v. Western Stage Co.*, 12–47; *Armstrong v. Pierson*, 15–476.

Where a verdict, taken in connection with the charge of the court as to form, etc., thereof, leaves no doubt as to what the court and jury mutually understood and intended, it is sufficient: *The State v. Funck*, 17–365.

Where the verdict in an action on a note was for "the amount of the note and interest," and the only question at issue was as to the right to recover at all, *held*, that the court might order the clerk to compute the amount and enter judgment accordingly: *McGregor v. Armill*, 2–30.

When, however, the amount cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount: *Fromme v. Jones*, 13–474; *Moore v. Derol*, 14–112

Under the facts of a particular case a verdict was held too uncertain to warrant judgment thereon: *Richardson v. McCormick*, 47–80.

The provision as to the signing of the verdict is directory merely, and if it is in fact returned by the jury, a failure to sign it will not be a fatal defect: *Morrison v. Overton*, 20–465.

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Polled: how done. R. § 3074.

SEC. 2804. When the verdict is announced, either party may require the jury to be polled, which shall be done by the court, or clerk, asking each juror if it is his verdict. If any one answer in the negative, the jury must be sent out for further deliberation.

Sealed verdict: effect of R. § 3075. C. '51, § 1785.

SEC. 2805. When, by consent of the parties and the court, the jury have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, nor shall such jury be polled or permitted to disagree thereto, unless such a course has been agreed upon between the parties in open court and entered on the record.

In case of a sealed verdict, the jury should not be polled, but if they are, the dissent of a juror to the verdict will not affect its validity: *Bingham v. Foster*, 37–339.

Where a jury sealed up their verdict and left it with the bailiff to be handed to the clerk, and then separated without the parties having consented to a verdict being rendered in that manner, *held*, that the separation did not necessarily render the verdict void: *Cook v. Walters*, 4–72; *Heiser v. VanDyke*, 27–359.

Where a sealed verdict was rendered and the jury separated, *held*, not improper to re-commit the verdict to the same jury to be amended to cure a defect in form: *Tifield v. Adams*, 3–487; nor to allow the jury to reconsider the verdict sealed and delivered, for the purpose of correcting an error which had occurred through inadvertence: *Hamilton v. Barton*, 20–505.

As to what is "open court," see *Hobart v. Hobart*, 45–501.

May be general or special. R. § 3077.

SEC. 2806. The verdict of a jury is either general or special. A general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all, or upon any of the issues.

Special defined. R. § 3078.

SEC. 2807. A special verdict is one in which the jury finds facts only. It must present the ultimate facts as established by the evidence, and not the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law.

[The words "and not the evidence," in the third line, as they stand in the original, are omitted in the printed code.]

In an action involving an issue as to the execution of an instrument, it being claimed by defendant that only a part of it had been read over to him, *held*, that a finding by the jury that defendant *signed* the instrument, was not the finding of an ultimate fact, but only an item of evidence to prove such fact: *Hardin v. Branner*, 25–364.

Interrogatories: how and when submitted. R. § 3079. C. '51, § § 1786–7.

SEC. 2808. In all actions, the jury, in their discretion, may render a general or special verdict; and in any case in which they render a general verdict, they may be required by the court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact to be stated to them in writing, which questions of fact shall be submitted to the attorneys of the adverse party before the argument to the jury is commenced.

The questions of fact presented to the jury for special findings must be founded upon the material facts in the pleadings in such form as to elicit conclusions of fact as established by the testimony, and not what the evidence was, nor conclusions of law: *Hatfield v. Lockwood*, 18–296; and it is not error to refuse to instruct the jury to make a special finding upon a fact which is immaterial: *Bonham v. Iowa Cent. Ins. Co.*, 25–328.

The questions so submitted should be such that they can be answered by yes or no, or in some brief and pertinent way: *Marshall v. Blackshire*, 44–475; and it is not error to refuse to submit to the jury particular questions not ultimate in their nature, or which could not well be considered or

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answered without danger of confusion and misapprehension: *Phœnix v. Lamb*, 29–352. The jury should not be required to find specially on a question, an answer to which would involve not the statement of a single fact, but a conclusion drawn from many facts: *Home Ins. Co. v. N. W. Packet*, 32–223, 246.

Where a party presented his interrogatories just before the final argument to the jury was commenced, *held*, not error to refuse them as not being presented in time: *Hopper v. Moore*, 42–563.

Where the jury, in answer to certain questions of fact which were necessary to support a general verdict, answered that they did not know, *held*, that the general verdict should be set aside and a new trial granted: *Darling v. West*, 51–259.

The provisions of this section apply only to trials in civil actions: *The State v. Ridley*, 48–370.

Judgment on special verdict, see § 2838.

Special verdict in criminal cases, see § 4463.

Special controls general. R. § 3380.

SEC. 2809. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

To entitle to a judgment upon a special verdict, against a general verdict in favor of the other party, the special findings must be inconsistent with the general verdict and sufficient of themselves when taken together with the facts admitted by the pleadings, to establish or defeat (as the case may be) the right to recover: *Hardin v. Branner*, 25–364.

It is only when the general and special verdicts are so inconsistent that both cannot stand, that the latter will be allowed to defeat the former; and where there is evidence to sustain the general verdict, it will stand, although the special verdict do not seem to sustain it: *Phœnix v. Lamb*, 29–352.

See also § 2858 and notes.

Money: amount assessed. R. § 3381. C. '51, § 1788.

SEC. 2810. When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of such recovery.

Joint or several verdicts. R. § 3383.

SEC. 2811. Where there are several plaintiffs or defendants, whether the pleadings are joint or several, the verdicts shall be moulded according to the facts and to suit the exigencies of the case.

Form of. R. § 3384. C. '51, § 1790.

SEC. 2812. The verdict shall be sufficient in form if it expresses the intention of the jury.

As to sufficiency in form, see notes to § 2803.

Entered of record. R. § 3385. C. '51, § 1789.

SEC. 2813. The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary.

Waiver of trial by jury. R. § 3387.

SEC. 2814. Trial by jury may be waived by the several parties to an issue of fact in the following cases:

1. By suffering default or by failing to appear at the trial;
2. By written consent, in person or by attorney, filed with the clerk;
3. By oral consent in open court, entered in the minutes.

REFERENCE.

Consent of parties required. R. § 3389. C. '51, §§ 1659, 1794.

SEC. 2815. All or any of the issues in an action, whether of fact or of law, or both, may be referred upon the consent of the parties, either written or oral, in court entered upon the record.

There cannot be a reference in an action for divorce, even by consent of parties: *Hobart v. Hobart*, 45–501.

Where the parties have agreed to a reference, neither can afterward demand a trial by jury: *Hewitt v. Eybert*, 34–185.

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When done without consent. R. § 3090.

SEC. 2816. When the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a reference in either of the following cases:

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when, the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the referee may be directed to hear and and report upon the whole issue, or upon any specific question of fact involved therein; or,

2. When the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or,

3. When a question of fact shall arise in any action by equitable proceedings, in which case the court, in the order of reference, shall prescribe the manner in which the testimony shall be taken on the trial.

PAR. 1: The cases intended to be included in this enumeration are only those which were formerly cognizable in equity, and it is only in such cases that a reference can be made without the consent of the parties. Otherwise, the right of trial by jury would be infringed: *McMartin v. Bingham*, 27–234.

But where accounts were to be examined and a series of calculations made, *held*, that the remedy by means of a reference would be more complete and adequate, and that, therefore, equity would have jurisdiction and a compulsory reference might be ordered: *The Blair Town Lot, etc., Co. v. Walker*, 50–376.

PAR. 3: A mortgage foreclosure, although triable under Rev. § § 2999 and 3000 as an action at law, *held*, to be, nevertheless, of equity cognizance, and that it might, as such, be referred without consent of parties: *The State v. Orwig*, 25–280.

Majority may decide. R. § 3091. C. '51, § 1652.

SEC. 2817. Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision by the majority shall be regarded as their decision.

Vacancies. R. § 3092. C. '51, § 1653.

SEC. 2818. When appointed by the court, the judge thereof may fill vacancies in vacation.

Stand in place of court. R. § 3093. C. '51, § 1759.

SEC. 2819. The referee shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge his duty.

Although the report of a referee is like the verdict of a jury or a finding by the court, yet under the language of § 2844 ¶ 1, a party may dismiss his action after a submission to the referee although he could not after a like submission to the court or a jury: *Belzor v. Logan*, 32–322.

The referee is not the court: *Hobart v. Hobart*, 45–501, 505.

Trial by: power of. R. § 3094.

SEC. 2820. The trial by referee shall be conducted in the same manner as a trial by the court. He shall have the same power to summon and enforce by attachment, the attendance of witnesses, to punish them as for a contempt for non-attendance or refusal to be sworn or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, allow amendments to pleadings, grant continuances, preserve order, and punish all violations thereof.

Report: judgment. R. § 3095.

SEC. 2821. The report of the referee on the whole issue, must state the facts found and the conclusions of law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been

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tried by the court; the report may be excepted to and reviewed in like manner.

After a referee's report has been filed, a party should not be allowed to raise a new issue by amended pleadings and have a re-submission without proper excuse for the delay being shown: *Newell v. Mahaska Co. Savings Bank*, 51–178.

The court may refer the case back to the referee to have the findings of fact made more specific, but the additional findings should be confined to matters specified in the order recommitting the case: *Sage v. Nichols*, 51–44.

The report of the referee is to be regarded as the verdict of a jury, and a judgment thereon should not be reversed unless there is such an absence of evidence in its support as to authorize the conclusion that it was not the result of the exercise of honest, intelligent, and unprejudiced judgment: *Taylor v. French Lumbering Co.*, 47–662; *Moore v. Brown*, 49–130; and see *Childs v. Shower*, 18–261; *Johnson v. Johnson*, 19–74; *Whichler v. Steamboat Ewing*, 21–240; nor can it be reviewed by the supreme court unless all the evidence is contained in the record: *Haywood v. Woods*, 28–563; and a certificate of the referee that the record contains the *substance* of all the material evidence, will not warrant such review: *Sears v. Selew*, 28–501; but, under Rev. § 3096, an exception to this rule was made in case of a reference in equitable actions, triable by the first method, and in such a case it was held that the court must try the case upon the evidence, and not upon the findings of facts by the referee: *Wilgus v. Gettings*, 21–177.

As to the duty of the referee in certifying up the evidence, etc., and the proper method of curing an omission in that respect: *Smith v. Harlan*, 49–101.

The court appointing a referee is not authorized to review the evidence taken before him, or his rulings, unless such evidence and rulings are preserved by bill of exceptions: *Inman v. Jamison*, 18–22. And if the finding is claimed to be against the evidence, all the evidence should be preserved and certified by the court: *Oliver v. Townsend*, 16–430.

But a party may have a review by the court of the findings of law and fact made by the referee, irrespective of whether any exceptions thereto were taken before him. The power of the court in acting on the report of a referee is not merely appellate: *Edwards v. Cottrell*, 43–194.

Exceptions before the referee need only be taken to make that of record which would not otherwise appear. Error in his conclusion of law may be taken advantage of by motion to set aside the report, or by exceptions filed upon the coming in of the report: *Washington Co. v. Jones*, 45–260.

The exceptions to the referee's report contemplated in this section, are those filed in the court to which the report is made, and not the exceptions taken before the referee under § 2823: *Michael v. Longman*, 42–484. And where no such exceptions were taken, either to the report or to the judgment thereon, a review cannot be had in the supreme court, even though the report was filed or the judgment rendered in vacation: *Roberts v. Cass*, 27–225.

Finding of facts. R. § 3096.

SEC. 2822. When the reference is to report the facts, the report shall have the effect of a special verdict.

See notes to preceding section.

To sign bill of exceptions. R. § 3097.

SEC. 2823. The referee shall sign any true bill of exceptions taken to any ruling by him made in the case whereto any party demands a bill of exceptions; and the party shall have the same rights to obtain such bill as exist in the court, and such bill shall be returned with the report.

As affecting this section, see notes I to § 2821.

Parties may agree on. R. § 3098. C. '51, §§ 1651, 1795.

SEC. 2824. In all cases of reference, the parties, except when a minor may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be

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persons free from exception, or the court may allow each party to select one, and itself to select a third.

Appointed in vacation: how. R. § 3099.

SEC. 2825. A judge of the court, when a case is pending, may, in vacation, upon the written consent of the parties, make an order of reference. In such case the order of reference shall be written in the written agreement to refer, and shall be filed with the clerk of the court with the other papers in the case.

Must be sworn. R. § 3100.

SEC. 2826. The referee must make affidavit well and faithfully to hear and examine the case, and make a just and true report therein according to the best of his understanding. The affidavit shall be returned with the report.

If the affidavit here required is shown to have been made, but lost, its absence will not warrant the setting aside of a referee's report: *Sears v. Sellew*, 28–501.

A failure to return the affidavit with the report is not a fatal objection to the report. The fact that the referee was duly sworn may be otherwise shown: *Shindler v. Luke*, 43–89.

Issues must be made up; court to make order as to procedure. R. § 3102

SEC. 2827. The order shall not be made until the case is at issue as to the parties whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing, and when he shall make his report; but in the absence of such direction, he shall do so on the morning of the tenth day after the day on which was made the order of reference, and shall file his report as soon as done; of the time thus fixed or determined the parties shall take notice, and non-attendance of either party within an hour of such time shall be attended with like consequences as if the case were in court, which consequences shall be reported as any other fact or finding of the referee.

Must accept; record made of. R. § 3103.

SEC. 2828. The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may, on the motion of either party, make proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on his motion, on good cause shown, enlarge the time for making his report.

Issue process: administer oath. R. § 3104. C. '51, § 1054.

SEC. 2829. Any one of such referees may issue and sign subpœnas and other process, and administer oaths necessary for the discharge of their duties and the full exercise of all their powers.

Mode of procedure in court obtains. R. § 3105.

SEC. 2830. The form of procedure which in the court itself regulates service, pleading, proof, trial, and the preparation, progression, and method of each of these, shall obtain before the referee; and in every incident of the proceeding before him, the rights and responsibilities of parties, and of their attorneys, and of the referee, shall be the same as if the referee was the court engaged in the same matter.

Section applied: *Keokuk Co. v. Howard*, 43–354.

EXCEPTIONS.

What and when taken. R. § 3106. C. '51, § 1805.

SEC. 2831. An exception is an objection taken to a decision of the court or party acting as the court on matter of law. The party objecting to the decision must do so at the time the same is made

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(but if decision is on motion, demurrer or judgment, exception may be taken within three days) and embody his objection in a bill of exceptions to be filed during the term or within such time thereafter as the court may fix. But in no event shall the time extend more than thirty days beyond the expiration of the term, except by consent of parties, or by order of the judge. But in an equitable action, tried as such, no bill of exceptions shall be required.

[A substitute for the original section; 18th G. A., ch. 209.]

[The following decisions were all made before the repeal of the original section, which was as follows: "An exception, is an objection taken to a decision of the court, or party acting as the court, on matter of law. The party objecting to the decision, must object at the time the decision is made, and at once present his bill of exceptions; unless the court or adverse party object he may have time to do so, not extending beyond the term. But in an equitable action, tried on written testimony, no exception shall be required."]

An exception must be taken at the time the ruling complained of is made. The only exception to this rule is that authorized by § 2789: *Joliet Iron and Steel Co. v. C. C. & W. R. Co.*, 50–455.

Unless it affirmatively appears that exception was properly taken to a decision of the court, assigned as error, it will not be reviewed on appeal: *Beason v. Jonason*, 14–399; *Appanoose Co. v. Walker*, 23–26. And this rule is not affected by the provision of § 3169, dispensing with the necessity of a motion for a new trial, in order to secure a review: *Eason v. Gester* 31–475. And the rule is applicable also where the ruling is upon a demurrer to an equitable answer. Whether an exception is necessary to a final decree in a suit in equity, *quære*; but it would seem the better practice. (So held under Rev. which did not contain the last sentence of this section): *Phipps v. Penn*, 23–30.

In the absence of an express agreement or consent, the judge has no power to sign a bill of exceptions after the final adjournment of the term: *Claggett v. Gray*, 1–19; *The State v. Orwig*, 34–112; and a bill so signed will be stricken out on motion in the supreme court: *Lynch v. Kenedy*, 42–220; *Gibbs v. Buckingham*, 48–96.

A bill of exceptions made by agreement of parties, may be settled and signed after the conclusion of the term: *Harrison v. Charlton*, 42–573.

In such case it must be filed within the time so given, and will not be considered if filed afterwards: *Lynch v. Kennedy*, 42–220; *Lloyd v. Beadle*, 43–659; *St. John v. Wallace*, 25–21; *Frost v. Senior*, 44–706; *Parmenter v. Elliott*, 45–317.

Exceptions cannot be taken after the term, except on leave granted: *The State v. Orwig*, 34–112.

It is not error to refuse to stop a trial for the purpose of allowing a party to prepare a bill of exceptions, when time is granted within which to prepare the same: *Anson v. Dwight*, 18–241.

An exception properly taken but afterwards expressly waived upon appeal, cannot be taken advantage of by the opposite party: *Fortney v. Jacoby*, 51–95.

A judge may, on his own motion, and without the request of either party, make and file a bill of exceptions, but the party should have notice of it. Such notice, however, will be presumed in the absence of a contrary showing: *Shepherd v. Brenton*, 15–84.

As to the proper method of taking exceptions to instructions, etc., see § 2789 and notes.

No stated form of. R. § 3107.

SEC. 2832. No stated form of exception is required. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be also stated, and no other shall be regarded.

A certificate of the judge showing the several rulings made during the trial as to the admission or exclusion of evidence, and that the same were duly excepted to, is sufficient as a bill of exceptions: *The State v. Fay*, 43–651; *Hay v. Frazier*, 49–454.

Where the party appealing has made a general objection to the admission of evidence, the ground of which does not appear of record, and it is *overruled*, such rul-

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ing cannot be reviewed upon appeal, for the reason that, in presenting such objection, he might have relied upon an insufficient ground and should not be allowed, upon appeal, to rely upon another and sufficient ground. But where the successful party makes a general objection which is *sustained*, if the appellant can show that there could be no legal or possible ground upon which such ruling can be sustained, he will be entitled to a reversal: *Clark v Connor*, 28–311; *Engleken v. Webber*, 47–558.

A general objection to the introduction of evidence, specifying no ground upon which it is raised, cannot be taken advantage of on appeal: *Gelpecke v. Lorell*, 18–17; *Carleton v. Byington*, 18–482; *Davidson v. Smith*, 20–466; *O'Hagan v. Clinesmith*, 24–249; *Chase v. Walters*, 28–460; *Keough v. Scott Co.*, 28–337; *Williams v. Meeker*, 29–292; *Snyder v. Nelson*, 31–248.

A party having objected on one ground to the introduction of evidence in the court below cannot rely upon a different ground in assigning error in the supreme court: *Iowa Homestead Co. v. Duncombe*, 51–525.

An exception on the ground of incompetency is sufficiently specific: *Greenleaf v. D. & S. C. R. Co.*, 30–301.

Where the objection is to the improper admission of testimony, the record should show the answer given, as well as the question objected to: *The State v. Keeler*, 28–551.

A witness' testimony, as embodied in a bill of exceptions, cannot be introduced on a subsequent trial to impeach him: *Boyd v. First Nat'l Bank, etc.*, 25–255.

SEC. 2833. When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts. Noted at end of decision. R. § 3108.

No objection to a judgment not excepted to in the court below can be considered upon appeal: *Redding v. Page*, 52–406; *Soup v. Smith*, 26–472.

An oral exception entered of record as here contemplated is sufficient, and none other need be taken: *Cramer v. White*, 29–336.

SEC. 2834. An exception, when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same by any unmistakable reference thereto; and the clerk, in making a transcript of the bill of exceptions, shall write therein at length all of such writing included therein by reference. Bill of: what to contain. R. § 3109.

To make writings, etc., a part of the record, they should be incorporated into the bill of exceptions or plainly identified thereby. They cannot be made a part of the record by the mere certificate of the clerk: *Garber v. Morrison*, 5–476; *Harmon v. Chandler*, 3–150; *Reed v. Hubbard*, 1 Gr. 153; *Jordan v. Quick*, 11–9; *The State v. Jones*, 11–11.

Such "writings" should be copied at length in their proper place in the transcript: *Moffit v. Rogers*, 15–453. Although, if attached and clearly identified, it might be sufficient, yet the safer and better plan is to follow the course laid out: *Lyons v. Thompson*, 16–62. And if the evidence, or other papers attached to the bill, are not sufficiently identified therein, they will be disregarded: *Van Orman v. Spafford*, 16–186.

A bill of exceptions is not sufficient to support a reversal for refusal to grant a new trial on insufficiency of evidence, unless it contains all the evidence (see note to § 2837, Par. 6): *Davis v. Card*, 33–592.

Held, that a bill of exceptions, which did not contain the evidence but directed the clerk to "insert all the evidence, rulings, objections and exceptions," did not sufficiently identify it, and such evidence was, therefore, upon motion, stricken from the files: *Hill v. Holloway*, 52–678.

SEC. 2835. When the decision is not entered on the record, or when the grounds of objection do not sufficiently appear in the record, the party excepting must reduce his exception to writing Judge to sign: on refusal other persons may. R. § 3110. C. 51, §§ 1806–7.

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and present it to the judge for his signature. If he deems it true he shall sign it. If the judge refuses to sign it, the party may procure the signature of two bystanders, attesting that the exception is true and that the judge has refused to sign the same, and the bill of exceptions shall then be filed with the clerk and shall become a part of the record. But the truth of such exception may be controverted and maintained by affidavits, not exceeding five on each side, which shall become part of the record. All affidavits impugning the exception must be filed within three days from the time of filing the bill of exceptions, and all affidavits sustaining the same within two days thereafter.

The only remedy, when the court refuses to sign a bill of exceptions, or signs an incorrect one, is by the signature of by-standers to a correct bill. A bill cannot be impugned by affidavits: *Woodworth v Byerly*, 43–106.

Where a bill of exceptions is signed by by-standers, it should be drawn up and signed at the time of the trial: *Clark v. Parvin*, Mor. 371; where time beyond the term has been given for filing the bill, that method does not obtain (per Wright, J.): *St. John v. Wallace*, 25–21.

The attorneys of a party are not proper persons, as by-standers, to sign a bill of exceptions of such party: *Ibid.; Simon v. Weigel*, 10–505.

It is not necessary that the judge certify to his refusal to sign the bill of exceptions. That fact may be proved by the evidence of the by-standers, as here provided: *Craig v. Andrews*, 7–17.

As to signing bills of exception by referee, see § 2823.

Must be on material point. R. § 3111.

SEC. 2836. No exception shall be regarded in the supreme court unless the ruling has been on a material point and the effect thereof prejudicial to the rights of the party excepting.

The supreme court will not reverse a cause for error committed below, unless it is affirmatively shown by the record that such error was actually prejudical to appellant: *Blackburn v. Powers*, 40–681; *Fulmer v. Fulmer*, 22–231.

Prejudice will be presumed from an erroneous ruling upon a motion for a change of place of trial. *Ferguson v. Davis Co.*, 51–220.

As to when the giving of instructions will be considered error without prejudice, see notes to § 2789.

The court must disregard all errors which do not affect substantial rights: § 2690.

NEW TRIALS.

For what causes granted. R. § 3112.

SEC. 2837. A new trial is a re-examination in the same court of an issue of fact, or some part or portions thereof after verdict by a jury, report of a referee, or a decision by the court. The former report, verdict, or decision, or some part or portion thereof, shall be vacated and a new trial granted on the application of the party aggrieved for the following causes affecting materially the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party; or any order of court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;

2. Misconduct of the jury or prevailing party;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Excessive damages, appearing to have been given under the influence of passion or of prejudice;

5. Error in the assessment of the amount of recovery, whether

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too large or too small, where the action is upon a contract or for the injury or detention of property;

6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;

7. Newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial;

8. Error of law occuring at the trial, excepted to by the party making the application.

IN GENERAL: A motion for a new trial is addressed to the sound discretion of the court, and such discretion will not be interfered with, unless it is manifest that it has been improperly exercised: *Freeman v. Rich*, 1-504; *Ruble v. McDonald*, 7-90; *Pickering v. Kirkpatrick*, 32-163. But this discretion is a legal one, and must be exercised according to the rules of law: Cases just cited and *Stewart v. B. & M. R. R. Co.*, 11-62; *Stockwell v. C. C. & D. R. Co.*, 43-470.

An order granting a new trial may be reviewed: *Stewart v. Erobank*, 3-191; *Cook v. Sypher*, 3-484; *Newell v. Sandford*, 10-396; but a stronger case should be made to justify the interposition of the supreme court when a new trial has been granted, than where it has been refused: *Ruble v. McDonald*, 7-90; *Newell v. Sandford*, 10-396; *Shepherd v. Brenton*, 15-84; *Burlington G. L. Co. v. Green*, 21-335; *Chapman v. Wilkinson*, 22-541; *White v. Poorman*, 24-108; *Roberts v Jones*, 30-525; *Tegeler v. Jones*, 33-234; and in such case the supreme court will not be inclined to set aside the ruling: *Robinson v. Bacon*, 24-409; *Pickering v. Kirkpatrick*, 32-163.

The order of the court granting a new trial will not be reversed unless the circumstances are such that it can be clearly seen that its discretion has been abused: *McNair v. McComber*, 15-368.

But if the court, in ordering a new trial, misstates or misapplies a legal proposition, such a ruling will be reversed with the same freedom as if made at any other stage of the trial: *Shepherd v. Brenton*, 15-84; *Ruble v. McDonald*, 7-90.

The court should require a much stronger case to be made in the application for a new trial, where two verdicts have been rendered in favor of the same party; yet such second verdict by no means concludes the court from again granting a new trial, and especially when the second application is based on another ground than that contained in the first: *Jourdan v. Reed*, 1-135.

While, as a general rule, if granted at all, a new trial is awarded for the entire case, yet, where it can be done without danger of confusion or prejudice, it may be granted as to one count and refused as to another: *Woodward v. Horst*, 10-120.

A new trial should not be granted where justice has been done and the merits correctly decided: *Ibid.*

PAR. 2: To vitiate the verdict of a jury for misconduct, it must be such as to satisfy the court that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence: *Langworthy v. Myers*, 4-18; *The State v. Accola*, 11-246.

Where the jury determined their verdict by adding together twelve different amounts marked down by them respectively, and dividing the same by twelve, having agreed beforehand to be bound by the result as their verdict, such verdict should be set aside: *Manix v. Malony*, 7-81; *Schanler v. Porter*, 7-482; *Denton v. Lewis*, 15-301; and it is error in such case to allow plaintiff to remit all above the lowest amount set down by any member of the jury, and render judgment in the plaintiff's favor for that amount: *Darland v. Wade*, 48-547. But where the verdict is on this account irregular as to only a part of the amount found, the valid portion will be allowed to stand: *Fuller v. C. & N. W. R. Co.*, 31-211. Where, however, by this method a sum is found, without an agreement in advance to be bound by it, and afterwards, upon discussion, it is agreed to and adopted, the verdict will be valid: *Barton v. Holmes*, 16-252; *Hamilton v. D. V. R. Co.*, 36-31; *Deppe v. C. R. I. & P. R. Co.*, 38-592.

So where a jury, having first agreed to be bound by the result, determine their verdict by lot, such verdict will be set aside: *Mersere v. Shine*, 37-253; and while they may, after having so formed an illegal verdict, repu-

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diate it and find a valid one as the result of due deliberation, yet the evidence of such action must be clear and satisfactory, and where a subsequent vote is but a ratification of the verdict by lot, it will not be sufficient: *Thompson v. Perkins*, 26–486.

The drinking of intoxicating liquor by a juror during the discharge of his duty as such, is sufficient ground for setting aside the verdict and ordering a new trial: *The State v. Baldy*, 17–39; *Berry v. Berry*, 31–415; and this, irrespective of whether he drinks so much as to come under the influence thereof, or not: *Ryan v. Harrow*, 27–494. But the drinking of two glasses of beer by a juror before the cause had been submitted to the jury, and during an adjournment of court, *held*, not such misconduct as to vitiate the verdict: *Van Buskirk v. Daugherty*, 44–42; and the same rule in this respect applies in criminal as in civil cases: *The State v. Bruce*, 48–530.

A small amount of intoxicating liquor taken at night and before the case was submitted to the jury, *held* not to constitute misconduct: *O'Neil v. K. & D. M. R. Co.*, 45–546.

Where one of the jurors was ill before the cause was submitted to the jury, and took for medicinal purposes, without medical prescription, some brandy, etc., *held*, not sufficient cause for setting aside the verdict: *The State v. Morphy*, 33–270.

A motion for new trial on the ground that a juror had formed and expressed an unqualified opinion or belief, will not be sustained where it does not appear that such fact was not known to the party complaining before the jury was sworn, nor that the juror was examined under oath as to whether he had formed or expressed such opinion: *Stewart v. Ewbank*, 3–191; *The State v. Shelledy*, 8–477; *The State v. Funck*, 17–365.

That a juror stated to his fellow jurors, after their retirement, matters outside the case, for their consideration in making up the verdict, may be ground for a new trial, if prejudice is shown to have resulted: *Hall v. Robison*, 25–91.

As to when misconduct of the jury in taking with them improper papers will be ground for reversal, see notes to § 2797.

Improper statements made in argument to the jury by the attorney of the successful party, may be such misconduct as to justify the court in setting aside the verdict: *Wickersham v. Timmons*, 49–267; but misconduct in the attorney of the prevailing party in the argument to the jury in referring to matters not pertaining to the case, *held*, not sufficient ground for a new trial when it did not appear that prejudice had resulted to the other party therefrom: *Hammond v. S. C. P. R. Co.*, 49–450.

PAR. 3: Where a party, who was also an important witness, was detained by illness from being present, but a continuance was not asked, *held*, that under the circumstances sufficient diligence was not shown to entitle him to a new trial on the ground of accident: *Whilworth v. Murphy*, 29–470.

PAR. 4: If the damages are deemed excessive, the court may fix a reasonable amount and give the successful party the option to accept such sum or submit to a new trial: *Brockman v. Berryhill*, 16–183; but the court has no power to render judgment for a sum less than the verdict without giving such option; *Noel v. D. B. & M. R. Co.*, 44–293.

In a particular case, the verdict *held* not excessive, and it is said that where there are concurring verdicts, the supreme court will hesitate before setting the last one aside on this ground: *Russ v. Steamboat War Eagle*, 14–363.

PAR. 6: Where the mind is brought inevitably to the conclusion that the verdict was not the result of a free, honest, and unbiased exercise of judgment on the testimony submitted, and that manifest injustice will result if judgment is rendered thereon, the court below should grant a new trial; and where such a case is made clearly apparent to the supreme court, a new trial will be ordered, though refused by the court below: *Jouraan v. Reed*, 1–135; *Fawcett v. Woods*, 5–400; *Byington v. Woodward*, 9–360. But it is not every case of doubt, nor where there is an apparent preponderance of evidence against the conclusion of the jury, that justifies a court in setting aside a verdict; and this is more especially true in an appellate court where the judge below, who heard the whole testimony, and had an opportunity to see and determine from their manner the credibility of witnesses, has, after due deliberation, refused to interfere: and the appellate tribunal may refuse to disturb the ruling when a new trial is granted, although it would have done the same thing if it had been

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refused: *McKay v. Thorington*, 15–25, 28; *Bergert v. Davenport City R. Co.*, 34–471.

A strong preponderance of evidence against the verdict and a conviction that a different result would more nearly accord with justice, are not sufficient to justify the supreme court in ordering a new trial, where they are not satisfied from the absence of evidence to support a verdict that it was not the result of a free, honest, unbiased and intelligent exercise of judgment and conscience on the part of the jury, and that justice will fail if the verdict is not set aside: *Garretty v. Brazell*, 34–100; *Parker v. D. S. W. R. Co.*, 34–399.

Where it clearly appears that the verdict is in conflict with the evidence, the supreme court will, on appeal, reverse the decision of the trial court in overruling a motion for a new trial based on that ground: *Lester v. Sallack*, 31–477; but such decision will not be disturbed unless so barren of support as to warrant the finding that it was the result of passion or prejudice: *Schermer v. Gendt*, 52–742.

To authorize the reversal of the decision of the court below setting aside a verdict on account of insufficiency of evidence, there should appear such conclusive preponderance of evidence in its support as would show that injustice would be done: *Worthington v. Olden*, 31–419.

To justify the granting of a new trial on the ground that the verdict is against the weight of evidence, the want of evidence must relate to a material issue legitimately made by the pleadings: *Parker v. Hendrie*, 3–263.

A verdict will not be disturbed in the supreme court unless clearly against the weight of evidence: *Booth v. Small*, 25–177.

The discretion of the trial court in overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, will not be reversed where there is a conflict in the testimony: *Russ v. Steamboat War Eagle*, 14–363; *Brockman v. Berryhill*, 16–183; *Burlington, G. L. Co. v. Green*, 22–508; *Ackley v. Berkey*, 22–226; *Pierce v. Walker*, 24–424; *McCabe v. Knapp*, 23–308; *Callanan v. Shaw*, 24–441, *Schrimper v. Heilman*, 24–505; *Hull v. Alexander*, 26–569; *Sherman v. West. Stage Co.*, 24–515, 554; *Garland v. Wholeham*, 26–185; *Todd v. Brenner*, 30–439; *Snyder v. Nelson*, 31–238; *Snyder v. Eldridge*; 31–129. And where the verdict has been set aside by the court below as not supported by the evidence and a new trial granted, it will require a stronger showing to justify the interposition of the supreme court than when a new trial, asked on similar grounds, has been refused: *Jenkins v. C. & N. W. R. Co.*, 32–97; also where several trials have resulted in the same verdict and the trial court has refused to set the last one aside as against the evidence, it would require a very strong case to justify an interference by the appellate court: *Burlington G. L. Co. v. Greene*, 28–289.

It is with reluctance and caution that an appellate court interferes with the verdicts of juries. Where there is reasonable doubt, or a conflict of evidence, the verdict will be upheld; but if there is no such doubt or conflict, the duty to set aside the verdict is plain; and in the case under consideration the verdict was set aside: *McAunich v. M. & M. R. Co.*, 2–338; and to the same point: *Martin v. Orndorff*, 20–217; *Lester v. Sallack*, 31–477.

The rule of the supreme court, that it will not interfere with the decision of the court below in refusing a new trial on account of the insufficiency of evidence where there is a conflict, has no application whatever to *nisi prius* courts. They should independently exercise the power to grant new trials, whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties, using caution, however, in the exercise of the power, so as not to invade the legitimate province of the jury: *Dewey v. C. & N. W. R. Co.*, 31–373.

Whenever a verdict is clearly, not doubtfully, against the manifest justice of the case, it is the duty of the trial judge unhesitatingly to set it aside; but where there is a conflict of evidence, and the jury being clearly charged as to the law, have found a verdict which the trial court has refused to set aside, the supreme court will not interfere: *Smith v. Williams*, 23–28.

The decision of the court below overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence, will not be reviewed, unless the bill of exceptions embodies the whole of the evidence: *The State v. Lyon*, 10–340; *The State v. Hockenberry*, 11–269; *Parsons v. Chapman*, 11–294; *McCool v. G. & C. U. R. Co.*, 17–461. A certificate that the bill of exceptions contains *substantially* all of the evidence, will not be

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sufficient: *Lea v. Roads*, 22–408; *Burling on G. L. Co. v. Green*, 21–335; *Davis v. Card*, 33–592; *McKenzie v. Kitler*, 21–254; *Jemmison v. Gray*, 29–537.

Before the enactment of the provisions contained in § 3169, *held*, that a judgment would not be reversed, on the ground that the verdict was contrary to the evidence, when a motion for a new trial upon that ground had not been made in the court below: *Brayton v. Boone*, 19–506.

That a verdict is against the instructions given the jury by the court, is sufficient ground for setting it aside: *Farley v. Budd*, 14–289. In such cases the decision of the court below in granting a new trial on that ground, will not be disturbed on appeal, nor the instructions given be reviewed. It is the duty of the jury to regard the instructions as the law, and find a verdict accordingly, whether they be right or wrong: *Savery v. Busick*, 11–487; *Jewett v. Smart*, 11–505; *Taylor v. Cook*, 14–501; nor will such decision be reviewed when the instructions are not before the appellate court: *Caffrey v. Groome*, 10–548; *Briggs v. Hartman*, 10–63; *Porter v. Thomson*, 22–391.

PAR. 7: The application for a new trial on the ground of newly discovered evidence, should be accompanied by the affidavit of the newly discovered witness, where it can be procured, stating the facts to be established by his testimony: *Warren v. The State*, 1 Gr. 106; *Mays v. Deaver*, 1–216; *Manix v. Malony*, 7–81; *Sulley v. Kuehl*, 30–275.

The party should give the court the best proof possible as to the newly discovered evidence, where it is, and that it can be produced on the trial: *Reeves v. Royal*, 2 Gr., 451.

It must appear that reasonable diligence was exercised to discover such evidence: *Bingham v. Foster*, 37–339, 341; *Mather v. Butler Co.*, 33–250; *Lay v. Wissman*, 36–305; *Kilburn v. Mullen*, 22–498; *Reeves v. Royal*, 2 Gr., 451.

A party must show what he did toward discovering the evidence, that the court may judge whether it constituted due diligence: *Sulley v. Kuehl*, 30–275.

In a particular case, *held*, that sufficient diligence had not been used: *Bailey v. Landingham*, 52–415.

Only *reasonable diligence* is required to be shown: *Stineman v. Beath*, 36–73; and where the new evidence consisted of proof of admissions which the witness did not speak of to any one until after the trial, *held*, that the showing of diligence was sufficient: *Eckel v. Walker*, 48–225.

A general allegation of the exercise of reasonable diligence will not be sufficient: *Carson v. Cross*, 14–463.

An application for new trial on this ground should be denied when it is apparent that the ground relied on is technical, and that the rights of the parties have been once fairly adjudicated and settled: *McLain v. Lawson*, 25–277.

A new trial in such cases should not be granted, unless the court should think that upon a new trial such newly discovered evidence might probably lead to a different result; *Millard v. Singer*, 2 Gr., 144; *The State v. Bowman*, 45–418; *Cornish v. C. B. & Q. R. Co.*, 49–378; *Carpenter v. Brown*, 50–451.

If a party is surprised on the trial by evidence which he is not prepared to meet, he should ask a continuance, and if he does not do so, the discovery of evidence to meet it afterwards, will not entitle him to a new trial. Diligence to procure the evidence in time for trial must be shown: *Dunlavey v. Watson*, 38–398.

A new trial will not be granted for newly discovered evidence which is merely cumulative: *Reeves v. Royal*, 2 Gr., 451; *Ruble v. McDonald*, 7–90; *Sturgeon v. Ferron*, 14–169; *Wilhelmi v. Thorington*, 14–537; *Keys v. Francis*, 28–321; *Cohol v. Allen*, 37–449; *Bingham v. Foster*, 37–339; *German v. Maquoketa Savings Bank*, 38–368; *First National Bank of Iowa City v. Charter Oak Ins. Co.*, 40–572; but to be cumulative the evidence must not only be to the same point, but of the *same kind* as that produced on the trial. Evidence of an admission of plaintiff of a fact, *held*, not to be cumulative with other evidence of such fact; *Wayt v. B. C. R. & M. R. Co.*, 45–217. That new evidence tends to establish the same ultimate fact, if it is not of the same kind and to the same point, will not render it cumulative; *Eckel v. Walker*, 48–225; *Able v. Frazier*, 43–175; *Alger v. Merritt*, 16–121.

Though the evidence be in some respects cumulative, still, if in any degree it has an independent and distinct bearing upon the issue, it will be sufficient: *Stineman v. Beath*, 36–73; *Hambel v. Williams*, 37–224.

Where a judge, in overruling a motion for a new trial, certifies that the evidence was cumulative, such statement will be regarded, on appeal, as true, when the evidence itself is not

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before the court: *Seymour v. Hoyt*, 23–19.

As to what evidence may be considered cumulative, see *German v. Maquoketa Savings Bank*, 23–368.

A new trial will not be granted on account of newly discovered evidence which would go in mitigation of damages: *Ruble v. McDonald*, 7–90; nor when such evidence merely impeaches an opposing witness: *Wise v. Bosley*, 32–34; *Dunlavey v. Watson*, 38–398.

Where, after the remanding of an equity cause, tried *de novo* in the supreme court, and before final decree in the lower court, a party makes such showing of newly discovered evidence as to entitle him to a new trial, he may file amended pleadings, if necessary, and introduce such evidence before final decree is rendered: *Adams Co. v. B. & M. R. R. Co.*, 44–335.

PAR. 8: An error of the court in granting or refusing a new trial on a legal proposition, is reviewable on appeal with no more presumption in its favor than a ruling made in any other stage of the case: *Byington v. Woodward*, 9–360.

Error of law is not ground for new trial unless duly excepted to: *Darrance v. Preston*, 18–396.

As to whether it was necessary to urge errors at law in a motion for new trial before the supreme court would review them on appeal, see note to § 3168; but a motion for a new trial is no longer necessary: §3169.

When to be made.
R. §§ 3114, 3115. C. '51, § 1808, 810.

SEC. 2838. The application must be made at the term and within three days after the verdict, report, or decision is rendered, except for the cause of newly discovered evidence; must be by motion upon written grounds, and if for the causes enumerated in sub-divisions two, three, and seven of the preceding section, may be sustained and controverted by affidavits.

TIME OF APPLICATION: Except when based upon the ground of newly discovered evidence, the application must be made within three days: *Boardman v. Beckwith*, 18–292 If made on that ground after the expiration of the three days, it should be by petition, but within one year after the discovery of such evidence, as provided in § 3155: *First Nat'l Bank of Tama City v. Murdough*, 40–26.

If the motion be made in proper time, an amendment thereto, germain to the object and purposes of the original motion, may be made after the time specified: *Sowden v. Craig*, 20–477.

Where the record shows that the motion was not made in time, the decision of the trial court in overruling it will not be reviewed. If the record is wrong in this respect, it should be corrected in the court below: *Stiles v. Botkin*, 30–60.

AFFIDAVITS: The ground relied on must be set out in the motion, otherwise affidavits in support thereof cannot be received: *Beal v. Stone*, 22–447.

The affidavits of jurors here contemplated are voluntary. The court cannot, by rule upon the jury, compel them to answer under oath as to the manner of making up their verdict: *Forshee v. Abrams*, 2–571; *Grady v. The State*, 4–461; *Crumley v. Adkins*, 12–363.

Affidavits of jurors may be received for the purpose of avoiding a verdict by showing any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself. But such affidavits cannot he received as to any matter essentially inhering in the verdict itself, as that a juror did not assent to it, that he misunderstood the instructions, that he was unduly influenced or mistaken, etc., etc.: *Wright v. Ill. & Miss. Tel. Co.*, 20–195; *Coules v. C., R. I. & P. R. Co.*, 32–515; *Garrity v. Brazell*, 34–100; *Shepherd v. Brenton*, 15–84, and cases cited.

Affidavits of jurors are receivable to show misconduct of the jury, as taking with them and considering a deposition not introduced in evidence: *Stewart v. B. & M. R. R. Co.*, 11–62; or to show the statement, by a juror to his fellows, of a fact outside the case made in court: *Hall v. Robison*, 25–91; or to show that the verdict was a quotient verdict: *Schanlen v. Porter*, 7–482; *Manix v. Maloney*, 7–81; *Hendrickson v Kingsbury*, 21–379; *Darland v. Wade*, 48–547; also to show that the verdict was arrived at by lot: *Ruble v. McDonald*, 7–90; *Wright v. Ill. & Miss. Tel. Co.*, 20–195. (As to quotient verdicts or verdicts by lot, see, generally, notes to preceding section, ¶ 2.)

Affidavits of jurors are not receivable to explain their verdict, by show-

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ing what items of account were allowed and what rejected: *Lloyd v. McClure*, 2 Gr., 159; nor to impeach their verdict: *Abel v. Kennedy*, 3 Gr., 47; as by averring that they did not voluntarily assent thereto: *Cook v. Sypher*, 3-484; *The State v. Douglass* 7-413; or by showing that they misunderstood the instructions or the testimony: *Davenport v. Cummings*, 15-219; *Jack v. Naber*, 15-450; *Moffit v. Rogers*, 15-453.

Affidavits of jurors are not receivable to show the motives which influenced their decision: *Durrance v. Preston*, 18-396; nor that they read and were influenced by a part of the answer in the case which had been stricken out by demurrer: *Cooles v. C. R. I. & P. R. Co.*, 32-515; nor that they were unduly influenced by fellow jurors in the determination of the verdict: *Bingham v. Foster*, 37-339; nor that they agreed to the verdict because one of their number was sick: *Brown v. Cole*, 45-601; or under a misapprehension of the law: *Ward v. Thompson*, 48-588; nor that they erroneously rejected evidence before them: *The State v. McConkey*, 49-49.

Not granted on account of smallness of damages. R. § 3113

SEC. 2839. A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, where the damages equal the actual pecuniary injury sustained.

Costs of. R. § 1317.

SEC. 2840. The costs of all new trials shall either abide the event of the suit or be paid by the party to whom such new trial is granted, according to the order of the court to be made at the time of granting such new trial.

Court may grant on conditions. R. § 3118.

SEC. 2841. The court may determine not to grant a new trial, unless certain terms or conditions named by the court shall be agreed to by the opposite party; in the event of his agreement to which, the terms or conditions named shall be entered on the record, and no new trial shall be granted if the party refuse to agree to the terms or conditions upon which a new trial shall be awarded.

The court may make the filing of a bond for the payment of judgment and costs the condition upon which a new trial will be granted: *Loring v. Holt*, 39-574.

It may also give the successful party the alternative of submitting to certain terms or to a new trial: *Brockman v. Berryhill*, 16-183.

If for omitted statement that alone may be tried. R. § 3119.

SEC. 2842. Upon any motion for a new trial in arrest of judgment, or for judgment, notwithstanding the verdict, by reason of the non-averment of some material fact, the party whose pleading is thus alleged defective may, if the court deem it necessary, file a statement of the omitted fact, which, if true, would remedy the alleged defects, and such statements shall be filed before the hearing of the motion and shall suspend the same. If the facts thus stated would not, if proved, defeat the object of the motion, it shall be granted. If such new averments would, if proved, defeat the object of the motion and be not admitted, they must be denied, or confessed and avoided by the opposite party within such time as the court shall direct unless the same are denied by legal operation, and in such case the law of pleading and of procedure applicable to actions and pleadings of the kind shall obtain, except that the party stating the new fact shall be held the plaintiff therein, and the statement and response shall not need to be verified.

Same. R. § 3120.

SEC. 2843. If the facts thus stated be admitted or found to be true, the party stating the same shall be entitled to such judgment as he would have been entitled to if such facts had been stated in the original pleading and admitted as proved on the trial,

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together with the costs of and occasioned by the new pleading and the proceedings therein; but if the fact be found untrue, the opposite party shall be entitled to his costs of and occasioned by the new pleading and the proceedings therein, in addition to any other costs to which he may be entitled.

DISMISSAL OF ACTION.

SEC. 2844. An action may be dismissed, and such dismissal shall be without prejudice to a future action: When done without prejudice. R. § 3127. C. '51, §§ 1803, 1804.

1. By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is by the court;

2. By the court, when the plaintiff fails to appear when the case is called for trial;

3. By the court, for want of necessary parties, when not made according to the requirement of the court;

4. By the court, on the application of some of the defendants when there are others whom the plaintiff fails to prosecute with diligence;

5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action.

The provision that plaintiff may dismiss before final submission, is equivalent to a denial of the right to dismiss after such submission: *Belzor v. Logan*, 32–322; and after submission it is too late to take a non-suit: *Hays v. Turner*, 23–214; *Mansfield v. Wilkerson*, 26–482. But a submission to a referee not being mentioned, a party may dismiss at any time before the filing of the referee's report, notwithstanding the referee, by §§ 2819 and 2820 stands in the place of the court: *Belzor v. Logan*, 32–322.

The direction of the court to the jury, after the giving of the instructions, to enter upon the consideration of the cause, is the final submission to the jury under this section: *Harris v. Beam*, 46–118.

Where, by the ruling of the court, in an action tried before it, all of plaintiff's evidence was excluded, and he was left without testimony, *held* that he should be allowed to dismiss, although the court was ready to give its decision: *Partridge v. Wilsey*, 8–459.

Plaintiff may dismiss after filing of the affidavit provided for in § 2699, in case interrogatories annexed to the answer are not responded to. Such affidavit only entitles to judgment on trial, and does not operate immediately as a judgment: *Perry v. Heighton*, 26–451.

Where a cause is being tried on appeal from a justice's court, the right to dismiss is the same as in an action originally brought in the higher court; certainly so, in an action which might originally have been prosecuted in such court: *Harris v. Laird*, 25–143.

A party may dismiss as to one or more of several causes of action and prosecute as to others: *Ballinger v. Davis*, 29–512.

A plaintiff who voluntarily dismisses his action cannot complain, on appeal, of any action of the court previous to such dismissal: *Marsh v. Graham*, 6–76.

Under our statute, there is no such thing as an involuntary non-suit upon the evidence: *Way v. Ill. Cent. R. Co.*, 35–585.

SEC. 2845. In all other cases upon the trial of the action the decision must be upon the merits. On the merits. R. § 3128.

Where there is no evidence tending to establish plaintiff's case, or to establish any one of two or more essential, ultimate facts necessary to be shown to entitle him to recover, it is the duty and within the province of the court to directly instruct the jury how to find. But if the evidence tends in any degree to establish the cause of action, the facts should be left to the jury, even though the court should feel in duty bound to set aside a verdict which the jury might render: *Way v. Ill. Cent R. Co.*, 35-585; and see notes to § 2789.

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Counter claim tried. R. § 3129. C. '51, § 1801.

SEC. 2846. In any case, when a counter claim has been filed, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear.

At any time before any pleadings are filed by defendant, plaintiff may dismiss his action and defendant cannot complain: *Holmes v. Hull*, 48–177.

Or dismissed. R. § 3130. C. '51, § 1802.

SEC. 2847. The defendant may, also, at any time before the final submission of the cause to the jury, or to the court when the trial is by the court, dismiss his counter claim without prejudice.

Defendant cannot take a non-suit on his counter claim after the case has been finally submitted to the court: *Gunsaulis v. Cadwaliader*, 48–48, following cases cited under § 2844.

Dismissal in vacation: costs: judgment. R. § 3131. C. '51, § 1822.

SEC. 2848. Any party to any claim may dismiss the same in vacation, and the clerk shall make the proper entry of dismissal on the record, and, if the costs are not paid, may enter judgment against such party therefor in favor of the party entitled thereto, and issue execution therefor at the order of such party. The party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal.

JUDGMENT.

Every final adjudication is. R. § 3121. C. '51, §§ 1814–15.

SEC. 2849. Every final adjudication of the rights of the parties in an action, is a judgment; and such adjudication may consist of many judgments, one of which judgments may determine for the plaintiff or defendant on the claim of either as an entirety; or when a claim consists of several parts or items, such judgment may be for either of them on any specific part or item of such aggregate claim, and against him on the other part thereof; or a judgment may, in either of these ways, determine on the claims of co-parties on the same side against each other.

A judgment cannot be rendered in favor of one defendant against a co-defendant, unless such judgment is asked for and there is an adjudication of the claims between them: *Beall v. West*, 13–61

A judgment cannot, without the consent of the parties or order made during term, be entered in vacation, and a judgment so rendered would be void: *Spear v. Fitchpatrick*, 37–127.

In the entry of a judgment by a justice, no particular form is necessary: *Stowers v. Milledge*, 1–150.

Judgment defined: *Smith v. Shawhan*, 37–533, 535.

May be for and against same party. R. § 3122.

SEC. 2850. Any party who succeeds in part of his cause, or in part of his causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part.

Abatement: how distinguished. R. § 3124.

SEC. 2851. Where matter in abatement is plead in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare.

Section applied: *Clise v. Freeborne*, 27–280.

As to how matter in abatement is to be pleaded, etc., see § 2732.

When special execution desired. R. § 3125

SEC. 2852. Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon.

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Several plaintiffs and defendants. R. §§ 3123, 3126. C. 51, § 1816.

SEC. 2853. In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them whenever a several judgment is proper, leaving the action to proceed as to the others.

In an action against several defendants, jointly and severally liable on a note, judgment may be taken as to one and the cause continued as to others; and such judgment will not bar the right to recover against those as to whom the case is continued, when the cause is ripe for disposition as to them: *Smith v. Coopers*, 9–376.

In an action against several defendants, if plaintiff maintains his cause of action against one of them alone, he may have judgment against that one and the other defendants may have judgment against plaintiff for their costs: *Eyre v. Cook*, 9–185.

In an attachment suit, where the defendant sued, by way of counterclaim, on an attachment bond executed by plaintiff to others, *held* that he might have judgment thereon set off against a judgment in favor of such plaintiff: *Branch, etc., Bank v. Morris*, 13–136.

When all not served proceed against those served. R. § 3132.

SEC. 2854. Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants if the action had been against such alone.

Relief asked or that is consistent granted. R. § 3133. C. 51, § 1820.

SEC. 2855. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his petition. But, in any other case, the court may grant him any relief consistent with the case made by the petition and embraced within the issue.

If the court has jurisdiction of the subject-matter and of the defendant, a judgment in excess of that asked is not void, but voidable only: *O'Connell v. Cotter*, 44–48.

When an answer is filed, the plaintiff is not limited to the relief asked by his petition: *Wilson v. Miller*, 16–111.

When part controverted. R. § 3135.

SEC. 2856. If only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted.

A party is not entitled to judgment for part of a claim not controverted, when such claim has not yet matured: *King v. Howell*, 28–65.

Section applied: *City of Davenport v. C. R. I. & P. R. Co.*, 38–633, 638.

Judgment on verdict. R. § 3136.

SEC. 2857. When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special or the court orders the case to be reserved for future argument or consideration.

When verdict is special. R. § 3137.

SEC. 2858. When the verdict is special, or when there has been a special finding on particular questions of fact or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered.

To justify a court in rendering a judgment on a special finding of facts against a general verdict, such finding must be manifestly inconsistent with the general verdict: *Bonham v. Iowa Cen'ral Ins. Co.*, 2–328; *Clark v. Warner*, 32–219; *Mershon v. Nat'l Ins. Co.*, 34–87, and, when taken together with the facts admitted in the pleadings, must be sufficient to establish the right to recover: *Lamb v. First, etc., Society*, 20–127, and see § 2809 and notes.

When the jury in their special verdict answer that they do not know as to certain facts which are necessary to be found in order to sustain a general verdict, the general verdict should be set aside and a new trial granted: *Darling v. West*, 51–259; and generally, see § 2808 and notes.

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Judgment notwithstanding verdict.
R. § 3138.

SEC. 2859. When, by the statements of the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party, unless the other party proceed as provided in section two thousand eight hundred and forty-two of this chapter.

Where there was no answer, *held*, that judgment should have been rendered for plaintiff, notwithstanding evidence on the part of the defendant disproving the claim had been erroneously received: *Singer M'f'g Co. v. Billings*, 39–347.

Where defendant pleads a tender, the court should render judgment in plaintiff's favor for the amount thereof, although the verdict of the jury be for the defendant: *Sheriff v. Hull*, 37–177, and see notes to § § 2104 *et seq.*

Judgment for excess of counter claim.
R. § 3139.
C. '51, § 1798.

SEC. 2860. If a counter claim, proved, exceed the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment must then be given therefor.

Judgment by agreement
R. § 3143.
C. '51, § § 1821-2.

SEC. 2861. Any judgment in a case pending other than for divorce which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing, signed and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith unless therein otherwise agreed upon between the parties.

An agreement for judgment, when properly filed, becomes a part of the record in the case and a subsequent pleading inconsistent therewith should be stricken from the files: *Vail v. Stone*, 13–284.

No distinction between debt and damages.
R. § 3144.

SEC. 2862. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

Provisions as to juries to govern court.
R. § 3145.
C. 51, § 1823.

SEC. 2863. The provisions of this chapter relative to juries, are intended to be applied to the court when acting as a jury on the trial of a cause so far as they are applicable and not incompatible with other provisions herein contained.

Where the cause is tried to the court without a jury, a judgment of the court stands as a general verdict of the jury, and will not be interfered with unless palpably against the weight of evidence: *Woods v. Gerecke*, 28–561.

The supreme court may review the finding of the court below in like manner as it may re-examine the verdict of a jury, but for that purpose the entire evidence must be take up. This takes the place of a motion to set aside the verdict of the jury for the reason that it is not supported by the evidence: *Snell v. Kimmell*, 8–281; and see notes to § 2743.

The same rules as to the admission or rejection of evidence are applicable in trials to the court as in trials to the jury: *Williams v. Soutter*, 7–435, 439.

CLERK.

Judgments and orders entered of record.
R. § 3140.

SEC. 2864. All judgments and orders must be entered on the record of the court and must specify clearly the relief granted, or order made in the action.

Satisfaction of to be entered by clerk.
R. § 3141.
C. '51, § 1819.

SEC. 2865. Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket.

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SEC. 2866. In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause and enter it in the proper book. But in no other case need a complete entry be made except at the request of a party who will pay the expense of such record.

Complete record in land cases made. R. § 3142. C. '51, § 1817.

This section contemplates only cases where plaintiff claims title in himself and defendant disputes such claim, and not a case where it is sought to subject real estate, standing in the name of the wife, to a judgment against the husband. In a proper case for making the record here provided, all that should be recorded is the original notice and return, the pleadings and the judgment or decree: *Smith v. Cumins*, 52–143.

DISCHARGE OF JUDGMENT.

SEC. 2867. A defendant against whom a judgment has been rendered, or any person interested therein, having some good matter of discharge which has arisen since the judgment, may, upon motion, in a summary way, have the same discharged either in whole or in part, according to the circumstances.

May be done on motion. R. § 3146.

SEC. 2868. The court shall have power, on motion, to inquire into the facts attending or connected with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void either in whole or in part, whenever such assignment or use shall be determined to be inequitable or fraudulent, or in bad faith.

Fraudulent assignment of. R. § 3147.

DEFAULT.

SEC. 2869. If a party fail to file or amend his pleading by the time prescribed by the rules of pleading, or, in the absence of rules, by the time fixed by the court; or if, having plead, his answer or reply on motion or demurrer is held insufficient or is struck out, and he fail to amend or to answer or reply further as required by the rules of or by the court, or if he withdraw his pleading without authority or permission to replead, judgment by default may be rendered against him on demand of the adverse party made before such pleading is filed.

When made and entered. R. § 3148. C. '51, § 1824.

It is erroneous to render judgment by default against defendant who has an answer on file undisposed of, although it may be defective: *Arbuckle v. Bowman*, 6–70; *Canal Bank v. Newberry*, 7–4; *B. & M. R. R. Co. v. Marchand*, 5–468; *Markey v. Mettler*, 1–528; *Brown v. Hollenbeck*, 2 Gr., 318; *Wolff v. Hagensick*, 10–590; *Mallory v. Sailing*, 48–699; nor where a material motion is on file: *Coffins v. Kemp*, 4 Gr. 119. So *held*, also, where a defendant had two answers on file and one of them was assailed by demurrer and the other remained undisposed of: *Crafts v. Clark*, 31–7[illegible].

Where a demurrer to an answer is sustained, default should not be rendered for failure to answer further, in the absence of any rule or order of the court fixing the time in which an answer must be filed: *Wright v. Howell*, 24–150; *Rollins v. Coggeshall*, 29–510.

A failure to answer an amended petition entitles plaintiff to default as fully as if the original petition had not been answered: *Brenner v. Gundershiemer*, 14–82.

Defendant's demurrer being overruled, and he being in default for want of an answer, *held*, error to render judgment against him without an assessment of damages, as provided in § 2872: *Musser v. Hobart*, 14–248.

The judgment here contemplated is one purely by default, and may be set aside as provided for in case of judgments of that kind (§ 2871): *Park v. Ratcliffe*, 42–42.

A judgment against a defendant

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who has appeared to an action and filed an answer, but at time of trial fails to appear, is not a judgment by default as here contemplated: *Douglass v. Langdon*, 29–245.

Where there are two defendants, one of whom makes default, and the other appears, it is not the practice to enter judgment on default against the first, before the issue raised by the answer of the second is disposed of: *Greenough v Sheldon*, 9–503.

While a party is in contempt, the court may refuse to receive pleadings offered by him: *Saylor v. Mockbie*, 9–209.

Before a judgment on default will be reviewed in the supreme court, a motion to set it aside must have been made and overruled in the court below: *Hunt v. Stevens*, 25–261.

Default may be granted and judgment rendered thereon, before the cause is regularly reached on the docket: *Brenner v. Gundershiemer*, 14–82.

Notice.
R. § 3149.
C. '51, § 1826.

SEC. 2870. Where no appearance is made, default shall not be had until the court determines from an inspection of the record that notice has been given as required by this code.

This provision is merely directory. It is the fact of service, and not the particular return or evidence thereof, which is jurisdictional: *Lawrence v. Howell*, 52–62.

Where judgment by default is rendered, it will be presumed that proper notice appeared to have been had, unless the contrary is alleged and clearly proved: *Hale v. First Nat'l Bank*, 50–642.

Where there is service, though defective, a judgment by default will not be void, even when it is error in the court to render it: *Pratt v. Western Stage Co.*, 27–363; *Muscatine Turn Verein v. Funck*, 18–469; and see cases cited in notes to section 2604.

The affidavits, etc., required to be filed in cases of service by publication, are essential to the validity of a judgment on such service; if materially defective, the judgment will be erroneous, even though it recites that defendant was served with notice. The presumptions in favor of the jurisdiction of the court do not cure such a defect: *Tunis v. Withrow*, 10–305.

Default rendered without legal authority should be set aside without a compliance with the terms prescribed in the next section. See notes to that section.

May be set aside: terms of.
R. § 3150.
C. '51, § 1827.

SEC. 2871. Default may be set aside on such terms as the court may deem just, among which must be that of pleading issuably and forthwith, but not unless an affidavit of merits be filed and a reasonable excuse shown for having made such default, nor unless application therefor be made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term.

The court has a large discretion in passing upon motions to set aside defaults, and unless it is shown that such discretion is abused the appellate court will not interfere: *Marsh v. Colony*, 36–603; *Rogers v. Cummings*, 11–459; but its ruling will be reversed when there is a clear abuse of discretion, or misapprehension of duty; and default should be set aside on application made before judgment is rendered, when based upon proper grounds: *Simmons v. Church*, 31–284.

Such discretion should not be exercised to relieve a party from the consequence of his own neglect or that of his attorney, but under the facts of a particular case, the decision of the court below refusing to set aside a default was overruled: *Ordway v. Suchard*, 31–481.

It will require a stronger case to warrant the reversal of the action of a court in setting aside a default, than in case of refusing to set it aside: *Westphal v. Clark*, 46–262.

A judgment by default will not be set aside on appeal, unless a motion to set it aside was made in the court below: *Downing v. Harmon*, 13–563.

The terms upon which a default will be set aside, rest within the sound discretion of the judge, and his action thereon will not be interfered with unless an abuse of discretion be made to appear: *Blough v. Van Hoorebeke*, 48–40.

The defendant seeking to have a default set aside, must present an affidavit of merits, as well as a reasonable excuse: *Smith v. Watson*, 28–218; *McDonald v. Donaghue*, 30–568; *King v. Stewart*, 48–334; and it is not sufficient to state generally that

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defendant has a good and substantial defense, but the facts should be stated that the court may determine therefrom the question of merits: *King v. Stewart*, 48–334; *Jaeger v. Evans*, 46–188.

The filing of an affidavit of merits, after the motion to set aside the default has been overruled for want of such affidavit, is not sufficient to cure the defect: *Thompson v. Savage*, 45–398.

The provision requiring an affidavit of merits before a default shall be set aside, applies only to cases where the party is really in default, but where default has been entered by mistake or improperly, it should be set aside without such affidavits: *Messenger v. Marsh*, 6–491; *Rice v. Griffith*, 9–539; *Roals v. Shules*, 29–507; *U. S. Rolling Stock Co. v. Potter*, 48–56.

Default should not be set aside where it is the result of the party's own negligence. The excuse in a particular case *held* not sufficient: *Harrison v. Kramer*, 3–543.

Where the defendant is ruled to answer by a certain day in vacation, if he is unable to do so then, for a good reason, he should do so as soon thereafter as possible, and on a motion to set aside a default for a failure to answer, an excuse will not be sufficient which applies to the failure to answer on the day fixed, but does not apply to the failure to answer subsequently, and before default was taken: *Thatcher v. Haun*, 12–303.

Default should not be set aside where it is the result of a party's own negligence: *Ibid.*

An answer should accompany the application to set aside a default: *Ibid.*

The defendant is not entitled to file his answer until the default is set aside: *King v. Stewart*, 48–334.

Held, a sufficient excuse for setting aside a default, that the attorney of the party in default was so ill that forgetfulness of his employment in the case could not be imputed to him as negligence: *Montgomery Co. v. Am. Em. Co.*, 47–91.

The excuse shown for having made default, *held* sufficient in a particular case: *McNulty v. Everett*, 17–581.

It would seem that the limitation of time within which a motion to set aside a default may be made, applies to *judgments* by default and not to simple defaults, and that the latter may be set aside at any time before or at the term when judgment is rendered thereon, whilst it might also be true that simple defaults taken in vacation are to be set aside at the commencement of the succeeding term: *Harper v. Drake*, 14–533.

The subsequent filing of an amended petition bringing in other parties, but not changing the relief asked against the defendant in default, will not operate to set aside a default: *McDonald v. Donaghue*, 30–568.

SEC. 2872. When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount, but no fee shall be charged therefor. When long accounts are to be examined, the court may refer the matter. In other cases the court shall assess the damages, unless a jury be demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor.

When clerk to compute amount. R. § 3151 C. 51, § § 1828–30, 1832.

A judgment by default admits the averments of the cause of action as alleged in the petition, and that something is due and payable. The only matter to be found in such case is the amount of damages: *Whittey v. Douge*, 9–597; but where the amount due upon a subscription of stock was dependent upon how many installments had been called for by the board of directors, etc., *held* that such facts must be proved to the court before it could assess the amount of recovery: *B. & M. R. R. Co. v. Shaw*, 5–463; *B. & M. R. R. Co. v. Marchand*, 5–468.

Where the amount, to be computed by the clerk, was left blank, to be filled in when ascertained, and was not filled in, *held* that although the rights of third parties had intervened, the judgment was not void as to them: *Lind v. Adams*, 10–398.

Where a reasonable attorney's fee is provided for, it may be proved up and should be allowed, although the petition does not state the amount claimed on that account: *Nelson v. Everett*, 29–184.

An attorney's fee is a part of the costs, and defendant in default as to the principal indebtedness cannot

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put in issue the amount of such fee and claim a jury trial thereon: *Musser v. Crum*, 48–52.

A party in default is not entitled to have the damages against him assessed by jury: *Wilkins v. Treynor*, 14–391; *Carleton v. Byington*, 17–579; *Armstrong v. Catlin*, 17–581; *Clute v. Hazleton*, 51–355.

A jury trial is waived by default: See § 2814.

Witness cross-examined. R. § 3152. C. '51, § 1831.

SEC. 2873. The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose.

A party in default can only cross-examine the witnesses against him. He cannot introduce evidence on his own behalf: *Carleton v. Byington*, 17–579; nor object to the introduction of evidence by the opposite party: *Wright v. Lacy*, 52–248. He has no right to offer evidence, address the jury, nor ask instructions: *Cook v. Walters*, 4–72.

In equitable proceeding. R. § 3153. C. '51, § 1833.

SEC. 2874. When the action is of an equitable character, the court, upon hearing the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules of equity.

Where a bill is taken as confessed, all definite and positive allegations are to be taken as true without proof, but if the allegations are indefinite, or the prayer is uncertain, the certainty requisite to a proper decree must be afforded by proof: *Harrison v. Kramer*, 3–543; *Bolander v. Atwell*, 14–35.

Where some of several defendants answer, and others make default, plaintiff should not have any greater relief against those in default than against those who answer: *Pearson v. David*, 4–410; and in such case, if the cause of action is not made out against those who appear, judgment should not be rendered against those in default, but the action should be dismissed as to them, also: *Curtis v. Smith*, 42–665.

When no personal service. R. § 3154.

SEC. 2875. A defendant served by publication alone, shall be allowed at any time before judgment to appear and defend the action, and upon a substantial defense being declared, time may be given on reasonable terms to prepare for trial.

SERVICE BY PUBLICATION.

Plaintiff required to give security. R. § § 3156–9. C. '51, § 1834. 9 G. A. ch. 150.

SEC. 2876. When judgment by default is rendered against a defendant who has not been personally served, the court, before issuing process to enforce such judgment, may, if deemed expedient, require the plaintiff to give security to abide the future order of the court as contemplated in the following section.

May move for new trial after judgment. R. § 3160. C. '51, § 1835.

SEC. 2877. When a judgment has been rendered against a defendant or defendants served by publication only and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action re-tried, and, security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be re-tried as to such defendants as if there had been no judgment; and upon the new trial, the court may confirm the former judgment or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action or under the judgment and not restored

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The filing of the motion here provided for, with the clerk, within a proper time is a sufficient "appearance in court" even though filed in vacation, and though the time therefor has expired before a term of court commences: *Conklin v. Johnson*, 34–266.

Upon the filing of such, motion the defendant is entitled to a re-trial of the entire proceeding: *Fleming's heirs v. Hutchinson*, 36–519.

Upon the re-trial depositions which were taken upon a notice filed with the clerk as provided in § 3753, are admissible. The fact that there was no cross-examination by defendant will not exclude them: *Watson v. Russell*. 18–79.

Where, upon a re-trial, no sufficient defense is found to the action, the original judgment should be confirmed. It is not necessary that plaintiff again introduce evidence which he had before produced in taking the default, as for instance the note sued on: *Morton v. Coffin*, 29–235.

The provisions of this section are applicable where the party is served by publication with notice of the application by an executor to sell real estate under § 2389. Such party may, in the time and manner here provided, have an order of sale, made in pursuance of such application and notice, set aside: *Huston v. Huston*, 29–347; but these provisions are not applicable to divorce suits; and whether they are not limited in their application to actions *in rem*, *quære: Gilruth v. Gilruth*, 20–225.

A defendant personally served outside of the state cannot claim the benefit of this section: *McBride v. Harn*, 52–79.

A defendant served by publication only, cannot appeal until he has moved for a re-trial as here provided (see § 3168): *Berryhill v. Jacobs*, 19–346; but an affirmance on appeal for failure to make such motion will not deprive the party of the right to still make the motion, if within proper time: *S. C.*, 20–246.

Section *held* not applicable in a particular case: *Hulverson v. Hutchinson*, 39–316.

SEC. 2878. The title of a purchaser in good faith to any property sold under attachment or judgment, shall not be affected by the new trial permitted by the preceding section, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

Title to property not affected. R. § 3163. C. '51, § 1836.

Section applied: *Union Bank of Maryland v. Ames*, 37–672.

SEC. 2879. The plaintiff may, at any time after the judgment, cause a certified copy thereof to be served on a defendant served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial shall be reduced to six months after such service.

Copy of judgment served on defendant. R. § 3161.

SEC. 2880. The service of the copy of the judgment shall be, whether made within or without the state, actual and personal by delivery of copy, and made and returned as in case of original notice.

Manner of. R. § 3162.

SEC. 2881. No personal judgment shall be rendered against a defendant served by publication only who has not made an appearance. But a personal judgment shall be rendered against a defendant, whether he appear or not, who has been served in any mode in this code provided other than by publication, whether served within or without this state.

Personal judgment: when rendered. R. § 3164.

Service by publication or by personal service without the state, upon one who is not a citizen or resident, confers no jurisdiction either as to the person or property of such non-resident, other than is acquired *in rem*: *Darrance v. Preston*, 18-396.

As personal service without the state only stands in place of notice by publication, no personal judgment can be rendered thereon: *Bates v. C. & N. W. R. Co.*, 19–260; and see notes to § 2621.

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LIENS.

Of judgments. R. §§ 4105, 4109. C. 51, §§ 2485, 2489.

SEC. 2882. Judgments in the supreme, district or circuit court of this state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment.

[As amended by 17 G. A., ch. 129, § 1, striking out the words "or in the district or circuit court of the United States, if rendered within this state," as they occur in the original section between the words "state" and "are" in the second line. The other sections of the act are inserted following § 2885.]

The lien of a judgment attaches, not to the naked legal title of property, but to the interest which the debtor has therein: *Blaney v. Hanks*, 14–400; *Patterson v. Linder*, 14–414; *Churchill v. Morse*, 23–229.

A judgment becomes a lien upon the interest in real estate owned by the debtor, equitable as well as legal: *Lippincott v. Wilson*, 40–425; *Blain v. Stewart*, 2–378; and as between the parties it is immaterial whether such interest appear of record or not: *Denegre v. Haun*, 13–240; *Lathrop v. Brown*, 23–40.

Such equitable interest may be sold on execution under such judgment: *Crosby v. Elkader Lodge*, 16–399; but a purchaser at a sale thereof takes only such interest as the defendant actually has. The lien is not such as to affect the legal title of one holding *bona fide*, without notice of the equity: *Harrison v. Kramer*, 3–543; *Hultz v. Zollars*, 39–589. And a junior judgment creditor taking advantage of the proceeding provided by §§ 3150 *et seq.*, may acquire, by reason of his greater diligence, a superior lien upon such property: *Bridgman v. McKissick*, 15–260.

A judgment is a lien upon an equitable interest of the debtor in property conveyed by a trust deed, and the surplus in the hands of the trustee may be seized thereunder, but the lien does not attach to such surplus until steps are taken to subject it to the payment of the judgment: *Cook v. Dillon*, 9–407.

A vendor's lien is not such an interest in real estate, without a judgment against the purchaser, that it can be enforced against such real estate. Equitable proceedings, or proceedings by garnishment, must be resorted to for that purpose, and until such proceedings are commenced the purchaser of the real estate may discharge the lien by payment to the vendor: *Baldwin v. Thompson*, 15–504; *Woodward v. Dean*, 46–499.

A mortgage being personal property, a judgment against the mortgagee does not become a lien upon the property covered thereby: *Scott v. Mewhirter*, 49–487.

A judgment is a lien upon a leasehold interest in real estate: *First Nat'l Bank, etc., v. Bennett*, 40–537.

A judgment against a firm is not a lien upon real estate equitably belonging to it, but held in the name of one partner: *Stadler v. Allen*, 44–198.

The lien of a judgment rendered upon a partnership debt, if prior in time to one on an individual debt, is not postponed to the latter. The rule that individual creditors are to have priority as to individual property applies only in equity: *Gillaspy v. Peck*, 46–461.

The lien of a judgment does not attach to property which is exempt from sale on execution thereunder. So *held*, in case of a homestead: *Lamb v. Shays*, 14–567; *Cummings v. Long*, 16–41; and also in case of the public buildings of a city (§3048): *City of Davenport v. Peoria M. & F. Ins. Co.*, 17–276.

A judgment on a debt contracted prior to the time that property assumes the homestead character, although rendered after that time, is a lien on such property, certainly as to persons chargeable with notice of the character of the debt; and if one claims under a homestead right, he is bound to ascertain when such right began; *Hale v. Heaslip*, 16–451; and see notes to §1992.

A judgment lien does not take precedence of prior equities and unrecorded instruments: *Seerers v. Delashmutt*, 11–174; *Wellington v. Tizzard*, 15–495; *Parker v. Pierce*, 16–227; *Hays v. Thode*, 18–51; *Hoy v. Allen*, 27–208. If the instrument is recorded before sale under the judgment, the purchaser at such sale is affected with notice thereof, and an assignee of a judgment stands in no

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better position than the original judgment creditor: *Chapman v. Coats*, 26–288, and see cases under § 1941, to the effect that the holder of a judgment lien is not a purchaser within the meaning of the recording acts, but that a third party or even a judgment creditor purchasing at a sale under the judgment is entitled to protection as a purchaser.

As between the judgment debtor and a purchaser under execution on such judgment, the purchaser may show by the pleadings or record in the action that the judgment attached as a lien on the property purchased by him, though from the face of the judgment that fact does not appear: *Markham v. Buckingham*, 21–494.

The lien of a judgment expires in ten years and cannot be revived or continued after that time by any proceeding on the judgment: *Denegre v. Haun*, 13–240; but although the lien ceases, the judgment itself is not barred until the expiration of twenty years (§ 2529, ¶ 6), and during that time an execution may be issued and a sale had thereunder (§ 3025); but an execution issued after the expiration of the ten years only operates as a lien from the time of its levy: *Stahl v. Roost*, 34–475. But in case of a mortgage foreclosure, the lien of the mortgage is not merged in that of the judgment, and continues after the judgment lien ceases, and until the judgment itself is barred: *Ibid*; *Hendershott v. Ping*, 24–134; *Shearer v. Mills*, 35–499. If, on appeal from the judgment, it is affirmed, and a *procedendo* issues, the lien of the judgment continues; but if a new judgment is rendered in the supreme court upon the appeal bond, the former judgment is merged therein, and its lien is lost:. *Swift v. Conboy*, 12–444.

A judgment may be enforced against property upon which it is a lien, after the death of a debtor, without filing it as a claim against the estate; but this must be done while the judgment lien exists: *Davis v. Shawhan*, 34–91.

As to lien of judgments in federal courts, see 17 G. A., ch. 129, inserted following § 2885, and note thereto.

When attach. R. § 4106. C. '51, § 2486.

SEC. 2883. When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition.

In another county how effected. R. § 4107. C. '51, § 2487.

SEC. 2884. If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies.

As to whether the judgments of a district court of the United States are liens in another county than that where rendered, until a transcript is filed as here provided, *quære: Lathrop v. Brown*, 23–40.

As to making judgments of justices liens in another county, see § 3567, and notes.

As to sending transcript of judgment to another county, see § 3031, and notes.

Duty of clerk. R. § 4108. C. '51, § 2488.

SEC. 2885. Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same in the same manner as though rendered in the court of his own county.

The clerk of the court where a transcript is filed has no power to issue an execution thereon: *Seaton v. Hamilton*, 10–394.

LIENS OF JUDGMENTS IN FEDERAL COURTS.

[Seventeenth General Assembly, Chapter 129.]

[Sec. 1 amends § 2882, which see.]

How judgment may be made a lien

SEC. 2. Judgments in the district or circuit court of the United States, if rendered in this state, may be made liens upon the real estate owned by the defendant, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment, by filing an attested copy of the judgment in the office of clerk of the state district court of the county in which the land

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When lien shall attach.

lies; and no lien shall attach to the lands in any county of this state until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition.

Duty of clerk.

SEC. 3. The clerk shall, on the filing of such transcript in his office, immediately proceed to docket and index the same in a separate book kept for that purpose, in the same manner as though rendered in the court of his own county, and he shall be allowed to charge and receive the same fees as provided by law for like service.

Satisfaction of judgment.

SEC. 4. When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing, referring to the judgment, and have it duly acknowledged and filed in the office of the clerk of the district court in every county where the judgment is a lien. If he fails to do so within sixty days after having been requested in writing so to do, he shall forfeit to the *plaintiff*, [defendant,] the sum of fifty dollars.

[The U. S. Circuit Court for this district, in the case of *Hinzie v. Elliott*, Oct. Term, 1877, (not reported), held that judgments of that court were liens throughout the district (i. e. the state) without a transcript being filed in the county where the land was situated.]

CONVEYANCE BY COMMISSIONER.

When made. R. § 3165.

SEC. 2886. Real property may be conveyed by a commissioner appointed by the court:

1. Where, by judgment in an action, a party is ordered to convey such property to another;

2. Where such property has been sold under a judgment or order of the court, and the purchase money paid.

Reference to judgment in. R. § 3166.

SEC. 2887. The deed of the commissioner shall refer to the judgment, orders, and proceedings authorizing the conveyance.

Title. R. § 3167.

SEC. 2888. A conveyance made in pursuance of a judgment, shall pass to the grantee the title of the parties ordered to convey the land.

Same. R. § 3168.

SEC. 2889. A conveyance made in pursuance of a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding.

Approval by court. R. § 3169.

SEC. 2890. A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be endorsed on the conveyance and recorded with it.

Form of conveyance. R. § 3170.

SEC. 2891. It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the name of such parties shall be recited in the body of the conveyance.

Recorded. R. § 3171.

SEC. 2892. The conveyance shall be recorded in the office in which, by law, it should have been recorded had it been made by the parties whose title is conveyed by it.

Judge may approve conveyances.

SEC. 2893. In all cases under this code, whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, it

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shall be lawful for the judge of the court, in vacation, to confirm or approve the same, and to cause the proper entry or entries thereof to be made required by law and the rules of such court.

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

SECTION 2894. A judgment by confession without action, may be entered by the clerk of the district or circuit court in the manner hereinafter prescribed. Clerk may enter. R. § 3397. C. '51, § 1837.

This statute does not authorize the confession of a judgment by the debtor, without the knowledge or consent of the creditor. Such a judgment may be canceled on motion of the creditor: *F. & M. Bank v. Mather*, 30–283.

SEC. 2895. Such confession can be only for money due, or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum. Can only be for money. R. § 3398. C. '51, § 1838.

SEC. 2896. A statement in writing must be made and signed by the defendant and verified by his oath to the following effect, and filed with the clerk: Verified statement filed with clerk. R. § 3399. C. '51, § 1839.

1. If for money due or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due as the case may be.

2. If for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting such liability, and must show that the sum confessed therefor does not exceed the same.

It is not sufficient to state that the sum for which judgment is confessed is due upon a note, but the statement should show the manner in which the indebtedness arose for which the note was given, and it must state that the amount is justly due: *Edgar v. Greer*, 7–136; and where the statement was that the amount was due on a promissory note given for a balance due on settlement, and it was not alleged that the amount was *justly due*, *held* that a judgment on such statement was illegal and should not affect third parties, and that an existing creditor, subsequently obtaining judgment, might have the judgment by confession set aside on motion: *Bernard v. Douglas*, 10–370; but as between the parties judgments by confession are valid, although the statement does not substantially comply with the statute in showing how the indebtedness arose (criticising *Edgar v. Greer*, 7–136, and *Kenneay v. Lowe*, 9–580, holding that the defendant himself might take advantage of such defect): *Plummer v. Douglas*, 14–69; and see *Churchill v. Lyon*, 13–431.

A statement that the amount due was for money borrowed from plaintiff and interest, etc., evidenced by a promissory note, etc., *held*, sufficient: *Van Fleet v. Phillips* 11–558; and so *held* where the statement was for "money borrowed": *Marvin v. Tarbell*, 12–93.

As to what is a sufficiently concise statement of the facts, etc., see *Miller v. Clark*, 37–325.

The statement, as between the parties, will be sufficient without being sworn to. If defective in that respect it may be amended on leave of court: *Thorp v. Platt*, 34–314.

One partner has no authority to confess judgment against the firm, and such a judgment would be void as to the other partners: *Christy v.*

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Sherman, 10–535; but it would be binding as to the partner confessing judgment: *North v. Mudge*, 13–496; but where the statement was signed in the firm name, and sworn to by one member, and the judgment entry recited that the firm acknowledged themselves justly indebted, etc., *held*, that the judgment would bind the firm: *Edwards v. Pitzer*, 14–607.

If the honesty and integrity of the transaction is affirmatively shown, the judgment will not be invalid as to creditors or parties, though based upon a defective statement: *Vannice v. Greene*, 16–574.

A warrant of attorney to confess judgment is of no validity under our law: *Hamilton v. Schoenberger*, 47–385.

Judgment: execution. R. § 3400. C. '51, §§ 1840–1.

SEC. 2897. The clerk shall thereupon make an entry of judgment in his court record for the amount thus confessed and costs, and shall issue execution thereon as in other cases.

In the absence of fraud or other ground of equitable relief, the judgment is conclusive as to any defense, such as usury, which might have been interposed before judgment; *Twogood v. Pence*, 22–543; *Troxel v. Clarke*, 9–201; *Miller v. Clarke*, 37–325; but a judgment by confession, entered into with the purpose of evading the usury laws, is void, as between the parties, as to the amount in excess of the sum lawfully due: *Mullen v. Russell*, 46–386; *Ohm v. Dickerson*, 50–671.

The judgment, when entered, is a judgment by the court, and is subject to revision on appeal in the same manner as any other judgment; *Edgar v. Greer*, 7–136; *Troxel v. Clarke*, 9–201.

All the power the clerk has to render judgment on confession, is given by the statute, and unless its provisions are strictly complied with, the power of attorney under which the clerk acts is a nullity: *Edgar v. Greer*, 7–136; *S. C.*, 10–279.

A judgment by confession may be entered in vacation, and the entry approved at the succeeding term, as provided by § 177; *Vanfleet v. Phillips*, 11–558.

Offer to confess before action: effect and procedure. R. § 3403.

SEC. 2898. Before an action for the recovery of money is brought against any person, he may go before the clerk of the courts of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on such cause of action as provided for in the foregoing sections. Whereupon, if such person, having had the same notice as if he were defendant in an action, that the offer would be made, of its amount and of the time and place of making it, refuses to accept it, and should afterwards commence an action upon such cause and not recover more than the amount so offered to be confessed, he shall pay all the costs of action; and on the trial thereof, the offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff was entitled, nor be given in evidence.

Same after action brought. R. § 3404.

SEC. 2899. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had three days notice that the offer would be made, of its amount and of the time of making it, fails to attend, and on the trial does not recover more than was so offered to be confessed, such plaintiff shall pay the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or amount to which the plaintiff was entitled, nor be given in evidence upon trial.

This provision as to offering to confess does not contemplate admissions or confessions contained in the pleadings: *City of Davenport v. C., R. I. & P. R. Co.*, 38–633.

The offer need not include costs ac-

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cruing; the liability for costs would follow as an incident: *Manning v. Irish*, 47–650.

Where an offer to confess was made in a justice's court, and plaintiff recovered judgment for a larger amount than the amount of the offer, but on appeal judgment was given for an amount not greater than the offer; *held*, that plaintiff should pay the costs; that the provisions of this section have reference to the amount finally recovered, and that defendant was not obliged to proceed after judgment by the justice, according to the provisions of § 3593: *Watts v. Lambertson*, 39–272.

This section is applicable in cases of an appeal from the award of damages made by commissioners in an *ad quod damnum* proceeding, under §§ 1244, *et seq.*: *Harrison v. Iowa Midland R. Co.*, 36–323.

CHAPTER 11.

OF AN OFFER TO COMPROMISE.

By allowing judgment to be taken for a certain sum. R. § 3405.

SECTION 2900. The defendant in an action for the recovery of money only, may, at any time after service of notice and before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum of money, or to the effect therein specified with costs. If the plaintiff accept the offer, and gives notice thereof to the defendant or his attorney within five days after the offer is made, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and in either, case, the offer and acceptance shall be entered upon record and judgment shall be rendered by the court accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he cannot recover costs but shall pay the defendant's costs from the time of the offer.

An offer to confess, unless accepted, does not entitle plaintiff to judgment for the amount offered: *Holmes v. City of Hamburg*, 47–348.

It is error to allow the statement of an offer to compromise to be made to the jury: *McCormick v. C., R. I. & P. R. Co.*, 47–345.

An offer to pay a sum of money and costs if plaintiff will dismiss his action, is not within the provisions of this section: *Quinton v. Van Tuyl*, 30–554.

Same: conditional offer. R. § 3406.

SEC. 2901. In an action for the recovery of money only, the defendant, having answered, may serve upon the plaintiff or his attorney an offer in writing, that if he fails in his defense the amount of recovery shall be assessed as a specified sum. If the plaintiff accepts the offer, and gives notice thereof to the defendant or his attorney within five days after it was served, or within three days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff does not so accept the offer, he shall prove the amount to be recovered as if the offer had not been made, and

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the offer shall not be given in evidence or mentioned on the trial. And if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense, and in respect to the question of amount, to be taxed under the direction of the court.

No cause for continuance. K. § 3467.

SEC. 2902. The making of any offer pursuant to the provisions of this chapter, shall not be a cause for a continuance of an action or a postponement of a trial.

CHAPTER 12.

OF RECEIVERS.

When and how appointed. R. § 3119. C. '51, § 1656.

SECTION 2903. On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits, and such other proof as the court or judge deems proper, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned.

Under this section a receiver may be appointed in a law action, and in a proper case, before defendant is affected with notice of the pendency of the suit: *Jones v. Graves*, 20–596.

It is not necessary that it should conclusively appear that the party is entitled to recover, before a receiver can be appointed; a probable right only is required: *Des Moines Gas Co. v. West*, 44–23.

It is a legitimate and regular mode of proceeding for a court of equity, in an action for the settlement of accounts between partners, to appoint a receiver to take charge of the partnership assets, etc.: *Saylor v. Mockbie*, 9–209; but in such case it must first be made to appear that there is a partnership in existence, and a right in the party applying to share in the profits; a mere agreement for a partnership will not be sufficient: *Hobart v. Ballard*, 31–521; and in a particular case, *held*, that the facts were not sufficient to authorize the appointment of a receiver of partnership property on the petition of one of the partners: *Loomis v. McKenzie*, 31–425.

The appointment of a receiver to take charge of mortgaged premises, after final judgment of foreclosure, is allowable, if at all, only upon a strong showing: *Adair v. Wright*, 16–385.

The judge may appoint a receiver in vacation. Such appointment should not, except under peculiar circumstances, be made without notice to the opposite party, and where peculiar circumstances are relied on, they should be set forth: *French v. Gifford*, 30–148; and in general, notice to the opposite party is necessary: *Bisson v. Curry*, 35–72, 80.

The compensation allowed a receiver in a particular case, *held*, too great, and it is said that the rule that such compensation should be paid out of the fund of which the receiver has charge, applies only to cases where he is held to have been prop-

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erly appointed, and settles up the business given in his charge, and not to cases where his appointment is set aside before such final adjustment, as having been improperly made. In the latter case, the general rule as to costs (§ 2933) applies: *French v. Gifford*, 31–428.

Oath and bond of. R. § 3420. C. '51, § 1657.

SEC. 2904. Before entering upon the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be by him approved, in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties and that he will obey the orders of the court in respect thereto.

Power of. R. § 3421. C. '51, § 1658.

SEC. 2905. Subject to the control of the court or judge, a receiver has power to bring and defend actions, to take and keep possession of property, to collect debts, to receive the rents and profits of real property, and, generally, to do such acts in respect to the property committed to him as may be authorized.

Errors or irregular proceedings of a receiver must be corrected by the court having control of his action, and cannot be set up in an action brought by him: *Stewart v. Lay*, 45–604.

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

Judgments on motion in certain cases. R. § 3422.

SECTION 2906. Judgments or final orders may be obtained on motion by sureties against their principals, by sureties against their co-securities, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables, and other officers, for the receiving of money or property collected for them, and damages, and in all other cases specially authorized by statute.

The court, under this section, may order an attorney to pay to the client money collected for him in the course of professional employment, and disobedience to such order may be punished under § 218: *Cross v. Ackley*, 40–493.

So the court may make an order against a clerk to compel payment of money received by him on a judgment: *Elliott v. Jones*, 47–124.

Notice: service. R. § 3423.

SEC. 2907. Notice of such motion shall be served on the party against whom the judgment or order is sought at least ten days before the motion is made.

Form of. R. § 3424.

SEC. 2908. The notice shall state in plain and ordinary language the nature and grounds of the motion, and the day on which it will be made.

See *Mansfield v. Wilkerson*, 26–482.

When abandoned. R. § 3425.

SEC. 2909. Unless the motion is made and filed with the case on or before the day named in the notice, it shall be considered as abandoned.

No written pleadings. R. § 3426.

SEC. 2910. The motion shall be heard and determined without written pleadings, and judgment given according to law and the rules of equity.

See *Mansfield v. Wilkerson*, 26–182.

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CHAPTER 14.

OF MOTIONS AND ORDERS.

Motion defined. R. § 3428.

SECTION 2911. A motion is a written application for an order addressed to the court, or to a judge in vacation, by any party to a suit or proceeding, or by any one interested therein.

A decree or judgment is not an order within the meaning of the words here used: *Wagner v. Tice*, 36–599.

Several objects included. R. § 3438.

SEC. 2912. Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made.

Proof to sustain or resist: how taken. R. § 3440.

SEC. 2913. Testimony to sustain or resist a motion may be in the form of affidavits, or in such other form as the parties may agree on or the court or judge direct. If by affidavit, the person making the same may be required to appear by the court or judge and submit to a cross-examination.

Similar provision; see § 3695.

Notice of motion: how and when taken. R. § 3429.

SEC. 2914. A party who has appeared in an action, or who has been served with the original notice in such action in any manner provided by this code, shall take notice of all motions filed during term time upon the same being filed by the clerk and entered in the appearance docket. All motions filed in vacation shall be entered on such docket and served as herein required.

A party must take notice of motions filed during term. No other notice is necessary: *Wagner v. Tice*, 36–599.

Notice of a motion for change of venue, made in vacation (under § 2591), should be given as here required: *Preston v. Winter* 20–264; *Loomis v. McKenzie*, 31–425.

A motion to set aside a judgment rendered at a prior term, should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21–277.

Notice; what to state. R. § 3430.

SEC. 2915. When notice of a motion is required to be served, it shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, and the place where, and the day on which it is to be heard, and, if affidavits are to be used on the hearing, the notice shall be accompanied with copies thereof and shall be served such length of time before the hearing as the court or judge deems reasonable.

SERVICE.

Service: how made. R. § 3431.

SEC. 2916. Notices, and copies of motions mentioned in this chapter, may be served by any one who would be authorized to serve an original notice.

Same. R. § 3432.

SEC. 2917. The service shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record of such party.

Same. R. § 3433. C. '51, § 2496.

SEC. 2918. The service may be personal on such party or attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney by being left at his office with any person having the charge thereof.

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SEC. 2919. Any officer authorized to serve any notice, shall serve at once the same and make prompt return to the party who delivered the same to him, and a failure to do so shall be punished as a disobedience of the process of the court. Return. R. § 3435.

SEC. 2920. The return of proof of service must state the manner in which it was made. Same. R. § 3436. C. '51, § 2409.

SEC. 2921. When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving notices, and on whom they shall be served. When court may direct manner of service. R. § 3437.

ORDERS.

SEC. 2922. Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order. Order defined. R. § 3427.

There is a distinction between an order and a judgment. An order is not a judgment in such sense that the statute of limitations applies to it: *Smith v. Shawhan*, 37–533, 535.

SEC. 2923. For good cause shown, a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties. May issue in vacation. R. § 3795. C. '51 § 2210.

Where the sheriff published notice of a sale in another paper than that designated by plaintiff, *held*, that the judge in vacation, upon proper application, might make an order directing the publication to be made in the proper paper: *Herriman v. Moore*, 49–171.

SEC. 2924. Such order shall be in force only during the vacation in which it is granted and for the first two days of the ensuing term. How long in force. R. § 3796. C. '51, § 2211.

This section applies only to the order, contemplated in the two preceding sections, and not to a temporary injunction granted in vacation: *Curtis v. Crane*, 38–459; nor to an order in a proceeding by *habeas corpus*: *Shaw v. McHenry*, 52–182.

SEC. 2925. The judge granting it may require the filing of a bond as in case of an injunction, unless from the nature of the case such requirement would be clearly unnecessary and improper. Bond. R. § 3797. C. '51, § 2212.

SEC. 2926. Orders made out of court shall forthwith be filed with and entered by the clerk in the journal of the court in the same manner as orders made in the term. To be filed and entered of record. R. § 3439.

CHAPTER 15.

OF SECURITY FOR COSTS.

SECTION 2927. If a defendant shall, at any time before answering, make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state or a private or foreign corporation, before any other proceeding in the cause shall file in the clerk's office a bond, with a sufficient security to be approved by the clerk, for the payment of Must be given when. R. § § 3442, 3443.

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all costs which may accrue in the action in the court in which it is brought or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter.

This section applies to domestic as well as to foreign corporations: *D. M. V. Live Stock Ins. Co. v. Henderson*, 38–446.

These provisions are not applicable to proceedings in justices' courts: *Smith v. Humphrey*, 15–428.

Whether in an action on appeal from a justice's court, security for costs can be required, *quære*; but the motion therefor should at least be made at the earliest practicable moment: *Adae v. Zangs*, 41–536, 540.

The affidavit that the party has a good defense need not state the facts constituting such defense. The affidavits and counter affidavits provided for in the latter part of the section are as to the facts on which the motion is based, as the residence or non-residence of plaintiff: *D M. V. Live Stock Ins. Co. v. Henderson*, 38–446.

From the order dismissing the action for want of a bond under the following section, an appeal lies, but not from the order requiring a bond: *Ibid.*

Cause dismissed. R. § 3443.

SEC. 2928. An action in which a bond for costs is required by the last section, shall be dismissed if a bond is not given in such time as the court may allow.

When plaintiff becomes non-resident. R. § 3444.

SEC. 2929. If the plaintiff in an action, after its institution, becomes a non-resident of this state, he may be required to give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter.

Additional security. R. § 3445.

SEC. 2930. In an action in which a bond for costs has been given, the defendant may, at any time before trial, make a motion for additional security on the part of the plaintiff; and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or is not sufficient for the amount thereof, it may dismiss the action, unless, in a reasonable time to be fixed by the court, sufficient security is given by the plaintiff.

Attorney or officer cannot be. R. § 3446.

SEC. 2931. No attorney or other officer of the court shall be received as security in any proceeding in court.

This provision applies not only to the bond for costs, but to injunction, attachment and other bonds: *Massie v. Mann*, 17–131.

An attorney who tenders himself and is accepted as surety, cannot escape liability through the provisions of this section: *Wright v. Schmidt*, 47–233.

Judgment on bond rendered on motion. R. § 3447.

SEC. 2932. After final judgment has been rendered in an action in which security for costs has been given as required by this chapter, the court, on motion of the defendant or any other person having the right to such costs or any part thereof, may render judgment summarily, according to the chapter on summary proceedings, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff or so much thereof as may remain unpaid.

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CHAPTER 16.

OF COSTS.

SECTION 2933. Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of costs.

Recoverable by successful party. R. § 3449. C. 51, § 1811.

Where plaintiff recovers the whole of his claim, an apportionment of costs should not be made: *Drummond v. Irish*, 52–41; nor when recovery is had for less than his claim, if the claim is indivisible: *Hammond v. S. C. & P. R. Co.*, 49–450.

The provision as to apportionment of costs applies only to cases where the demand is composed of separate claims: *Upson v. Fuller*, 43–409.

In an action before a justice upon four separate items, plaintiff recovered judgment, but upon appeal he obtained a general verdict for a less amount; *held*, that the case was a proper one for apportionment of costs, and that § § 3592–3, as to costs in cases of appeal from justices did not prevent such apportionment: *Howder v. Orerholster*, 48–365.

Where defendent admitted plaintiff's claim, and the only contest was on a counter claim in which defendant was successful, *held*, that plaintiff should pay all costs, excepting those for commencing action and entering judgment for balance found due him: *Hull v. Clayton*, 42–526. See, also, *Judd v. Day*, 50–247.

Where plaintiff sought, by motion, to have a judgment which had been discharged restored, and defendant resisted, *held*, that upon the sustaining of the motion all of the costs should have been taxed against the defendant: *Kanke v. Herrum*, 48–276.

In an action for the recovery of certain articles of specific personal property, where plaintiff recovered as to certain articles and failed as to others, *held*, that an apportionment of costs, was proper: *Whitaker v. Sigler*, 44–419; so *held* also where plaintiff failed as to a part of his demand, and had increased the costs by bringing his action in equity, when, as to a part of his claims, an action might have been brought at law: *Hatch v. Judd*, 29–95.

Where a number of witnesses were summoned by plaintiff, and in attendance to testify touching an issue presented by the pleadings, and the defendant, just before the impaneling of a jury, withdrew his answer and thereby rendered the testimony of such witnesses unnecessary, *held*, that although defendant was successful in the suit, it was proper to tax up a portion of the costs against him: *Whitney v. Hackney*, 20–460.

The apportionment of costs in certain cases is in the discretionary power of the trial court, and that discretion will not be interfered with on appeal unless an improper exercise thereof is shown: *Bush v. Yeoman*, 30–479; and when the supreme court is called upon to review the action of the court below as to costs, the facts and circumstances attending the trial should be fully brought before it: *Arthur v. Funk*, 22–238.

The mere fact that a decree in favor of the defendants, directed that they pay the costs in the first instance, to be afterward recovered by them of the plaintiffs, *held*, not of itself sufficient to warrant a reversal, when the facts on which the court acted were not shown: *Scott v. Cole* 27–109.

The court may, in determining the matter of costs, consider affidavits and counter affidavits, or may require the affiants brought in and subjected to examination and cross-examination: *Packer v. Packer*, 24–20.

In an action for an infant by his next friend, such "next friend" is liable for costs: *Vance v. Fall*, 48–364.

Section applied: *Strayer v. Stone*, 47–333, 337.

As to the apportionment of costs of compensation of receiver, see *French v. Gifford*, 31–428, in notes to § 2903.

SEC. 2934. In actions where there are several plaintiffs or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues,

Where several parties and causes of action. R. § 3451.

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the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determinded in his favor.

This section is applicable to a case where plaintiff recovers on his demand, and defendant, in whole or in part, upon a counter claim: *Arthur v. Funk*, 22-238.

Uncollected costs: party making to pay. R. § 3452.

SEC. 2935. All costs accrued at the instance of the successful party which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party.

What included in. R. § 3453.

SEC. 2936. The necessary fees paid by the successful party in procuring copies of deeds, bonds, wills, or other records filed as a part of the testimony, shall be taxed in the bill of costs.

Same. R. § 3454.

SEC. 2937. Postage paid by the officers of the court, or by the parties in sending process, depositions, and other papers being part of the record by mail, shall be taxed in the bill of costs.

Cost: allowed party who confess matter which arose after action. R. § 3455.

SEC. 2938. When a pleading contains a defense stating matter which arose after the commencement of the action, whether such matter of defense be alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and thereupon shall be entitled to the costs of the cause as to the party pleading such matter up to the time of such pleading.

On dismissal of action or death of party. R. § 3456.

SEC. 2939. When a plaintiff dismisses the action or any part thereof, or suffers it to abate by the death of the defendant or other cause, or where the suit abates by the death of the plaintiff, and his representatives fail to revive the same according to law, judgment for costs may be rendered against such plaintiff or representative, and, if against a representative, shall be paid as other claims against the estate.

Between co-parties. R. § 3457.

SEC. 2940. The co-parties against whom judgment has been recovered, are entitled as between themselves to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the co-parties, and inured exclusively to his benefit.

When dismissed for want of jurisdiction. R. § 3458.

SEC. 2941. Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause.

Clerk to tax. R. § 3459.

SEC. 2942. The clerk shall tax in favor of the party recovering costs, the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the cause or may deem just to be taxed.

This section authorizes the taxation, in addition to compensation for the services specifically mentioned, of a further sum for other matters, when deemed just, and it is not limited in its application to the apportionment of costs provided for by §§ 2933, 2934. The cost of writing down the testimony by a person appointed by the court, on agreement of parties, may thus be taxed as costs: *Kuhnlee v. Ind. Dist. of Charles City*, 36-39.

But the section affords no warrant for taxing up as costs any fee of officers except it is allowed by law: *Sprout v. Kelly*, 37-44.

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When cause of action is assigned. R. § 3460.

SEC. 2943. In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party.

Re-taxation. R. § 3461. C. '51, § 1813.

SEC. 2944. Any person aggrieved by the taxation of a bill of costs, may, upon application, have the same re-taxed by the court, or by a referee appointed by the court, in which the application or proceeding was had, and in such re-taxation all errors shall be corrected; and if the party aggrieved shall have paid any unlawful charge by reason of the first taxation, the clerk shall pay the costs of re-taxation, and also to the party aggrieved the amount which he may have paid by reason of the allowing of such unlawful charges.

On appeals to supreme court. R. § 3462.

SEC. 2945. In cases of appeals from the district or circuit court, the clerk shall make a complete bill of costs showing the items which shall accompany the record, and a copy of the same shall be placed upon the execution docket of the court below.

Clerk of supreme court: duty of. R. § 3463.

SEC. 2946. When the costs accrued in the supreme court and the court below are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court and take his receipt for the same.

Duty of clerk below. R. § 3464.

SEC. 2947. On receiving such costs, the clerk of the court below shall charge himself with the money upon his execution docket, and pay it to the persons entitled to the same.

Interest from verdict to be computed. R. § 3466.

SEC. 2948. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk and added to the costs of the party entitled thereto.

ATTORNEYS' FEES.

[Eighteenth General Assembly, Chapter 185.]

Recovery of, limited.

SEC. 1. In any action upon a written contract for the payment of money, made after the taking effect of this act, in which it is an agreement to pay an attorney's or collection fee, no greater recovery for attorney's fee shall be had against the maker of such contract than is provided for in section two hereof, anything in said contract contained to the contrary notwithstanding.

Amount of, allowed.

SEC. 2. When judgment is recovered on a written contract, made after the taking effect of this act, containing an agreement to pay an attorney's fee, there shall be an attorney's fee allowed by the court, and taxed as a part of the costs, except as provided in sections three and four hereof; but in no case shall the amount allowed be greater than the following, to-wit: For the first two hundred dollars, or fraction thereof, ten per cent. of the amount found due. For the excess of two hundred dollars, up to five hundred dollars, five per cent. For the excess of five hundred dollars, up to one thousand dollars, three per cent. For all in excess of one thousand dollars, one per cent; *provided*, that the plaintiff shall be entitled to recover not to exceed one-half of the above collection fee in case payment is made after commencement of suit and before return day, and in case of payment before judgment and after return day, the plaintiff may recover not to exceed three-fourths

In case of payment before return day.

Before judgment.

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of the said amount and have judgment therefor; and no fee shall be allowed if suit has not been commenced or expense incurred.

Division of fee not allowed.

SEC. 3. Before any allowance of attorney's fee shall be made by the court, the court shall be fully satisfied by affidavit of the attorney engaged in the cause, which affidavit shall be filed with the original papers, that there has been and is no agreement expressed or implied, between the attorney and his client, or between the attorney and any other person, except a practicing attorney engaged with him as attorney in the cause, for any division or sharing of the fee to be taxed; and no fee shall be taxed except in favor of a regular attorney, and in compensation for services actually rendered in the cause.

Fee only taxed in favor of regular attorney.

Not allowed unless defendant had opportunity to pay.

SEC. 4. Before any attorney's fee shall be allowed by the court, the court shall be fully satisfied that the defendant, if he be a resident of the county and the suit is not aided by an attachment, had information of the whereabouts of the contract, and had a reasonable opportunity to pay the same before suit was brought. But this provision shall not apply when the contract is by its terms payable at a particular place, and the maker of the contract has not tendered the money due at the place named in the contract.

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TITLE XVIII.

OF ATTACHMENTS, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENTS AND GARNISHMENT.

Property attached. R. § 3172. C. 51, § 1846.

SECTION 2949. The plaintiff in a civil action may cause any property of the defendant which is not exempt from execution to be attached at the commencement or during the process of the proceeding, by pursuing the course hereinafter prescribed.

An attachment may issue in an equitable proceeding as well as in an action at law: *Baldwin v. Buchanan*, 10–277.

The action may be regarded as commenced, within the meaning of this section, as soon as the petition is filed, and before notice is placed in the hands of the sheriff, or served, as specified in § 2532: *Hagan v. Burch*, 8–309.

Where there are several defendants, the property of a non-resident defendant may be attached, it being shown that the resident defendants are insolvent: *Smith v. Coopers*, 9–376. Also, *held*, that in an action against several defendants, the plaintiff might have an attachment against any as to whom there were proper grounds therefor, without regard to whether there were any grounds as to the others or not, (overruling *Courrier v. Cleghorn*, 3 Gr. 523; *Ogilvie v. Washburn*, 4 Gr. 548): *Chittenden v. Hobbs*, 9–417.

Separate petition. R. § 3173. C. 51, § 1847.

SEC. 2950. If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto.

A separate petition need not be filed when an attachment is sought at the commencement of the action: *VanWinkle v. Stevens*, 9–264; *Shaffer v. Sundwall*, 33–579.

If the amount due is stated in the body of the petition, it need not be repeated in that part asking a judgment: *Shaffer v. Sundwall*, 33–579.

Petition must state. R. § 3174. C. 51, § 1848. 13 G. A. ch. 161, § 1.

SEC. 2951. The petition which asks an attachment must in all cases be sworn to. It must state:

1. That the defendant is a foreign corporation, or acting as such; or,
2. That he is a non-resident of the state; or,
3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts; or
4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,
5. That the defendant is about to dispose of his property with intent to defraud his creditors; or,

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6. That he has absconded, so that the ordinary process cannot be served upon him; or,

7. That he is about to remove permanently out of the county and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff; or,

8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff; or,

9. That he is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; or,

10. That he is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or,

11. That he has property or rights in action which he conceals; or,

12. That the debt is due for property obtained under false pretences.

The averments of the grounds of attachment are not a part of the petition in the sense that they can be demurred to. If they are insufficient, a motion to dissolve the attachment is the proper remedy; if inconsistent grounds are alleged, the plaintiff may, on motion, be required to elect between them: *Holloway v. Herryford*, 9–353.

Two or more causes for attachment may be stated, but they cannot be stated in the alternative: *Stacy v. Stichton*, 9–399; and see § 3021.

If the petition is actually sworn to, the fact that the jurat is not signed by the officer administering the oath, will not invalidate subsequent proceedings: *Cook v. Jenkins*, 30–452.

Where the cause of attachment, as alleged is insufficient, an amendment made, after the writ is issued, which does not show that the cause therein alleged, existed at the time of the issuance of the writ, will not cure the defect: *Bundy v. McKee*, 29–253.

The allegation that defendant is "not now an inhabitant of this state" is equivalent to saying that he is a "non-resident of the state": *Wiltse v. Stearns*, 13–282.

In asking a judgment under ¶ 3 it is not necessary to aver an intention to defraud creditors: *Branch, etc., Bank v. White*, 12–141. In such case no actual fraud need exist (explaining previous cases under Code of '51): *Mingus v. McLeod*, 25–452.

The removal contemplated in ¶ 3 is a permanent one. That defendant is about to remove property for a temporary purpose, is not ground for attachment: *Warder v. Thelkeld*, 52–134.

The allegation that defendant has disposed of his property, in part, "with intent to delay and hinder creditors, and prevent and defeat them from the collection of their claims," is not sufficient to bring a cause within ¶ 4; an intention to defraud must be alleged: *Torbert v. Tracy*, 12–20.

That defendant is absenting himself from the state, does not alone constitute an absconding: *The State v. Morris*, 50–203.

Issued and served on Sunday; when. 10 G. A. ch. 14.

SEC. 2952. Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day.

On contract petition must state. R. § 3175. C. '51, § 1849.

SEC. 2953. If the plaintiff's demand is founded on contract, the petition must state that something is due, and, as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment.

A writ of attachment should be quashed when the petition therefor does not state that something is due, and as nearly as practicable the amount due: *Blakley v. Bird*, 12–601, *Kelley v. Donnelly*, 29–70.

When the plaintiff's claim is not founded on contract, he is not required to state in his petition the amount due: *Sherrill v. Fay*, 14–292; but if founded on contract and not in tort, this section applies, although the damages are not settled or liquidated by such contract: *Lord v. Gaddis*, 6–57.

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That the amount sworn to as due is unconscionable and unreasonable, is no ground for dissolving an attachment, although it may render plaintiff liable on his attachment bond: *Ibid.*

This section has no application to actions grounded upon tort. It is error to charge that in such cases an attachment is wrongfully sued out unless the plaintiff recovers more than five dollars (overruling *Gaddis v. Lord*, 10–141): *Weller v. Hawes*, 49–45; and see notes to § 2961.

An attachment in justice's court cannot be granted for less than $5.00. See § 3606.

See, as applicable to this section, notes to § 2955.

SEC. 2954. The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent. greater in value than that amount. Amount of property attached. R. § 3176. C. '51, § 1850.

SEC. 2955. If the demand is not founded on contract, the original petition must be presented to some judge of the supreme, district, or circuit court, who shall make an allowance thereon of the amount in value of the property that may be attached. The provisions of this section apply only to cases in the district and circuit court. Not on contract; judge to allow. R. § 3177. C. '51, § 1851. 13 G. A. ch. 161 § 2.

An action on a penal bond, *held*, to be an action upon contract, and not within this section. The distinction intended is between actions *ex contractu* and those *ex delicto;* and if on contract, they fall under § 2953, although the damages are not settled or liquidated by the contract itself: *Lord v. Gaddis*, 6–57; and see *Johnson v. Butler*, 2–535.

This section does not refer to actions brought to recover a certain liquidated sum, as a forfeiture provided by a penal statute or ordinance, the remedy in such case being by action of debt: *Town of Decorah v. Dunston*, 34–360.

An action for damages for false representations as to the soundness of sheep sold, *held*, to be an action founded on contract, and to come within the provision of § 2953: *Swan v. Smith*, 26–87.

FOR DEBTS NOT DUE.

SEC. 2956. The property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the petition, in addition to that fact, states: What petition must state. R. § 3178. C. '51, § 1852.

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or

2. That he is about to remove from the state and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted; or,

3. That the defendant has disposed of his property in whole or in part with intent to defraud his creditors; or,

4. That the debt was incurred for property obtained under false pretenses.

In an action commenced by attachment under this section, the defendant cannot set up the defense that the debt is not due: *Churchill v. Fullam*, 8–45.

That defendant refused to make any arrangements for securing, etc., as specified in ¶ 2, need only be averred in connection with the allegation that he is about to remove, etc., and has no application to the preceding subdivision in relation to cases where defendant is about to dispose of his property, etc.? *Danforth v. Carter*, 1–546.

A disposition or removal of property must be with intent to defraud, in order to bring the case within this section: *Pride v. Wormwood*, 27–257.

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When to plead in such case. R. § 3179.

SEC. 2957. If the debt or demand on which the attachment suit is brought is not due at the time of the service of the attachment, the defendant is not required to file any pleadings until the maturity of such debt or demand; but he may, in his discretion, do so and go to trial as early as the cause is reached.

Judgment in. R. § 3180.

SEC. 2958. And no final judgment shall be rendered upon such attachment unless the party consents as in the last section, until the debt or demand upon which it is based becomes due. But property of perishable nature may be sold as in other attachment cases.

BOND.

Must be first given: amount. R. § 3181. C. '51, § 1853.

SEC. 2959. In all cases, before an attachment can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars in a court of record, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment.

[The printed code has "it" instead of "an attachment," in the first line, as in the original.]

The bond is to be double the value of the property which the sheriff may attach, or three times the amount sworn to by plaintiff. It is not sufficient that it be double the amount sworn to, or double the value of the property which is actually attached: *Churchill v. Fulliam*, 8–45; *Hamill v. Phenicie*, 9–525; *VanWinkle v. Stevens*, 9–264; *Hamble v. Owen*, 20–70. A bond signed by both principal and sureties in their partnership name, is not *prima facie* insufficient: *Danforth v. Carter*, 1–546; *Churchill v. Fulliam*, 8–45.

Additional security. R. § 3182.

SEC. 2960. The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated and restitution directed of any property taken under it, unless, in a reasonable time to be fixed by the court or judge, security is given by the plaintiff.

Action on or by way of counter claim. R. § 3183. C. '51, § 1854.

SEC. 2961. In an action on such bond, the plaintiff therein may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond.

[The word "fixed" in the fifth line, as in the original, is "filed" in the printed code.]

An action for wrongfully suing out an attachment, should be brought on the bond: *Abbott v. Whipple*, 4 Gr. 320.

An action might be maintained independently of the statute against a party who, maliciously and without probable cause, should sue out a writ of attachment; but in the absence of proof of malice and want of probable cause, the only remedy is on the bond: *Tallant v. Burlington Gas Light Co.* 36–262.

The question in an action on the

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bond, for improperly suing out the writ, is not whether the facts alleged as grounds for attachment were actully true, but whether plaintiff, exercising that degree of caution that a reasonably prudent man should have exercised, had good cause to believe that they were true: *Winchester v. Cox*, 4 G. 121; *Mahnke v. Damen*, 3-107; *Benton v. Knapp*, 14-196.

Defendant may show as a defense, either that he had good cause to believe the grounds stated to be true, or that it was true in fact, irrespective of his grounds of belief: *Vorse v. Phillips*, 37-428.

Where the ground alleged for an attachment was that defendant was about to dispose of his property with intent to defraud his creditors, *held*, that on the trial of a counter claim for damages for the wrongful suing out of such attachment, defendant could not testify what his intention in disposing of his property really was, the true question being whether plaintiff had *reasonable cause* to believe that defendant's intention was fraudulent: *Selz v. Belden*, 48-451.

The judgment in an attachment suit may be introduced in evidence in an action on the bond, and is conclusive as to the indebtedness between the parties, but not as to the plaintiff's belief in regard to the truth of the matters stated in his petition: *Giddis v. Lord*, 10-141; *Rarer v. Webster*, 3-502.

To entitle a party to exemplary damages, it must appear that the attaching plaintiff procured the attachment without reasonable grounds to believe the truth of the matter stated in his application, and with the intention, design, or set purpose of injuring the defendant therein: *Ibid.* (both cases.)

A failure to recover at all, or a recovery of less than $5.00, is conclusive that the attachment was wrongfully sued out: *Gaddis v. Lord*, 10-141. See also notes to § 2953.

Dismissal of suit by plaintiff does not of itself entitle defendant to nominal damages on the bond: *Nockles v. Eggspieler*, 47-400.

In an action on the bond, either original or by way of counter claim, the party, if entitled to recover at all, may recover all expenses incurred in making defense to the attachment proceeding: *Vorse v. Phillips*, 37-428.

Where the suing out of an attachment was not wilful and malicious, the damages recoverable are confined to actual compensation for damages immediately consequent upon the wrongful act, and under Rev. § 3183, which did not authorize the recovery of attorney's fees, *held*, that defendant could not recover such fees for defending an attachment suit, or prosecuting an action on the bond: *Plumb v. Woodmansee*, 34-116.

The mis-print of "filed" for "fixed" is referred to and recognized as an error in *Selz v. Belden*, 48-451, and *Weller v. Hawes*, 49-45.

The jury have nothing to do with fixing the amount of the attorney's fee. The better practice would be not to introduce any evidence as to such fee during the trial, but if, in answer to a special interrogatory, the jury find that the judgment was wrongfully sued out, then evidence as to the amount of the fee should be introduced to the court and a finding made, and the amount so fixed should then be added to or deducted from the amount found by the jury as the case may require: *Selz v. Belden*, 48-451.

Attorney's fees constitute a part of the costs, and the legislature may authorize the court to fix the amount, without submitting the question to the jury: *Weller v. Hawes*, 49-45.

MODE OF ATTACHMENT.

SEC. 2962. The clerk shall issue an attachment, directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated. To whom directed. R. § 3185. C. 51, § 1856.

The cause of attachment need not be stated in the writ: *Wadsworth v. Cheeney*, 13-576.

It is not essential that the writ recite the fact that a bond has been filed: *Hays v. Gorby*, 3-203 (commenting upon *Barber v. Swan*, 4 Gr. 352); *Ellsworth v. Moore*, 5-486.

Prior to the enactment of § 3021, which is broader than Rev. § 3142, it was held that the seal of the court was essential to the writ of attachment, and the absence of such seal could not be supplied by way of amendment: *Foss v. Issett*, 4 Gr. 76; and that affixing the seal of the

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wrong court was equivalent to omitting the seal entirely: *Shaffer v. Sundwall*, 33–579. But since the enactment of that section, it is held that such defect in the writ may be amended: *Murdough v. McPherrin*, 49–479.

An attaching creditor acquires no greater right in the property attached than was held by the defendant at time of attachment: *Manny v. Adams*, 32–165; *Harshberger v. Harshberger*, 26–503.

Successive writs may be issued in the same county until the proper amount of property is attached: *Hamill v. Phenicie*, 9–525.

More than one attachment may issue and to several counties at same time. R. § 3184. C. '51, §§ 1855, 1858.

SEC. 2963. Attachments may be issued from courts of record to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court; and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus.

Property attached: officer's duty. R. § 3186. C. '51, § 1857.

SEC. 2964. The sheriff shall in all cases attach the amount of property directed if sufficient, not exempt from execution, found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable.

An attachment levy made by a sheriff outside of his county, or secured by fraud or violence, is void, and may be dissolved by motion: *Pomroy v. Parmlee*, 9–140.

Appraisement of the property levied on is not necessary to make the levy good; it is only required where a delivery bond is given (see §2997): *Smith v. Coopers*, 9–376.

Several attachments. R. § 3187.

SEC. 2965. Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff.

May follow to another county; when. R. § 3188.

SEC. 2966. If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after removal.

The removal of the *debtor* is entirely immaterial: *Budd v. Durall*, 36–315.

What may be attached and how done. R. § 3194. C. '51, §§ 1859–60.

SEC. 2967. Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows:

1. By giving the defendant in the action, if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of attachment;

2. If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found;

3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached.

4. Debts due the defendant, or property of his held by third persons and which cannot be found, or the title to which is doubtful, are attached by garnishment thereof.

The provision as to notice applies only to cases of attached property, and not to cases of garnishment: *Phillips v. Germon*, 43–101.

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To constitute a valid levy, even between the parties, the officer should do that which would amount to a change of possession, or something equivalent to a claim of d minion coupled with the power to exercise it: *Crawford v. Newell*, 23–453. But there may be a valid attachment levy, as between the parties at least, upon property not capable of manual delivery, which is left in charge of defendant: *Nockles v. Eggspieler*, 47–400

The proceedings specified in ¶ 3 create a lien on the stock and prevent a transfer thereof: *Mooar v. Walker*, 46–164.

The provisions of ¶ 4 are applicable only to personal property, and not to cases where it is sought to reach the equitable interest of real property held by third parties: *Seymour v. Kramer*, 5–285.

An attachment by garnishment creates no lien on the property, but the remedy is of a personal nature against the garnishee: *Mooar v. Walker*, 46–164.

Judgments owned by defendant are *debts*, and can only be attached by garnishment, a though under § 3046 they may be levied on and sold under execution: *Ochiltree v. M. I. & N. R. Co*, 49–150.

From the provisions of ¶ 4 it appears that garnishment is simply a mode of attachment: *Woodward v. Adams*, 9–474.

Defendant examined on oath before judge. R. § 3189. 13 G. A. ch. 1.7, § 21.

SEC. 2968. Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or the officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and, it being shown to the judge of any court by affidavit, that the defendant has property within the state not exempt, the defendant may be required by such judge to attend before him, or before the court in which the action is pending, and give information on oath respecting his property.

When property bound. R. § 3215. C. '51, § 1874.

SEC. 2969. Property attached otherwise than by garnishment, is bound thereby from the time of the service of the attachment only.

The actual service of an attachment upon property creates a real lien, which nothing subsequent can destroy, except the dissolution of the attachment. The legislature may suspend the enforcement of such liens, but cannot destroy them: *Hannah v. Felt*, 15–141; and the death of the defendant will not destroy a prior acquired lien: *Lord v. Allen*, 34–281.

The lien of an attachment does not take priority over an unrecorded instrument: *Savery v. Browning*, 18–246.

Receiver appointed: when and how. R. § 3216.

SEC. 2970. The court before whom the action is pending, or the judge thereof in vacation, may, at any time, appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage, and control the same, and pay over the proceeds according to the nature of the property and the exigency of the case.

Money attached to be paid clerk. R. § 3217. C. '51, § § 1875, 1882.

SEC. 2971. All money attached by the sheriff, or coming into his hands by virtue of the attachment, shall forthwith be paid over to the clerk to be by him retained till the further action of the court.

Other property. R. § 3218.

SEC. 2972. The sheriff shall make such disposition of other attached property as may be directed by the court or judge, and where there is no direction upon the subject he shall safely keep the property subject to the order of the court.

PARTNERSHIP PROPERTY.

Inventory and appraisement. R. § 3190.

SEC. 2973. In executing an attachment against a person who owns property jointly or in common with another, or who is a member of a partnership, the officer may take possession of such

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property so owned jointly, in common, or in partnership, sufficiently to enable him to inventory and appraise the same, and for that purpose shall call to his assistance three disinterested persons; which inventory and appraisement shall be returned by the officer with the attachment, and such return shall state who claims to own such property.

Lien of plaintiff enforced by equitable proceedings. R. § § 3191-2.

SEC. 2974. The plaintiff shall, from the time such property is taken possession of by the officer, have a lien on the interest of the defendant therein, and may, either before or after he obtains judgment in the action in which the attachment issued, commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances and conditions provided in chapter twelve, of title seventeen.

By the garnishment of a partner, a creditor cannot acquire a greater interest in the property of the debtor than as provided in this section. In case of an attachment of partnership property, it is only the defendant's interest in the funds garnished which can be reached: *Cox v. Russel*, 44–556.

GARNISHMENT.

How effected. R. § 3195. C. '51. § 1861.

SEC. 2975. The attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due by him to the defendant or thereafter to become due, and that he must retain possession of all property of the said defendant then, or thereafter, being in his custody or under his control, in order that the same may be dealt with according to law, and the sheriff shall summon such persons as garnishees as the plaintiff may direct. But no judgment shall be entered in any garnishment proceedings condemning the property or debt in the hands of the garnishee until the principal defendant shall have had ten days' notice of such proceedings. If the case is pending in the district or circuit court, the notice shall be served in the same manner as original notices are required to be served. If the case is pending before a justice of the peace, the defendant shall have at least five days' personal notice of such proceeding, if he be a resident of the county; otherwise service of such notice may be made by posting the same in three public places in the township in the manner provided by sections three thousand six hundred and nine and three thousand six hundred and ten of the code. The fact that the defendant is not a resident of the county may be shown by the affidavit of the plaintiff or his attorney, filed with the justice before such notices are posted.

[As amended by 18th G. A., ch. 58, adding the latter part of the section commencing with the words, "But no judgment," etc., in the tenth line.]

The garnishee process only reaches the right which the defendant actually has at the time, in the property thereby sought to be attached: *Thomas v. Hillhouse*, 17–67.

The liability of a garnishee is measured by his obligation to the execution defendant at the time of service of garnishment: *Huntington v. Risdon*, 43–517.

To what extent the property of the debtor must be in the possession

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and control of the garnishee to render him liable, discussed: *First National Bank of Davenport v. D. & St. P. R. Co.*, 45–120.

A mortgagee of personal property not in his possession is not liable on garnishment for such property, or the amount by which the value thereof exceeds his claim: *Curtis v. Raymond*, 29–52; *First National Bank v. Perry*, 29–266. But the mortgagee in possession may be garnisheed for the surplus remaining in his hands: *Doane v. Garretson*, 24–351; and see notes to § 1927.

The effect of the garnishment is to stop the payment of any debt, but it does not prevent any transaction which does not grow out of the relation of debtor and creditor, as a sale of property to the garnishee for cash in hand, or a loan to him by the execution debtor, for a limited time, of a horse, etc.: *Victor v. Fire Ins. Co.*, 33–210, 214.

The garnishee is not released from his duty to retain in his posession property, etc., of defendant, by a failure to tender his fees in such manner as to require his attendance at court. He may, by proper notice and tender of fees, be required, at a subsequent term, to answer under the original notice of garnishment: *Westphal v. Clark*, 42–371.

No notice of garnishment, made in an action by attachment, need be given to defendant in such action. Sec. 2967, ¶ 1, applies only to cases of attachment of property: *Phillips v. Germon*, 43–101.

It is only when the sheriff has a writ of attachment, that he is authorized to notify a debtor, or person holding property, that he is garnished: *VanFossen v. Anderson*, 8–251. Garnishment is merely a mode of attachment; see section § 2967, ¶ 4 and notes.

The garnishment process may be served before service of notice of action by attachment: *Phillips v. Germon*, 43–101.

Though the notice to a garnishee to appear and answer specifies the wrong court, yet if answers are taken by the sheriff under execution from the proper court, and such answers duly returned, that court acquires jurisdiction to render judgment against the garnishee: *Fanning v. Minn. R. Co.*, 37–379.

Where a debtor is garnished in a suit against a creditor, but no judgment has been rendered in the proceeding, he may, in defense to an action by an assignee of his creditor's claim, to whom such claim has been assigned after the garnishment, plead the pendency of such proceeding as matter in abatement, but not in bar of the action: *Clise v. Freeborne*, 21–280.

SEC. 2976. A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment-debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk and by him minuted as an assignment on the margin of the judgment docket, and also an executor for money due from the decedent to the defendant may be garnished, but a municipal or political corporation shall not be garnished.

Sheriff garnished for money in his hands. R. § 3196. C. '51, § 1862.

A sheriff may, at the suit of the creditor of the mortgagor, be garnished for any balance of proceeds of the sale of property under a chattel mortgage, put in his hands for collection, remaining after satisfying the mortgage: *Hoffman v. Wetherell*, 42–89.

The exception of municipal corporations is the only exception from liability to garnishment: *Caldwell v. Stewart*, 30–379.

Corporations generally may be garnished. So *held* of a railroad company: *Taylor v. B. & M. R. Co.*, 5–114.

Under the Code of 1851 (§ 1862 of which did not contain the last clause of this section), *held*, that a corporation, whether public or private, might be garnished, and that even if a municipal corporation was exempt, it was a privilege which it alone could assert, and which could not be interposed by the debtor: *Wales v. City of Muscatine*, 4–302; *Burton v. Dist. T'p of Warren*, 11–166.

The municipal corporation itself may waive the exemption in its favor; and where the objection was not raised until upon a second trial, when the court first instructed in regard thereto, *held*, that the right to the exemption had been waived and could not then be raised: *Clapp v. Walker*, 25–315.

The provision that a municipal corporation should not be garnished, applies to all cases and without condition: *Jenks v. Osceola T'p*, 45–554.

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Fund in court. R. § 3197.

SEC. 2977. Where the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court a copy thereof, with notice, specifying the fund.

Money in the hands of an officer of the court may be attached as here provided. So *held*, where the money of a debtor, being taken under a search warrant sworn out by another person, and being in the hands of a justice, was attached for a debt due his creditor: *Patterson v. Pratt*, 19–358

Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21–535.

Death of garnishee. R. § 3198.

SEC. 2978. If the garnishee die after he has been summoned by garnishment and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives.

When garnishee to appear at court. R. § 3199. C. '51, § 1863.

SEC. 2979. Unless exempted as provided in the next section, the notice must also require the garnishee to appear on the first day of the next term of the court wherein the main cause is pending, or on the day fixed for trial if in a justice's court, and answer such interrogatories as may be then propounded to him, or that he will be liable to pay the entire judgment which the plaintiff eventually obtains against the defendant.

The creditor has the right to examine the garnishee personally, and where the garnishee did not appear, but filed a sworn answer, *held*, that such answer was properly stricken from the files and judgment rendered against him on default: *Penn v. Pelan*, 52–535.

Sheriff may take answers of garnishee. R. §§ 3200–1. C. '51, §§ 1864–5.

SEC. 2980. When the plaintiff, in writing, directs the sheriff to take the answer of the garnishee, the sheriff shall put to the garnishee the following questions:

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money or property which is not yet due? If so, state the particulars;

2. Have you in your possession or under your control, any property, rights, or credits of the said defendants? If so, what is the value of the same, and state all particulars;

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights, or credits belonging to him and now in the possession or under the control of others? If so, state the particulars: and append the examination to his return.

It is only when the sheriff has a writ of attachment that he is authorized to take answers as here provided: *VanFossen v. Anderson*, 8–251.

Whether a garnishee is required to set up any defense that the debtor may have, as that the property or debt is exempt, or should notify the debtor of the fact of garnishment, in order that the latter may set up such defense, *quære: Moore v. C., R. I. & P. R. Co.*, 43–385; *Leiber v. U. P. R. Co.*, 49–688.

MODE.

When garnishee refuses to answer. R. § 3202. C. '51, § 1866.

SEC. 2981. If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer on the first day of the next term of court, or on the day fixed for trial as above provided, and so he may be required in any event, if the plaintiff so notify him.

The questions need not be propounded or filed until the garnishee has appeared to answer: *Parmenter v. Chillis*, 12–22.

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Examination in court. R. § 3203. C. '51, § 1867.

SEC. 2982. The questions propounded to the garnishee in court, may be such as are above prescribed to be asked by the sheriff, and such others as the court may think proper and right.

When garnishee entitled to fees. R. § 3204. C. '51, § 1868.

SEC. 2983. Where the garnishee is required to appear at court, unless he has refused to answer as contemplated above, he is entitled to the pay and mileage of a witness, and may, in like manner, require payment beforehand in order to be made liable for non-attendance.

If his fees are not tendered, the garnishee may refuse to attend, but will not be released from his obligation to retain any property belonging to, or money due, defendant and his attendance may be secured at a subsequent term by proper summons and tender of fees: *Westphal v. Clark*, 42–371.

The power to compel the attendance of a garnishee is not limited to seventy miles, as is provided by § 3673 in case of witnesses: *Ibid.*

Presumption on failure to attend. R. § 3205. C. '51, § 1869.

SEC. 2984. If, when duly summoned, and his fees tendered when demanded, he fail to appear and answer the interrogatories propounded to him without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and shall be dealt with accordingly.

May show cause. R. § 3206. C. '51, § 1870.

SEC. 2985. But, for a mere failure to appear, he is not liable to pay the amount of the plaintiff's judgment, until he has had an opportunity to show cause against the issuing of an execution.

The plaintiff is not required to file a petition when calling upon the garnishee to show cause. The latter is entitled to an opportunity to do so, and this is given by serving him with notice to appear for that purpose. The judgment against him on default is not final and he may answer to the original notice of garnishment. Such answer to the merits should be presented with his excuse for default, but is not to be considered until the excuse is held sufficient and the default set aside: *Fifield v. Wood*, 9–249.

In a showing of cause against the issuance of execution, the garnishee should not only rebut the presumption of indebtedness, but show sufficient excuse for default: *Parmenter v. Childs*, 12–22.

Where the garnishee has appeared, but fails to answer in accordance with an order of court, judgment on default may be rendered against him under § 2869, and such default can only be set aside as provided in § 2871: *Scamahorn v. Scott*, 42–529.

As long as the judgment against the garnishee stands as only for failure to appear, and until he is called on to show cause, he may protect himself from liability by showing an assignment of the debt from the judgment debtor to another, and the judgment in garnishment will not bar an action against the garnishee by the assignee of the claim: *McPhail v. Hyatt*, 29–137.

May pay over money or property in his hands. R. § 3207. C. '51, § 1871.

SEC. 2986. A garnishee may, at any time after answer, exonerate himself from further responsibility, by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached, all of which may afterwards be treated as though attached in the usual manner.

This section does not authorize the discharge of a judgment against a garnishee by the payment of a sum less than the amount of such judgment, even though judgment be rendered for an amount greater than is actually due: *B. & M.R.R.Co. v. Hall*, 37–620.

A garnishee is not liable for interest unless it be shown that he used the money for which he is liable, instead of setting it apart as a separate fund; and this rule is not changed by the fact that he might, under this section, pay over the money to the sheriff: *Moore v. Lowry*, 25–336.

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A failure to tender or bring into court money or property in his hands liable to garnishment, does not subject the garnishee to costs: *Randolph v. Heaslip*, 11-37.

Answer controverted. R. § 3208. C. '51, § 1872.

SEC. 2987. When the garnishee has answered the interrogatories propounded to him, the plaintiff may controvert the same by pleading by him filed, and issue may be joined and the same tried in the usual manner. The answer of the garnishee shall be competent testimony on such trial.

The garnishee is bound to take notice of proceedings subsequent to his answer until he is discharged. He may move for a discharge upon filing his answer: *Chase v. Foster*, 9-429.

While the answer of the garnishee is competent evidence on the trial, *Fairfield v. McNany*, 37-75, the credit and weight to which it is entitled should be left to the jury: *Drake v. Buck*, 35-472.

The issue raised on the answer of garnishee must be tried in the court wherein the original action is pending, and the venue cannot be changed to the county of the garnishee's residence under § 2589: *Miller v. Mason*, 51-239.

The defendant in the original action may set up by way of objection to a judgment against the garnishee that the indebtedness is exempt from execution against the debtor, or that the judgment against the debtor is satisfied, etc. But he cannot interpose an objection which is personal to the garnishee: *Wales v. City of Muscatine*, 4-302.

A justice has jurisdiction in proceedings against a garnishee, although the judgment on which garnishment issues be for more than one hundred dollars: *Gillette v. Richards*, 46-652.

A pleading controverting the answer of the garnishee need not be sworn to, see § 2675.

As to proceedings by garnishment on execution, see § 3051.

JUDGMENT.

May be entered. R. § 3209. C. '51, § 1873.

SEC. 2988. If, in any of the above methods, it is made to appear that the garnishee was indebted to the defendant, or had any of the defendant's property in his hands, either at the time of being served with the garnishee notice aforesaid or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him, to the full amount of that judgment, or to the amount of such indebtedness and of the property so held by him; and a conditional judgment shall be entered up against him accordingly, unless he prefers paying or delivering the same to the sheriff as above provided.

Primarily the garnishee is taken to be an innocent person, and to stand indifferent between the parties, and if no issue is raised on his answer, it is the sole test of his indebtedness. His rights are to be carefully protected and he is not to be placed in a situation where he will be compelled to pay the debt twice: *Walters v. Washington Life Ins. Co.*, 1-404; and he is in no case to be placed in a worse condition than he would be if the defendant himself was enforcing his claim: *Williams v. Housel*, 2-154; *Smith v. Clark*, 9-241; *Burton v. Dist. Tp. of Warren*, 11-166.

To charge a garnishee on his answer alone, there must be in it a clear admission of a debt due to, or the possession of attachable property of the defendant. If there is a reasonable doubt whether he is chargeable, he is entitled to judgment in his favor: *Morse v. Marshall*, 22-290; *Church v. Simpson*, 25-408; but, although the garnishee deny generally having property of, or being indebted to, the defendant, if it appear from the other statements of his answer that he is so indebted, judgment should be rendered against him: *Bebb v. Preston*, 1-460.

The judgment rendered against the garnishee should not exceed the amount of the judgment against the original debtor and the costs of the proceeding in which such judgment was obtained: *Timmons v. Johnson*, 15-23.

Without a recovery against the

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debtor there can be no judgment against the garnishee: *Barton v. Smith*, 7–85; and a judgment against a garnishee will be reversed on appeal where it does not appear from the record that judgment was rendered against the defendant in the main action: *Bean v. Barney*, 10–493; *Toll v. Knight*, 15–370.

The court cannot render a contingent or alternative judgment against the garnishee: *Battell v. Lowery*, 46–49.

Where the garnishee is found indebted to defendant on a contract payable in property other than money, the judgment should be conditioned that it may be discharged in property, or, on failure thereof, become absolute, and a general execution issue: *Stadler v. Parmelee*, 14–175; *Ransom v. Stanberry*, 22–334.

Where it appears that the garnishee has a lien upon property of defendant in his hands, the judgment should be conditioned that it be discharged upon the property being turned over to the sheriff, the proceeds to be applied to the original judgment, after satisfying the lien of the garnisnee: *Hawthorn v. Unthank*, 52–507.

The legal effect of a judgment against a garnishee is to satisfy, to the extent of such judgment, the indebtedness between such garnishee and the principal debtor: *Stadler v. Parmlee*, 14–175.

SEC. 2989. If the debt of the garnishee to the defendant is not due, execution shall be suspended until its maturity. When debt not due. R. § 3210.

SEC. 2990. The garnishee shall not be made liable on a debt due by negotiable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. Negotiable paper. R. § 3211.

In a case such as here contemplated, the court may order that plaintiff have judgment when the provisions of this section are complied with. Such order will not be a final judgment upon which execution may issue: *Seals v. Wright*, 37–171.

These provisions may be taken advantage of by the garnishee, but if waived by him the failure to comply with them does not effect the power of the court to render judgment: *McPhail v. Hyatt*, 29–137. But though the garnishee fail to demand indemnity and allow judgment to go against him, such judgment will be no defense against a holder of the paper, who acquired it before the garnishment: *Yocum v. White*, 36–288.

Under Rev. § 3211, which contained the clause "or assignable," after "negotiable," *held*, that a judgment on a mortgage alone could not be rendered unless the mortgage was delivered or the garnishee exonerated: *Timmons v. Johnson*, 15–23; also, that negotiable paper assigned after maturity was not such paper as was here contemplated, and that the garnishee would be liable thereon without indemnity being given: *McCoid v. Beatty*, 12–299; *Stevens v. Pugh*, 12–430; but, *contra*, see *Hughes v. Monty*, 24–499.

SEC. 2991. The judgment in the garnishment suit condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant. Judgment conclusive. R. § 3212.

[The word "in" in the first line, as in the original, is "of" in the printed code.]

An assignee of non-negotiable paper must give the maker notice of the assignment, before such maker is required to answer as garnishee in a suit against the assignor, or at least before judgment is rendered against such garnishee, or he will be barred by such judgment: *Walters v. Washington Ins. Co.*, 1–404: *McCoid v. Beatty*, 12–299.

If the paper is assigned after the garnishment of the maker, he may be held liable, notwithstanding he knew of the assignment before answering: *Stevens v. Pugh*, 12–430; and see note to § 2985.

If the debtor brings a suit against the garnishee, in this state, for a debt due him, the latter can successfully defend by setting up the fact that he has been garnished upon such debt in another state: *Moore v. C. R. I. & P. R. Co.*, 43–385; *Leiber v. U. P. R. Co.*, 49–688.

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Docket of original case shall contain. R. § 3213.

SEC. 2992. The docketing of the original case shall contain a statement of all the garnishments therein, and when judgment is rendered against a garnishee, the same shall distinctly refer to the the original judgment.

It seems that the original judgment is sufficiently referred to if the record entry of the judgment against the garnishee contains the title of the cause in which such original judgment was rendered: *Boyd v. Rutledge*, 25–271.

Appeal. R. § 3214.

SEC. 2993. An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or an intervenor claiming the property or money.

If the garnishee allows judgment to go against him for an amount in excess of his indebtedness, and does not appeal therefrom, he cannot be relieved, even on payment of the amount actually due. Sec. 2986 does not apply in such case: *B. & M. R. R. Co. v. Hall*, 37–620.

A judgment against a garnishee will not be reviewed on appeal when the appellant has taken no exceptions to any ruling of the court, or submitted any motion to set aside the judgment: *Eason v. Gester*, 31–475; *Robison v. Saunders*, 14–539.

RELEASE OF PROPERTY.

By defendant executing a bond. R. § 3191, 3192, 4129. C. '51, § 1876.

SEC. 2994. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties to be approved by the officer having the attachment, or, after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action.

[The word "sureties" in the second line, as in the original, is "securities" in the printed code].

Property released by the bond as here provided, may be levied on under other attachments. The lien of the attachment is discharged by the giving of the bond: *Jones v. Peasley*, 3 Gr. 52.

The bond here required being executed to the sheriff instead of the plaintiff, *held*, that the plaintiff might, nevertheless, sue thereon: *Moorman v. Collier*, 32–138; also, *held*, that it was not essential that the defendant should sign the bond: *Selz v. Beldon*, 38–451; and a bond irregular in form, *held*, sufficient: *Sheppard v. Collins*, 12–570.

The execution of a supersedeas bond on appeal to the supreme court from a judgment rendered in an attachment proceeding, does not operate to discharge the delivery bond here provided for. The plaintiff may avail himself of either or both such securities: *Williams v. Robison*, 21–498.

It is erroneous, after the bond here referred to has been executed, to require defendant to pay charges for keeping the attached property before releasing it to him. Such charges go with the costs in the case: *Milburn v. Marlow*, 4 Gr. 17.

Judgment on bond. R. § 3193.

SEC. 2995. Such bond shall be part of the record, and, if judgment go against the defendant, the same shall be entered against him and sureties.

By defendant or person in possession giving bond. R. § 3219.

SEC. 2996. The defendant, or any person in whose possession any attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, but

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if that sum would exceed three times the claim, then in such sum as equals three times the claim, conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court.

A delivery bond, though so defective as not to be sufficient under the statute, may still be enforced as a common law bond, and the attachment defendant will be liable thereon if judgment goes against him in the proceedings in which the attachment was issued, although the property released by such bond be not specifically sold to satisfy the judgment; *Garretson v. Reeder*, 23-21; and see *Waynant v. Dodson*, 12-22.

Under Code of 1851, § 1876, *held*, that debts or property attached by garnishment might be released, in the same way as property actually seized, and that the provisions as to appraisement were applicable to such cases: *Woodward v. Adams*, 9-474.

Appraisement of property. R. § 3220. C. '51, §§ 1877-8.

SEC. 2997. To determine the value of property in cases where a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after having been sworn by him to make the appraisement faithfully and impartially, shall proceed to the discharge of their duty. If such persons disagree as to the value of the property, the sheriff shall decide between them.

The appraisement is not, *prima facie* at least, essential to the validity of the bond and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9-474.

Defense to action on bond. R. § 3221. C. '51, § 1879.

SEC. 2998. In an action brought upon the bond above contemplated, it shall be a sufficient defense that the property for the delivery of which the bond was given, did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment.

A defendant in an action on a bond, who seeks to take advantage of the fact that the property did not belong to him, must state in his answer to whom it did belong: *Blatchley v. Adair*, 5-545.

SALE OF PERISHABLE PROPERTY.

How and when made. R. § 3222. C. '51, § 1881. 13 G. A. ch. 167, § 22.

SEC. 2999. When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualification of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods in execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding.

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SPECIFIC ATTACHMENTS.

In actions to enforce liens, recovery, sale, or partition of personal property. R. § 3225. 13 G. A. ch. 167, § 23.

SEC. 3000. In an action to enforce a mortgage of, or lien upon personal property, or for the recovery, sale, or partition of such property, or by a plaintiff having a future estate or interest therein, for the security of his rights, where it satisfactorily appears by the petition, verified on oath or by affidavits, or the proofs in the cause, that the plaintiff has a just claim, and that the property has been or is about to be sold, concealed, or removed from the state, or where plaintiff states on oath that he has reasonable cause to believe, and does believe, unless prevented by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property.

By vendor of property fraudulently purchased. R. § 3226.

SEC. 3001. In an action by a vendor of property fraudulently purchased, to vacate the contract and have a restoration of the property, or compensation therefor, where the petition shows such fraudulent purchase of property and the amount of the plaintiff's claim, and is verified by his oath, an attachment against the property may be granted.

Granted by court or judge: terms of. R. § 3227. 13 G. A. ch. 167, § 24.

SEC. 3002. The attachment in the cases mentioned in the last two sections may be granted by the court in which the action is brought, or by the judge of any court, upon such terms and conditions as to security on the part of the plaintiff for the damages which may be occasioned by them, and with such directions as to the disposition to be made of the property attached, as may be just and proper under the circumstances of each case.

Describe property: to be endorsed by court or judge. R. § 3230.

SEC. 3003. The attachment shall describe the specific property against which it is issued, and shall have endorsed upon it the direction of the court or judge as to the disposition to be made of the attached property. It shall be directed, executed, and returned as other attachments.

Court to fix terms of bond given to discharge property. R. § 3231.

SEC. 3004. The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment or to retain the attached property.

INDEBTEDNESS DUE THE STATE.

Duty of district attorney and attorney general. 10 G. A. ch. 133, § 1.

SEC. 3005. In all cases in which any person is indebted to the state of Iowa, or to any officer or agent of the state for the use or benefit of the state, the proper district attorney, or the attorney-general, shall demand payment or security therefor, whenever, in the opinion of said district attorney or attorney-general, the debt is not sufficiently secured.

Attachment may issue: conditions of. Same, § 2.

SEC. 3006. In all suits for money due to the state of Iowa, or due to any state agent or officer for the use of the state, it shall be lawful for an attachment to issue against the property or debts of the defendant not exempt from execution, upon the filing of an affidavit by the district attorney of the proper district, or of the attorney-general, that he verily believes that a specific amount therein stated is justly due, and the defendant therein has refused

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to pay or secure the same, and that unless an attachment is issued against the property of the defendant there is danger that the amount due will be lost to the state.

It is evidently contemplated that an attachment shall issue for the cause herein stated, only when demand has been made upon the debtor for payment or security and is refused; and that defendant is absent from the state, so that demand cannot be made upon him, does not change the rule: *The State v. Morris*, 50–203.

SEC. 3007. The attachment so issued shall be levied as in other cases of attachment, and no bond shall be required of the plaintiff in such cases, and the sheriff shall not be authorized to require any indemnifying bond before levying the same. No bonds can be required. Same, § 3.

SEC. 3008. Any property taken on attachment under the provisions of the two preceding sections, shall be subject to be released upon the execution of a delivery bond, with sufficient security as provided by law in other cases. Property released: how. Same, § 4.

SEC. 3009. In case any sheriff shall be held liable to pay any damages by reason of the wrongful execution of any writ of attachment issued under the three preceding sections, and if a judgment be rendered therefor by any court of competent jurisdiction, the amount of such judgment when paid by such sheriff shall become a claim against the state of Iowa in favor of such sheriff, and a warrant therefor shall be drawn by the auditor upon proper proof. Damages paid by sheriff becomes a debt against the state. Same, § 5.

SEC. 3010. The sheriff shall return upon every attachment what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also the appraisement above contemplated, when such has been made. When garnishees are summoned, their names, and the time each was summoned, must be stated. And where real property is attached, the sheriff shall describe it with certainty to identify it, and, where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. He shall return with the writ all bonds taken under it. Such return must be made immediately after he shall have attached sufficient property, or all that he can find; or, at latest, on the first day of the first term on which the defendant is notified to appear. Sheriff's return: contents of specified. R. § 3224.

It is the levy of the attachment, and not the sheriff's return on the writ, that gives the court jurisdiction of the subject matter; and a defect in the return will not render the proceedings void, nor subject to collateral attack; but they will be voidable only, and subject to correction in a direct proceeding. Therefore, *held*, that a return which did not state that the property levied on was the property of the debtor, was not so defective as to render a title acquired by sale under such attachment proceedings void (overruling *Tiffany v. Glover*, 3 Gr. 387;) *Rowan v. Lamb*, 4 Gr. 468.

SEC. 3011. If judgment is rendered for the plaintiff in any case in which an attachment has been issued, the court shall apply in satisfaction thereof, the money arising from the sales of perishable property, and if the same is not sufficient to satisfy the plaintiff's claim, the court shall order a sale by the sheriff of any other attached property which may be under his control. Judgment: how satisfied. R. § 3232. 13 G. A. ch. 167, § 25.

In case of judgment in attachment proceedings, a special execution in pursuance thereof cannot issue after the death of the judgment debtor: *Welch v. Battern*, 47–147.

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Court may control property. R. § 3233.

SEC. 3012. The court may, from time to time, make and enforce proper orders respecting the property, sales, and the application of the moneys collected.

Expenses for keeping. R. § 3234.

SEC. 3013. The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs.

Surplus. R. § 3235.

SEC. 3014. Any surplus of the attached property and its proceeds shall be returned to the defendant.

Discharge of property. R. § 3236.

SEC. 3015. If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him.

If the judgment is for defendant, the officer holding proceeds of property may at once pay the same to defendant, unless plaintiff announces his purpose to appeal: *Danforth v. Rupert*, 11–547.

Where the special verdict of the jury showed that at the time the attachment issued plaintiff had no cause of action, *held*, that the attached property was discharged, although there was a verdict for plaintiff on an amended petition subsequently filed: *Cramer v. White*, 29–336.

Intervention: how made and tried. R. § 3237.

SEC. 3016. Any person other than the defendant may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in, or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may empanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party at the discretion of the court.

In this proceeding the intervenor cannot recover damages for use or loss of service of the property: *Jennings v. Hoppe*, 44–205; and these provisions are applicable not only to specific attachments, but in case of any attached property: *Ibid.*

A party has a right to intervene on appeal from the judgment of a justice of the peace against a garnishee, though no appeal be taken by the garnishee: *Daniels v. Clark*, 38–556.

Defendant's remedy only on bond. R. § 3238.

SEC. 3017. The fact stated as a cause of attachment, shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may in his discretion, sue thereon by way of counter claim, and in such case shall recover damages as in an original action on such bond.

An issue cannot be made in the main action upon the facts stated as a ground of attachment; such issue can only be raised on the bond: *Berry v. Gravel*, 11–135, and cases cited: *McLaren v. Hall*, 26–297.

A motion to dissolve the attachment, based upon affidavits that the cause for attachment as stated in the petition is not true, cannot be sustained. No issue can be joined as to the facts stated as cause for the attachment. The only remedy is on the bond: *Sturman v. Stone*, 31–115.

Defendant may sue on the bond by way of counter claim in the original action: *Branch, etc., Bank v. Morris*, 13–136; and under Code of 1851, *held*, that defendant might set up a claim for damages for the wrongful suing out of the attachment, by way of counter claim in the original action, independently of the bond: *Reed v. Chub*, 9–178; *Stadler v. Parmlee*, 10–23

A suit on a bond, by way of counter claim, is an answer in the action sufficient to prevent default under § 2635: *Town v. Bringolf*, 47–133, 135.

When defendant sued on the bond, by way of counter claim, and recov-

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ered judgment by default against the principal, *held*, that the surety, not being a party to the action, was not liable in an action on such judgment: *Bunt v. Rheum*, 52–619.

Discharge of attachment on motion: causes for. R. § 3239.

SEC. 3018. A motion may be made to discharge the attachment, or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the attachment should not have issued, or should not have been levied on all or on some part of the property held.

To justify the discharge of property on motion of this kind, the case should be made clear and entirely satisfactory. Otherwise the party should be left to other and ordinary means for testing the liability of the property to seizure under the writ: *McLaren v. Hall*, 26–297.

Attached property will be discharged on motion only where it is apparent of record that it should not have been levied on; a third party claiming the property should proceed under § 3016: *Tidrich v. Sulgrove*, 38–339; *Williams v. Walker*, 11–77.

That property levied on is exempt from execution may be set up as a ground for its release: *Willson v. Stripe*, 4 Gr. 551; so may the fact that the property was attached by the sheriff outside of his county, or that the levy was secured by fraud or violence: *Pomroy v. Parmlee*, 9–140.

That the petition for attachment does not state sufficient ground therefor, cannot be raised by demurrer, but must be reached by motion as here provided: *Hunt v. Collins*, 4–56; and where it appears that at the time the writ issued, plaintiff had no cause of action, the property should be discharged, although a cause of action, as made out in an amended petition, has accrued subsequently to the writ: *Cramer v. White*, 29–336.

Under the last clause of the section, the question whether certain real estate is subject to attachment, may properly be determined on motion, but if the title to such property be a matter of dispute between the parties, upon the facts, it cannot properly be determined in this manner: *Rausch v. Moore*, 48–611.

In a particular case, *held*, that an attachment should have been quashed for defects in the affidavit to the petition: *Stadler v. Parmlee*, 10–23.

Plaintiff to have two days to appeal. R. § 3240.

SEC. 3019. When an attachment has been discharged, if the plaintiff then announce his purpose to appeal from such order of discharge, he shall have two days in which to perfect his appeal, and during that time such discharge shall not operate a return of the property nor divest any lien, if such appeal be so perfected at the end thereof.

Same. R. § 3241.

SEC. 3020. But, if judgment in the action be also given against the plaintiff, he must also, within the same time, take his appeal thereon, or such discharge shall be final.

Judgment against plaintiff discharges the attachment without any order of court, and an appeal, taken after two days from the rendition of such judgment, will not revive the attachment: *Harger v. Spofford*, 44–369.

To be liberally construed: amendments made as in other cases. R. § 3242.

SEC. 3021. This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall he quashed, dismissed, or the property attached released, if the defect in any of the proceedings has, or can be amended so as to show that a legal cause for the attachment existed at the time it was issued; and the court shall give the plaintiff a reasonable time to perfect such defective proceedings; the causes for attachment shall not be stated in the alternative.

Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed, and the attachment should not be dissolved for any defects thus corrected: *Gourly v. Carmody*, 23–212.

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A party is not to be prejudiced by any defects which are corrected by amendment: *Wadsworth v. Cheeney*, 13–576.

An amendment is allowable correcting a defect in the form of the affidavit: *Shaffer v. Sundwall*, 33–579: *Lowenstein v. Monroe*, 52–231; or a defect in the bond: *Cheever v. Lane*, 9–193; *Holmes v. Budd*, 11–186.

This section is broader than Rev. § 3242, and clearly authorizes an amendment to a writ that is defective, by reason of having the seal of the wrong court attached thereto: *Murdough v. McPherrier*, 49–479 (overruling *Foss v. Isett*, 4 Gr. 76, and *Shaffer v. Sundwall*, 33–579, decided under prior statutes).

Encumbrance book: notice of attachment to be entered in. R. § 3243.

SEC. 3022. No levy of attachment on real estate shall be notice to a subsequent vendee or encumbrancer in good faith, unless the sheriff making such levy shall have entered in a book which shall be kept in the clerk's office of each county by the clerk thereof, and called "encumbrance book," a statement that the land, describing it, has been attached, and stating the cause in which it was so attached, and when it was done and signed by such sheriff; and such book shall be open as other books kept by such clerk to public inspection.

The entry in the incumbrance book of an attachment on an equitable interest in land, is not notice to a vendee or mortgagee of the person holding the legal title: *Farmers, etc., Bank v. Fletcher*, 44–252.

An entry of the fact of levy on lands under an attachment against the husband, constitutes no notice where the title to such lands is in the wife: *Bailey v. McGregor* 46–657.

Section applied: *First Nat'l Bank v. Hayzlett*, 40–659.

Sheriff: constables. R. § 3244. C. '51, § 1883.

SEC. 3023. The word "sheriff" as used in this chapter, is meant to apply to constables when the proceedings are in a justice's court, or the like officer of any other court.

Justice: clerk. R. § 3245, C. '51, § 1884.

SEC. 3024. When the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated.

CHAPTER 2.

OF EXECUTIONS.

Limitation on issuance of. R. § 3246.

SECTION 3025. Executions may issue at any time before the judgment is barred by the statute of limitations, and but one execution shall be in existence at the same time.

No notice of the issuance of execution need be given the defendant therein: *Ayres v. Campbell*, 9–213.

Execution on a judgment in justice's court, a transcript of which is not filed in the office of the clerk of the circuit court, cannot issue after ten years (see § 3569): *Givens v. Campbell*, 20–79.

See *Stahl v. Roost*, 34–475.

Judgments: orders enforced by. R. § 3247. C. '51, § 1885.

SEC. 3026. Judgments or orders requiring the payment of money, or the delivery of the possession of property are to be enforced by execution. Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempt.

From courts of record. R. § 3248. C. '51, § 1888.

SEC. 3027. Executions from any court of record may issue into any county which the party ordering them may direct.

Lands may be sold in one county upon execution issued from another, without a transcript being filed, as provided by § 3031; see notes to that section.

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When issued and served on Sunday. R. § 3263.

SEC. 3028. An execution may be issued and executed on Sunday, whenever an affidavit shall be filed by the plaintiff or some person in his behalf, stating that he believes he will lose his judgment unless process issue on that day.

Issued on demand of party; duty of clerk. R. § 3265.

SEC. 3029. Upon the rendition of judgment, execution may be at once issued, and shall be by the clerk on the demand of the party entitled thereto; and upon its issuance, the clerk shall enter on the judgment docket the date of its issuance, and to what county and what officer issued, and shall also enter on said docket the return of the officer with the date of the return, the dates and amount of all moneys received into or paid out of the office thereon; and these entries shall be made at the time of the thing done.

Penalty for clerk's failure of duty. R. § 3266.

SEC. 3030. The clerk wilfully neglecting or refusing to perform any one of the duties in this chapter imposed, shall be liable to a penalty of five hundred dollars, and to damages to the party aggrieved, and shall be guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office.

When issued to another county, what done. R. § 3269.

SEC. 3031. In case execution is issued to a county other than that in which the judgment is rendered, a transcript of such judgment must be filed in the office of the clerk of the district court of such county, who shall make an entry thereof in the judgment docket of such court, and the officer having such execution shall return a copy thereof, with his return and doings endorsed thereon, to such clerk, who shall make entries thereof in the same manner and extent as if such judgment had been entered in and execution issued from such court.

The provisions of this section are directory only, and without the filing of the transcript here provided for, a sale of lands in one county may be made on execution issued from another (see § 3027); but in the absence of actual notice, the proceedings of levy and sale will not be sufficient to impart constructive notice to the purchaser, before the filing of the sheriff's deed. Actual notice thereof, however, will supply the want of record notice which the filing of transcript would give: *Hubbard v. Barnes*, 29–239; *McGinnis v. Edgell*, 39–419.

The sheriff's deed when recorded, will operate as constructive notice of the title of the purchaser. The object of filing a transcript as provided in this section is only to make the judgment a lien: *Foreman v. Higham*, 35–382.

An execution cannot be issued on the transcript; it must issue from the court originally rendering the judgment (§ 3027): *Seaton v. Hamilton*, 10–394; *Furman v. Dewell*, 35–170.

As to filing transcript, see also, § 2884.

Return; how made; money how sent. R. § 3250. C. '51, § 1883.

SEC. 3032. When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money cannot thus be sent except by the direction of the party entitled thereto, or his attorney.

General form of execution. R. § 3251. C. '51, § 1890.

SEC. 3033. The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for money; and, if not for money, it must state what specific act is required to be performed. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of property of the debtor subject to execution.

An execution issuing from a justice's court, and specifying who recovered the judgment, and against whom it was recovered, but not the names of the parties to the action, *held*, sufficient: *Williams v. Brown*, 28–247.

An execution in a particular case, *held*, sufficient: *Burdick v. Shigley*, 30–63.

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When against representatives. R. § 3252.

SEC. 3034. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property.

When for delivery of possession of property. R. § 3253.

SEC. 3035. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment out of the property of the party against whom it was rendered subject to execution, and the value of the property for which judgment was recovered to be specified therein if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

When for performance of any other act. R. § 3254.

SEC. 3036. When it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

Officer to receipt for. R. § 3255.

SEC. 3037. Every officer to whose hands an execution may legally come shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from such delivery.

If a levy be made while the execution is alive, a sale thereunder will be valid, although made after the execution itself has expired: *Stein v. Chambless*, 18–474; *Mooney v. Maas*, 22–380. And see *Childs v. McChesney*, 20–431; *Butterfield v. Walsh*, 21–97; *Thorington v. Allen*, 21–291.

The failure of the sheriff to make return of a sale within the year following, during which redemption is allowed, will not render the sale void: *Cooper v. French*, 52–531.

Officer to endorse when received and what he does under it. R. § 3257.

SEC. 3038. The officer to whom an execution is legally issued, shall endorse thereon the day and hour when he received it, and the levy, sale, or other act done by virtue thereof, with the date, and the dates and amounts of any receipts or payment in satisfaction thereof; the endorsements must be made at the time of the receipt or act done.

PRINCIPAL AND SURETY.

Property of principal first liable. R. § 3258. C. 51, § 1915.

SEC. 3039. When a judgment is against a principal and his surety, the officer having the collection thereof shall exhaust the property of the principal before proceeding to sell that of the surety.

One of two joint judgment debtors cannot compel the creditor to resort to the other first, unless so directed in the judgment, although as between the two the latter is primarily liable: *Palmer v. Stacy*, 44–340.

Meaning of term surety. R. § 3259.

SEC. 3040. The term "surety" in the foregoing section, shall embrace accommodation endorsers, stayers, and all other persons whose liability on the claim is posterior to that of another; but the surety shall, if requested by the officer, show property of the principal to entitle himself to the benefit of this provision.

Property of surety liable: when. R. § 3260.

SEC. 3041. After exhausting the property of the principal, the officer shall subject the property of the other parties in the order of their liability in the execution. But the party subsequently

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liable, shall, if requested by the officer, show property of the party liable before him so as to entitle himself to the benefit of this provision.

SEC. 3042. But all the parties will be considered as equally liable in all cases, unless the order of liability is shown to the court and recited in the judgment, and the clerk issuing execution on the judgment containing such recital shall state the order of liability in the execution.

Judgment recite order of liability. R. § 3261.

LEVY.

SEC. 3043. When an execution is delivered to an officer, he must proceed to execute the same with diligence; if executed, an exact description of the property at length, with the date of the levy, shall be endorsed upon or appended to the execution, and if the writ was not executed, or only executed in part, the reason in such case must be stated in the return.

Mode of: duty of officer. R. § 3262.

No notice of a levy need be given to the execution defendant: *Ayers v. Campbell*, 9–213.

Levy *held*, insufficient for want of precision and certainty in the description of the property taken, and a sale thereunder, *held* void: *Payne v. Billingham*, 10–360.

SEC. 3044. The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

Same. R. § 3267. C. '51, § 1904.

Judgments were not subject to levy, until a statutory provision to that effect was made. See § 3046 and notes.

It seems that a levy is, as between the parties, *prima facie* satisfaction of the debt, and that a subsequent release thereof without the knowledge of the surety, will release him: *Sherraden v. Parker*, 24–28, and cases cited.

SEC. 3045. The officer shall in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may, at any time thereafter, make other levies if he deem it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof.

What property he shall take. R. § 3268. C. '51, § 1903. 9 G. A. ch. 171, § 10.

Where the levy is excessive, the sale will be set aside, even though the whole property sold had been previously attached in the same action: *Cook v. Jenkins*, 30–452.

Merely noting the fact of levy upon personal property without taking and keeping possession of it, *held*, not sufficient to create a lien: *Techmeyer v. Waltz*, 49–645.

The last sentence of the section merely declares the law as it existed before its incorporation. See *Reeves v. Sibern*, 16–234.

SEC. 3046. Judgments, bank bills, and other things in action, may be levied upon and sold, or appropriated as hereinafter provided, and assignment thereof by the officer shall have the same effect as if made by the defendant.

Judgments, bank bills, things in action. R. § 3272. C. '51, § 1893. 13 G. A. ch. 167, § 26.

Under Rev. § 3272, which did not contain the word "judgments," it was held that a judgment could not be levied on and sold as property, but that garnishment of the judgment debtor was the proper remedy: *Osborn v. Cloud*, 23–104; and although under this section judgments may be levied on and sold under execution, they are debts and cannot be reached under attachment by a levy, but only by garnishment under § 2967, ¶ 4: *Ochiltree v. M. I. & N. R. Co.*, 49–150.

Negotiable notes may be taken and endorsed, and the endorsement will

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transfer the note, discharged of infirmities: *Earhart v. Gant*, 32–481.

The word "defendant" will apply to a defendant in a garnishment proceeding as well as to the defendant in the original action: *Ibid.*

The interest of a mortgagor in personal property, which is in the possession of the mortgagee, is not a "thing in action," such that it can be levied on under execution: *Campbell v. Leonard*, 11–489.

Held, that bonds of a railroad company which had been negotiated and afterwards bought back by it, but not delivered, might be levied on under execution against the company: *Hetherington v. Hayden*, 11–335.

Persons indebted to defendant may pay. R. § 3273. C. '51, § 1894.

SEC. 3047. After the rendition of judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

[The printed code has the word "sheriff" following "necessary," in the third line, which is not in the original.]

Public property not liable. R. § 3274. C. '51, § 1895.

SEC. 3048. Public buildings owned by the state, or any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purpose for which such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied on to pay the debt of any such.

Public buildings, being exempt from execution, a judgment against a county or city owning them is not a lien thereon (§ 2882 and notes): *The City of Davenport v. The Peoria M. & F. Ins. Co.*, 17–276.

A mechanic's lien cannot be enforced against such buildings, etc., as are here exempt from execution: *Loring v. Small*, 50–271; *Lewis v Chickasaw Co.*, 50–234; *Charnock v. Dist. T'p, etc.*, 51–70.

Tax levied to pay corporate debt. R. § 3275. C. '51, § 1896. 13 G. A. ch. 43. 14 G. A. ch. 87.

SEC. 3049. If no property of a municipal corporation against which execution has issued can be found, or if the judgment creditor elect not to issue execution against such corporation, a tax must be levied as early as practicable to pay off the judgment. When a tax has been so levied and any part thereof shall be collected, the treasurer of such corporation shall pay the same to the judgment creditor, or to the clerk of the court in which the judgment was rendered, in satisfaction thereof.

Under the Revision it was held that this section did not confer any *power* to tax where such power was not otherwise granted: *Clark v. City of Davenport*, 14–494; and that a tax could not be levied in excess of the limits imposed by § 796 (Rev. § 710): *Iowa R. Land Co. v. Sac Co.*, 39–124, 133, and cases cited. (Referred to with approval in *Jeffries v Lawrence*, 42–498, 505, a case decided under the present code.)

This tax may be in addition to the taxes provided by §§ 496–498, and the limit there fixed on the amount of tax does not apply in such case: *Rice v. Walker*, 44–458.

The provisions of this section are applicable to a school district, and mandamus may be brought against its officers to compel the levy of a tax as here provided: *Boynton v. District T'p of Newton*, 34–510; *Stevenson v. District T'p of Summit*, 35–462, 471.

The levy of a tax to pay off the judgment may be enforced by mandamus, and the order may direct that if the amount which may be legally levied is not sufficient, similar taxes shall be levied for that purpose for subsequent years: *Coy v. City Council of Lyons*, 17–1.

Where a tax has been levied and collected, as here provided, an act on of mandamus will lie to compel the treasurer to pay it over to the creditor: *Brown v. Crego*, 32–498.

The judgment creditor has a right to require that the levy and collection be made, and a sufficient amount thereof set apart for the payment of his debt: *The State ex. rel., etc., v. City of Davenport*, 12–335

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Stocks or interests levied upon. R. § 3269. C. '51, § 1892.

SEC. 3050. Stock or interests owned by the defendant in any corporation, and also debts due him, and property of his in the hands of third persons, may be levied upon in the same manner provided for attaching the same.

Judgments owned by defendant, although *debts*, may, by express provision, be levied on and sold under execution without garnishment. See § 3046, and notes.

PROCEEDINGS BY GARNISHMENT.

How done: proceedings. R. § 3270.

SEC. 3051. In proceedings by garnishment on execution, the garnishee shall be served as in case of attachment. The plaintiff may, also, if the garnishee is called into court, have a case docketed against him without docket fee, and upon his answer to the officer, issue may be made and notice thereof given him, or issue may be made on his answer in court without any notice thereon, if made at the same term; and in all these and every other particular, the proceedings shall be the same as under garnishment on attachment, as near as the nature of the case will allow.

If issue is not taken upon the answer of the garnishee at the term it is filed, the garnishee is entitled to notice: *Kienne v. Anderson*, 13–565.

Not affected by expiration of execution. R. § 3271.

SEC. 3052. Proceedings by garnishment on execution shall not be in any manner affected by the expiration of the execution or its return; and where parties thereunder have been garnished, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as the garnishments thereon are concerned.

JOINT OR PARTNERSHIP PROPERTY.

Officer may take possession, inventory and appraise. R. § 3287. C. '51, § 1917.

SEC. 3053. When an officer has an execution against a person who owns property jointly, in common, or in partnership with another, such officer may levy on and take possession of the property owned jointly, in common, or in partnership, sufficient to enable him to appraise and inventory the same, and for that purpose shall call to his assistance three disinterested persons, which inventory and appraisement shall be returned by the officer with the execution, and shall state in his return who claims to own the property.

Lien enforced by equitable proceeding. R. § 3289-91.

SEC. 3054. The plaintiff shall, from the time such property is so levied on, have a lien on the interest of the defendant therein, and may commence an action by equitable proceedings to ascertain the nature and extent of such interest and to enforce the lien; and, if deemed necessary or proper, the court or judge may appoint a receiver under the circumstances provided in chapter twelve of title seventeen of this code.

The interest of a partner in partnership property is liable to execution. Such execution should be levied thereon, and will remain a lien until satisfied by sale or otherwise. The equitable proceedings here contemplated simply pertain to the method of enforcing the liability of the property to the writ: *Lambert v. Powers*, 36–18.

These provisions simply provide a manner for ascertaining the interest of the debtor partner in the partnership property, and for enforcing the creditor's remedy against such interest. The interest and claims of copartners and firm-creditors, in and to the firm property, must be considered in determining the interest of the debtor. To this end such partners and

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creditors may be made parties, and when the case demands it the partnership may, in this proceeding, be fully settled and wound up: *Richard v. Haines*, 30–574.

INDEMNIFYING BOND.

May be required when. R. § 3277. C. '51, § 1916.

SEC. 3055. An officer is bound to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing from some other person, his agent, or attorney, that such property belongs to him; or, if after levy he receives such notice, such officer may release the property unless a bond is given as provided in the next section; but the officer shall be protected from all liability by reason of such levy until he receives such written notice.

The officer is bound to levy as herein provided, and is not liable in any way by reason of such levy, until he receive the notice provided for. He cannot demand from plaintiff an indemnifying bond until such notice is served. The remedies by interpleader, provided for in §§ 2572–2575, is merely cumulative: *Kaster v. Pease*, 42–488.

In the absence of the notice here provided, replevin will not lie against the sheriff for property levied on: *Finch v. Hollinger*, 43–598; *Peterson v. Espeset*, 48–262.

Although the officer is to be protected from all liability by reason of the levy until notice is received, he cannot maintain an action for expenses and attorney's fees in defending a replevin suit for the property levied on, in which he is successful: *Rickabaugh v. Bada*, 50–56.

This section has no application to a case where a debtor claims property as exempt: *McCoy v. Cornell*, 40–457; nor to levies under attachment. The bond here provided for is not authorized in such case: *Wadsworth v. Walliker*, 45–395.

The written notice provided for, must be delivered to the officer. It is not sufficient to simply read it to him: *Gray v. Parker*, 49–624.

Service of the written notice here contemplated upon the *deputy* sheriff who made the levy, *held* sufficient: *Burrows v. Waddell*, 52–195.

Terms and conditions of. R. § 3277.

SEC. 3056. When the officer receives such notice he may forthwith give the plaintiff, his agent, or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the district court of the county in which the levy is made.

If not given levy discharged. R. § 3278.

SEC. 3057. If such bond is not given, the officer may refuse to levy, or if he has done so, and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

Officer protected if bond good when taken. R. § 3279.

SEC. 3058. The claimant or purchaser of any property, for the seizure or sale of which an idemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property if the surety on the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond, and recover such damages as he may be entitled to.

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This section, in so far as it deprives the owner of property, for the seizure and sale of which an indemnifying bond has been taken, of the right to maintain an action for the recovery of such specific property against an officer who levies thereon under an execution against another, is unconstitutional as depriving such owner of his property without due process of law, and is void: *Foule v. Mann*, 53–42.

Application of proceeds of such property. R. § 3280.

SEC. 3059. Where property, for the sale of which the officer is indemnified, sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or payment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested.

Executions issued by justices. R. § 3286.

SEC. 3060. The provisions of the preceding sections as to bonds, shall apply to proceedings upon executions issued by justices of the peace. Indemnifying bonds shall be returned in such cases with the execution under which they are taken.

The provisions as to indemnifying bond relate only to levies under execution, and not to those under attachment. See note to § 3055.

STAY OF EXECUTION.

How effected: for what time. R. § 3293.

SEC. 3061. On all judgments for the recovery of money, except those rendered in any court on an appeal or writ of error thereto, or against any officer, person, or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs from the time of rendering judgment until paid, as follows:

1. If the sum for which judgment was rendered, inclusive of costs, does not exceed one hundred dollars, three months;

Debts previously contracted: law of

2. If such sum and costs exceed one hundred dollars, six months; *provided*, that the provisions of this chapter in relation to stay of execution shall not apply to existing contracts, but such contracts shall be governed by the laws in force at the time they were made, which are as follows:

When judgment has been rendered against any one for recovery of money, he may, by procuring one or more sufficient freehold securities to enter into a recognizance acknowledging themselves security for the defendant for the payment of the judgment, together with the interest and costs accrued and to accrue, have a stay of the execution from the time of rendering judgment, as follows:

If the sum for which judgment was rendered, inclusive of costs, does not exceed five dollars, one month;

If such sum and costs exceed five, but not twenty dollars, two months;

If such sum and costs exceed twenty, but not forty dollars, three months;

If such sum and costs exceed forty, but not sixty dollars, four months;

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If such sum and costs exceed sixty, but not one hundred dollars, six months;

If such sum and costs exceed one hundred, but not one hundred and fifty dollars, nine months;

If such sum and costs exceed one hundred and fifty dollars, twelve months;

Interest on.

And provided further, that all judgments shall bear interest at the rate of ten per cent. per annum on which stay is taken.

The privilege of staying the judgment is extended to any one who, being a party to the proceeding, has such an interest as that, in equity, as between him and the judgment debtor, he may be compelled to pay the debt. Therefore, *held*, that a subsequent purchaser of mortgaged premises, who had assumed the payment of the incumbrance, might stay a judgment against the original mortgagor under a foreclosure proceeding to which both were parties: *Moses v. Clerk, etc.*, 12-139.

Where judgment is rendered prior to the taking effect of the Code and a stay is taken subsequent to that time, the laws in force prior to the Code should be followed: *DuBoise v. Bloom.* 38-512.

Under Rev. § 3293 (which did not forbid stays of judgments from which an appeal had been taken), it was *held* that the provisions as to staying executions applied also to judgments rendered in the supreme court, as provided in § 3195 (Rev. § 3537): *Peoria F. & M. Ins. Co. v. Dickerson*, 29-98.

Affidavit of surety.

SEC. 3062. Officers approving stay bonds shall require the affidavit of the signers of such bond that they own real estate, not exempt from execution and aside from encumbrance, to the value of twice the amount of the judgment.

The question as to whether a bond is good is not judicial, and the clerk is liable for failure to use reasonable care in ascertaining the sufficiency of the security before accepting a bond. The fact that the surety makes affidavit, etc., does not release the officer from such liability, and he may refuse the bond, although the affidavit is made: *Hubbard v. Switzer*, 47-681; and see § 250.

No appeal where stay is taken. R. § 3294.

SEC. 3063. No appeal shall be allowed after such stay has been obtained, nor shall a stay be taken on a judgment entered as herein contemplated against one who is surety in the stay of execution, nor shall such stay be allowed to any judgment obtained by a laboring man or mechanic for his wages.

The right of appeal is waived by taking a stay: *Seacrest v. Newman*, 19-323.

Clerk to take and record bond. R. § § 3295, 3298.

SEC. 3064. The surety for stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in case of other judgments.

This section is not obnoxious to the objection that it deprives the parties upon the bond of the right of trial. Such right of trial is waived by the execution of the bond: *Carender v. Heirs of Smith*, 5-157, 186.

Under Rev. § § 3295, 3298, which were somewhat different, it was held that a stay bond, although filed, would not become a lien upon the property of a surety as against persons not having actual notice, unless entered of record as provided in those sections: *Waldron v. Dickerson*, 52-171.

Execution recalled. R. § 3296.

SEC. 3065. When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon.

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Property levied on released. R. § 3297.

SEC. 3066. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

Execution against: form of. R. § 3299.

SEC. 3067. At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

Delay in issuing execution after expiration of stay, does not discharge the lien of the judgment: *Parish v. Elwell*, 46–162.

Surety may prevent stay. R. § 3300.

SEC. 3068. When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which judgment is founded, there shall be no stay of execution allowed if the surety object thereto at the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof cannot be levied of the principal defendant.

Surety may determine stay. R. § 3301.

SEC. 3069. Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be liable for the judgment, interest and costs thereon unless execution issues immediately; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk as in other cases.

Other surety given. R. § 3302.

SEC. 3070. If other sufficient surety be entered, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety.

Judgment lien not released. R. § 3303.

SEC. 3071. Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the said execution shall return thereon what amount was made from the principal debtor, and how much from the surety.

EXEMPTIONS.

Property enumerated. R. §§ 3304, 3305, 3208. C. '51, §§ 1858 9. 11 G. A. ch. 51. 13 G. A. ch. 167, §§ 27, 28. 14 G. A. ch. 42.

SEC. 3072. If the debtor is a resident of this state and is the head of a family, he may hold exempt from execution the following property: All wearing apparel of himself and family kept for actual use and suitable to their condition and the trunks or other receptacles necessary to contain the same; one musket or rifle and shot gun; all private libraries, family bibles, portraits, pictures, musical instruments, and paintings, not kept for the purpose of sale; a seat or pew occupied by the debtor or his family in any house of public worship; an interest in a public or private burying ground, not exceeding one acre for any defendant; two cows and calf; one horse, unless a horse is exempt as hereinafter provided; fifty sheep and the wool therefrom and the materials manufactured from such wool; six stands of bees; five hogs, and all pigs under six months; the necessary food for all animals exempt from execution, for six months; all flax raised by the defendant on not exceeding one acre of ground and the manufactures therefrom; one bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture, not exceeding two hundred dollars in value;

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all spinning wheels and looms, one sewing machine and other instruments of domestic labor kept for actual use; the necessary provisions and fuel for the use of the family for six months; the proper tools, instruments, or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor; the horse, or the team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon, or other vehicle, with the proper harness or tackle, by the use of which the debtor, if a physician, public officer, farmer, teamster, or other laborer habitually earns his living; and to the debtor, if a printer, there shall also be exempt a printing press and the types, furniture, and material necessary for the use of such printing press and a newspaper office connected therewith, not to exceed in all the value of twelve hundred dollars.

[As amended by 15th, G. A., ch. 42, striking out "thereon" as it stood in the twelfth line, following "wool," and inserting in lieu thereof the words, "therefrom and the materials manufactured from such wool."]

The question as to who is the "head of the family" so as to be entitled to the benefits here secured, discussed, and *held*, that an unmarried man, with whom his brother and wife lived, and for whom they kept house, he furnishing the necessaries, etc., was not within the meaning of the phrase: *Whalen v. Cadman*, 11–226.

Where a widower kept house, employing a domestic, and having living with him his son and son's wife, who paid no compensation, *held*, that he was the head of the family: *Tyson v. Reynolds*, 52–431.

The term "head of the family" is used in reference to the relation existing between the members of the family as recognized by law and the usages of society. Where a woman who, as a widow and mother of children, held the team belonging to her former husband exempt from execution, subsequently re-married, *held*, that she thereupon ceased to be "the head of the family," and the team became subject to execution upon a judgment against her; that the question as to who was the head of the family was one of law and not of fact, and that when the husband is resting under no disability, he, and not the wife, is the head of the family, without regard to which one is the owner of the property: *Van Doran v. Marden*, 48–186.

Two horses with which a physician "habitually earns his living" will be exempt to him, although he does not use them as a team but singly; but he must show that they are so used, before he can have the benefit of the exemption: *Corp v. Griswold*, 27–379.

Evidence *held* sufficient in a particular case to show that the horses and wagon of a farmer were exempt as habitually used to earn his living: *Beran v. Hayden*, 13–122; and so in case of a laborer, a team and wagon *held* exempt: *Baker v. Hayzlett*, 53–18.

The words, "by the use of which the debtor * * * habitually earns his living," refer, alone, to the team, wagon, vehicle, etc., and not to the tools of the mechanic, or to the books and instruments of the physician. A party claiming tools as exempt must show that he is a mechanic, and that they are the tools of his trade; but he need not show that by the use of them he habitually earns his living: *Perkins v. Wisner*, 9–320.

The tools and instruments contemplated are those used or handled by the mechanic, and do not include the building or place where the trade is pursued. Therefore, *held*, that the building used by a photographer in carrying on his business, although shown to be personal property, was not exempt, in the absence of any showing that a building constructed in a peculiar manner was required in his business: *Holden v. Stranahan*, 48–70.

A threshing machine, owned and used for purposes of gain, by threshing for others, is not a part of the proper tools of a farmer so as to be exempt: *Meyer v. Meyer*, 23–359, 375.

A simple waiver of the benefit of exemption laws, made contemporaneously with the contract or debt, will not entitle the creditor, in case of a failure to pay, to levy an execution under a judgment thereon, upon exempt property, against defendant's objection: *Curtis v. O'Brien*, 20–376; but a voluntary surrender of property to the sheriff having the execution, precludes the debtor from afterwards

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setting up that it is exempt: *Richards v. Haines*, 30–574; and by standing by and allowing a levy to be made upon his property without objection, the debtor waives his right to insist that the property is exempt: *Angell v. Johnson*, 51–625.

The property which is exempt from execution in the hands of the husband as head of the family, is, upon his death, to be set apart to the widow, and to continue exempt in her hands: See § 2371, and notes.

SEC. 3073. The word "family," as used in the last section does not include strangers or boarders lodging with the family. Family defined. R. § 3306. C. '51, § 1900.

SEC. 3074. The earnings of such debtor for his personal services, or those of his family, at any time within ninety days next preceding the levy, are also exempt from execution and attachment. Personal earnings. R. § 3307. C. '51, § 1901.

This exemption extends to professional men, as well as to laborers: *McCoy v. Cornell*, 40–457.

If the employer of the debtor is garnished, he is not liable unless more than ninety days' earnings are in his hands. The earnings for that length of time, whether accruing before or after the garnishment, are exempt: *Davis v. Humphrey*, 22–137.

SEC. 3075. There shall be exempt to an unmarried person not the head of a family, and to non-residents, their own ordinary wearing apparel and trunk necessary to contain the same. Unmarried persons. R. § 3308. C. '51, § 1902. 13 G. A. ch. 167, § 28.

SEC. 3076. Where the debtor, if the head of a family, has started to leave this state, he shall have exempt only the ordinary wearing apparel of himself and family, and such other property, in addition, as he may select, in all not exceeding seventy-five dollars in value; which property shall be selected by the debtor and appraised according to the provisions of section two thousand nine hundred and ninety-seven of chapter one of this title, but any person coming into this state with the intention of remaining, shall be considered a resident within the meaning of this chapter. Persons who have started to leave the state. R. § 3308. C. '51, § 1902. 13 G. A. ch. 167, § 28.

SEC. 3077. None of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied. Purchase money. 13 G. A. ch. 167, § 27.

SEC. 3078. Where a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them. Absconding debtor. R. § 3309.

SALE.

SEC. 3079. The sheriff must give four weeks' notice of the time and place of selling real property, and three weeks' notice of personal property. Notice of. R. § 3310. C. '51, § 1905.

SEC. 3080. Notice shall be given by being posted up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two publications of such notice in some newspaper printed in the county, if there be one. In constables' sales, there shall be no newspaper publication, and the notice shall be posted in three public places of the township of the How given. R. § 3311. C. '51, § 1906.

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justice, and one of them at his office door. The time of such notice shall be two weeks.

The proprietor of a newspaper cannot, by mandamus, compel publication in his paper. See notes to § 873.

Penalty for selling without notice. R. § 3312. C. '51. § 1907.

SEC. 3081. An officer selling without the notice above prescribed shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected.

Time. R. § 3313. C. '51, § 1908

SEC. 3082. The sale must be at public auction, between nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice.

The doctrine of *caveat emptor* applies to the purchaser at a sale under execution, and such sale will not ordinarily be set aside to relieve one who has acquired a defective title, though it will, in some cases, if the purchaser acquires no title at all: *Hamsmith v. Espy*, 19–444.

A purchaser at an execution sale, even if he is the plaintiff in execution, is protected against equities and unrecorded instruments of which he has no notice: See notes to § 1941.

Where a notice of sale fixed the time as between two and five o'clock in the afternoon, *held*, that it would be presumed, in the absence of a showing to the contrary, that the officer did his duty, and made the sale within the time specified by law, and that the sale was valid: *Cole v. Porter*, 4 Gr. 510.

A sale *en masse* of tracts which could advantageously be sold separately, will be set aside, either on motion or in an independent proceeding in equity for that purpose: *White v. Watts*, 18–74; *Boyd v. Ellis*, 11–97; *Bradford v. Limpus*, 13–424; and see § 3088 and notes. So *held*, in case of a sale in gross of distinct parcels under judgment of foreclosure on a mortgage covering all of them: *Lay v. Gibbons*, 14–377; but such a sale, after an offering in parcels without a bid, will not be irregular: *Hill v. Baker*, 32–302.

So in a sale of a quarter section, one forty of which was the homestead, *held*, that an offer in forties was a sufficient compliance with § 1993, requiring other property to be exhausted before the homestead is sold: *Burmeister v. Dewey*, 27–468.

It may be questioned whether sale of two lots together, instead of separately, is such an irregularity as can, after the execution of the deed, be made available to defeat the title in a third party, though it is available to set aside a sale to the execution plaintiff: *Love v. Cherry*, 24–204.

Held, that a sale *en masse*, not shown to have been to the injury of the debtor and not attacked for six years, would not be set aside: *Cunningham v. Felker*, 26–117.

A sale of a large tract within the corporate limits of a city, *held* not invalid as a sale *en masse*, it not being shown that it had been divided into lots: *Wallace v. Berger*, 25–456.

Inadequacy in price, *held*, in a particular case, not sufficient to invalidate a sheriff's sale: *Ibid.* So *held* also, where the property had passed into the hands of a subsequent purchaser in good faith: *Hill v. Baker*, 32–302.

It seems that when the inadequacy in the amount realized at the sale is great, and it appears that the bidders were few, and the power to adjourn was not judiciously exercised by the sheriff, the sale should be set aside if application therefor is seasonably made: *Swortzell v. Martin*, 16–519.

Gross inadequacy of price, coupled with other circumstances tending to prove fraud, and a sale in gross of separate parcels, *held*, grounds for setting aside a sheriff's sale: *Boyd v. Ellis*, 11–97. So *held*, also, in case of a sale *en masse* at an inadequate price, pending litigation: *King v. Tharp*, 26–283.

The opposite party must be notified of a motion to set aside a sale. Otherwise he will not be bound thereby: *Wright v. LeClair*, 3–221, *Lyster v. Brewer*, 13–461.

A sheriff's sale will not be set aside on motion when the purchaser is not a party to the execution, at least without notice to such purchaser: *Osborn v. Cloud*, 21–238.

Officer may postpone when. R. § 3314. C. '51, § 1909.

SEC. 3083. When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may

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postpone the sale for not more than three days, without being required to give any farther notice thereof; but he shall not make more than two such postponements, and such postponement shall be publicly announced when the sale should have taken place.

The discretion of the sheriff, as to adjournment, should be excercised with a fair and impartial attention to the interests of all parties concerned. Where his power in that respect is not judiciously exercised, it may be a ground for setting the sale aside: *Swartzell v. Martin*, 16–519.

The fact that there was one more adjournment than is here authorized, and that the time was extended beyond the period here fixed, *held*, a mere irregularity, to be taken advantage of only on a showing of prejudice: *Reese v. Dobbins*, 51–282.

The adjournment of a sale by plaintiff's attorney, is a gross irregularity, and a sale at a time to which it is so adjourned will be void: *Wolf v. Van Metre*, 27–348.

Disposition of excess. R. § 3315. C. '51, § 1910.

SEC. 3084. When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands on which said overplus may be rightfully applied.

An excess from a sale of mortgaged property under decree of foreclosure, may be applied to another execution in the sheriff's hands in the manner here provided: *Payne v. Billingham*, 10–360.

Another execution. R. § 3316. C. '51, § 1911.

SEC. 3085. If the property levied on sell for less than sufficient for that purpose, the plaintiff may order out another execution, which shall be credited with the amount of the previous sale. The proceedings under this second sale shall conform to those hereinbefore prescribed.

Levy holds good unless plaintiff abandons. R. § 3317. C. '51, § 1912.

SEC. 3086. When property is unsold for want of bidders, the levy still holds good; and, if there be sufficient time, it may again be advertised or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added, that if such property does not produce a sum sufficient to satisfy such execution, the officer shall proceed to make an additional levy, on which he shall proceed as on other executions, or the plaintiff may, in writing filed with the clerk or justice, abandon such levy upon paying the costs thereof. In which case execution may issue with the same effect as if none had ever been issued.

A second levy cannot be made until the first is disposed of: *Downard v. Crenshaw*, 49–296.

A sale under an execution which has expired, is valid, if the levy was made while the execution was in force: *Butterfield v. Walsh*, 21–97; and see notes to § 3037.

Notice to defendant: sale void without. R. § 3318.

SEC. 3087. If the defendant is in actual occupation and possession of any part of the land levied on, the officer having the execution, shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; and sales made without the notice required in this section, may be set aside on motion made at the same or the next term thereafter.

Notice is not required where defendant is not personally in the actual possession or occupancy of the property: *Babcock v. Gurney*, 42–154; *Bennett v. Burton*, 44–550.

The owner is not, within the meaning of this section, "in the actual occupation" of land leased to, and occupied by, a tenant; but where the owner is in the actual use and enjoyment of the property, although not residing thereon, he is in such actual occupation and possession as is here required. So *held*, where the owner, by means of employes residing on the land, was operating a saw mill

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thereon: *Fleming v. Maddox*, 30–239.

The provision that in the cases here referred to the sale may be set aside, does not invest the court below with such discretion that its action cannot be reviewed on appeal. Though mandatory rather than permissive, it seems there might be cases within the letter of the statute where it would not be enforced: *Jensen v. Woodbury*, 6–515.

This section applies to sales under special, as well as under general execution: *Ibid.*; *Fleming v. Maddox*, 30–239.

Defendant may divide land and give officer plan. R. § 3319.

SEC. 3088. At any time before nine o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on; subscribed by him, and in that case the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs and no more. If no such plan is furnished, the officer may sell without any division.

Distinct or separate parcels or tracts which can have no increased value by reason of being sold together, cannot be sold *en masse*, even if no bid is made for them when offered separately. This is the common law rule. The provision of this section as to subdivision does not affect that rule except as here specified: *Williams v. Allison*, 33–278, 288; and as to the effect of a sale *en masse*, see notes to § 3082.

When purchaser fails to pay. R. § 3320. C. '51, § 1913.

SEC. 3089. When the purchaser fails to pay the money when demanded, the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement as above authorized.

Where the judgment creditor bids off the property and refuses to pay the costs, the sheriff may treat the sale as a nullity, as here provided: *Reese v. Dobbins*, 51–282.

Sales vacated when execution is not a lien. R. § 3321.

SEC. 3090. When any person shall purchase at a sheriff's sale any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the court shall set aside such sale on motion, notice having been given to the debtor as in case of action, and a new execution may be issued to enforce the judgment, and upon the order being made to set aside the sale, the sheriff or judgment-creditor shall pay over to the purchaser the purchase money; said motion may also be made by any person interested in the real estate.

The sale will not be set aside if a debtor has some interest in, or title to, the property, although it be not of value. The doctrine of *caveat emptor* applies: *Hamsmith v Espy*, 19–444; *Holtzinger v. Edwards*, 51–383.

This section, *held*, not applicable to a case where defendant had title to the property sold, and the judgment was not a lien thereon, because it was rendered in another county and no transcript was filed in the county where the land was situated: *Chambers v. Cochran*, 18–159.

If the judgment is against principal and surety, and the sale be set aside, as here provided, the surety will not be held discharged, unless he has, by reason of the sale, changed his condition or been prejudiced: *Ibid.*

Disposition of money levied on. R. § 3322. C. '51, § 1914.

SEC. 3091. Money levied upon may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value.

The excess remaining in the sheriff's hands from sale of property under execution, may be appropriated as here provided: See § 3084 and notes.

Bank bills, etc., may be levied on and sold: See § 3046 and notes.

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SEC. 3092. When a judgment has been obtained against the executor of one deceased, or against the decedent in his lifetime, which the personal estate of the deceased is insufficient to satisfy, the plaintiff may file his petition in the office of the clerk of the court where the judgment is rendered against the executor, the heirs and devisees of real estate, if such there be, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same.

Judgment against executor or decedent: how satisfied from real property.
R. § 3323.
C. '51, § 1918.
13 G. A. ch. 167, § 29.

[The printed Code has "a lien" in the fifth line, in place of "rendered," as above and as in the original. The section so stood in the bill as reported by the Code Commissioners, following 13G. A., ch. 167, § 29, but before adoption by the legislature it was amended to read as here given and as it originally stood in the Revision. This amendment was not incorporated into the printed Code.]

SEC. 3093. The person against whom the petition is filed shall be notified by the plaintiff to appear on the first day of the term, and show cause, if any he have, why execution should not be awarded.

Notice.
R. § 3324.
C. '51, § 1919.
13 G. A. ch. 150, § 1.

SEC. 3094. The notice shall be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance as in civil actions, and service of such notice on non-resident defendants may be had in such cases by publication.

How served and returned.
R. § 3325.
C. '51, § 1920.
13 G. A. ch. 150, § 2.

SEC. 3095 At the proper time the court shall award the execution unless sufficient cause be shown to the contrary.

Execution awarded.
R. § 3326.
C. '51, § 1921.

SEC. 3096. The non-age of the heirs or devisees shall not be deemed such sufficient cause.

Non-age.
R. § 3327.
C. '51, § 1922.

SEC. 3097. Mutual judgments, the executions on which are in the hands of the same officer, may be set off the one against the other; except that the costs shall not be set off, unless the balance of cash actually collected on the large judgment is sufficient to pay the costs of both judgments, and such costs shall be paid therefrom accordingly.

Mutual judgments set off.
R. § 3328.
C. '51, § 1923.

A judgment against two persons, jointly, may be set off against a judgment in favor of one of them against the creditor in such joint judgment; *Ballinger v. Tarbell*, 16–491.

Judgments cannot be set off, the one against the other, unless they are strictly mutual and are still in fact the property of the respective parties thereto: *Bell v. Perry*, 43–368.

Where the judgment has been fraudulently assigned for the purpose of preventing the set-off here contemplated, such set off may be obtained as equitable relief in an action in equity: *Hurst v. Sheets*, 14–322.

SEC. 3098. When real property has been levied upon, if the estate is less than a leasehold having two years of an unexpired term, the sale is absolute.

When sale absolute.
R. § 3329.
C. '51, § 1924.

SEC. 3099. When the estate is of a larger amount, the property is redeemable as hereinafter prescribed.

When redeemable.
R. § 3330.
C. '51, § 1924.

APPRAISEMENT OF PERSONAL PROPERTY.

SEC. 3100. Personal property levied upon and advertised for sale on execution must be appraised before sale by two disinterested householders of the neighborhood, one of whom shall be chosen by the execution debtor and the other by the plaintiff, or in case of the absence of either party, or if either or both parties neglect

How made and amount it must sell for.

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or refuse to make choice, the officer making the levy shall choose one or both, as the case may be, who shall forthwith proceed to return to said officer a just and true appraisement, under oath, of said property if they can agree; and in case they cannot agree, they shall choose another disinterested householder, and with his assistance they shall complete such appraisement, and the property shall not be sold for less than two-thirds of said valuation; provided, the same shall be offered for three successive days at the same place and hour of day as advertised, and if no offer equal to two-thirds the value thereof be made, then it shall be lawful to sell said property for one-half of said valuation.

Under Rev. § 3361, providing for appraisement of real property before sale, *held*, that the fact that one of the appraisers was not a householder, as provided by that section, would not render the sale void: *Hill v. Baker*, 32–302; but in such a case, where the lands were appraised at less than one-half their real value, *held*, that the debtor would be allowed to redeem from the judgment creditor: *Woods v. Cochrane*, 38–484.

The word "neighborhood" construed: *Ibid.*

Under the same section of the Rev., *held*, that a sale for a less proportion of the appraised value than there authorized, would be invalid, at least as between the parties; and that the fact that the debtor's title was doubtful, or other such circumstances affecting the value of the property, would be immaterial. Such facts should be taken into account by the appraisers and the value fixed by them should be that of defendant's interest in the property: *Maple v. Nelson*, 31–321.

It is competent to change the remedy as to existing contracts, by changing from a sale under appraisement to sale without appraisement, but a law changing from a sale without appraisement to one with appraisement cannot apply to contracts already made: *Olmstead v. Kellogg*, 47–460, and cases cited.

REDEMPTION.

Officer to execute deed or certificate.
R. § 3331.
C. '51, § 1925.

SEC. 3101. If the property sold is not subject to redemption, the sheriff must execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to such purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, and stating that unless redemption is made within one year thereafter according to law, he or his heirs or assigns, will be entitled to a deed for the same.

By defendant when.
R. § 3332.
C. '51, § 1926.
13 G. A. ch. 167, § 30.

SEC. 3102. The defendant may redeem real property at any time within one year from the day of sale as herein provided, and will, in the meantime, be entitled to the possession of the property. But in no action where the defendant has taken an appeal from the circuit or district court, or stayed execution on the judgment, shall he be entitled to redeem.

The legal estate of the owner, is not divested by the sale until the time for redemption has expired, and a deed is made to the purchaser. A judgment recovered against him during the period allowed for such redemption, becomes a lien on his interest in the property, and in case he or his assignee redeems from the prior sale, such judgment may be enforced against the property so redeemed, although the holder of the judgment failed to exercise his own right of redemption from the sale: *Curtis v. Millard*, 14–128.

If the debtor or his grantee or assignee redeems land sold in partial satisfaction of a judgment, it at once becomes liable to satisfy the unpaid balance of such judgment: *Stine v. Chambless*, 18–474; *Crosby v. Elkader Lodge*, 16–397. But these cases are overruled by *Clayton v Ellis*, 50–590, cited under following section.

Defendant's right of possession or

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redemption may be levied upon and sold under execution: *Barnes v. Cavanagh*, 53–24; *Crosby v. Elkader Lodge*, 16–399.

The purchaser at a sheriff's sale of property subject to redemption does not acquire the legal title until the period of redemption has expired: *Shiner v. Hammond*, 51–491.

The restriction upon defendant as to redemption in case of appeal taken, or a stay of execution, does not apply to creditors holding liens (§ 3104) and such lien-holders have the same right to redeem in such cases as in any other: *Sieben v. Becker*, 53–24.

The defendant may redeem where he has previously sold the property and conveyed by deed with covenants of warranty: *Harrey v. Spaulding*, 16–397.

In computing the time here allowed for redemption, the day of sale is excluded, and redemption may be made any time during the corresponding day of the month of the next year: *Teucher v. Hiatt*, 23–527.

The statutory right to redeem within one year, cannot be extended by an act of the party claiming the right, such as a suit to redeem or the like, without more: *Hughes v. Feeter*, 25–547.

The provisions of this section are applicable to foreclosure sales: *Barret v. Blackmar*, 47–565.

SEC. 31 For the first six months after such sale, his right to redeem is exclusive; but if no redemption is made by him at the end of that time, any creditor of the defendant whose demand is a lien upon such real estate, may redeem the same at any time within nine months from the day of sale. But a mechanics' lien, before judgment thereon, is not of such character as to entitle the holder to redeem. When by creditors. R. § 3333. C. '51, § 1927.

The holder of a judgment, recovering on a debt contracted prior to the acquisition of a homestead, may redeem from a sale of such homestead, although the judgment record does not show the facts making the judgment a lien. Proof of such facts may be made *aliunde: Phelps v. Finn*, 45–447

A lien holder may redeem irrespective of whether an appeal or stay of execution is taken: See § 3102 and notes.

An execution creditor who has bought in the property under his execution does not have a lien upon such property for any unsatisfied balance of his claim, and neither he nor his assignee can redeem under such sale: (overruling *Crosby v. Elkader Lodge*, 16–399). *Clayton v. Ellis*, 51–590.

A redemption made by a *creditor* within the first six months, will be good as to a subsequent lien-holder. It is only the debtor and purchaser who can object to such redemption: *Wilson v. Conklin*, 22–452.

The judgment contemplated as sufficient to entitle the holder of a mechanic's lien to redeem is not a mere money judgment, but a judgment in equity establishing the lien against the specific property: *Spink v. McCall*, 52–432.

This section and the following, refer to redemption from a sale, and do not affect the right of a junior lien-holder, not made a party to a foreclosure proceeding, to redeem by action in equity: *Jones v. Hartsock*, 42–147.

There is a difference between redeeming from a judgment and redeeming from a sale under a judgment. A junior lien-holder cannot redeem from a prior judgment under which there has been no sale, without paying the full amount thereof, but either the debtor or a lien creditor may redeem from the sale itself. A lien creditor redeeming from a sale takes the property free from any lien of the judgment: *Hays v. Thode*, 18–51; and a junior mortgagee, made defendant in a foreclosure of a senior mortgage, may redeem from the senior mortgagee bidding in the property at the sale, by the payment of the amount of his bid with interest, etc.: *Tuttle v. Dewey*, 44–306.

SEC. 3104. Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors, may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due. Who creditor. R. § 3334. C. '51, § 1928.

A mortgagee may redeem though the liability secured by the mortgage is only a contingent one and might possibly never ripen into a certainty: *Crossen v. White*, 19–109.

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May redeem from each other.
R. § 3335.
C. '51, § 1929.

SEC. 3105. Creditors having the right of redemption may redeem from each other within the time above limited, and in the manner herein provided.

Terms of.
R. § 3336.
C. '51, § 1930.

SEC. 3106. The terms of redemption in all cases will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien, with interest upon the whole at the rate of ten per cent. per annum, together with costs, subject to the exception contained in the next section. But where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, a rebate of interest at the rate of ten per cent. per annum must be made by such mortgagee on his claim.

In redemptions made before the expiration of nine months from date of sale, the redemption is performed by the parties themselves, without the aid of the clerk, and the only evidence of the transaction necessary is a proper transfer of the certificate of sale (§ 3120), and the provisions of §§ 3115, 3117, and 3118 apply only to redemptions made after the expiration of nine months (§ 3112): *Good v. Cumming*, 35–67.

The holder of a junior mortgage, made defendant in a foreclosure proceeding, may redeem, after sale, from the holder of the senior mortgage who has bid in the property for less than the mortgage debt, by paying the amount bid by such purchaser. He need not pay off the whole amount of the judgment held by the senior mortgagee: *Tuttle v. Dewey*, 44–306.

In redeeming from an execution creditor who has bought in the property at the sale, the debtor need only pay the amount bid by such creditor. Any portion of the judgment remaining unsatisfied by said sale is not a lien upon the property sold. (Overruling *Crosby v. Elkader Lodge*, 16–397): *Clayton v. Ellis*, 50–590.

There is no distinction between the debtor and the creditor as to the matter of redemption: *Ibid.*

The lien referred to in the expression "of his own lien" is that of the holder, and not of the redemptioner: *Ibid.*

Senior creditor.
R. § 3337.
C. '51, § 1931.

SEC. 3107. When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens.

Junior.
R. § 3338.
C. '51, § 1932.

SEC. 3108. The junior creditor may in all such cases prevent a redemption by the holder of the paramount lien, by paying off the lien, or by leaving with the clerk beforehand the amount necessary therefor.

Same.
R. § 3339.

SEC. 3109. A junior judgment creditor may redeem from a senior judgment creditor, by paying to the party, the clerk, or the sheriff, if execution has issued, the full sum due, with interest and costs, and shall become thereby vested with the title to the judgment so redeemed.

When money paid to sheriff.
R. § 3340.

SEC. 3110. If paid to the sheriff, he shall give to the party redeeming a certificate that he has paid such sum for the redemption of the judgment, describing it, which being presented to the clerk, he shall enter such redemption on the judgment docket, as he shall also do if the money is paid to himself.

Junior from senior creditor.
R. § 3341.
C. '51, § 1933.

SEC. 3111. Whenever a senior creditor redeems from a junior creditor, the latter may in return redeem from the former, and so on, as often as the land is taken from him by virtue of a paramount lien.

When right expires.
R. § 3342.
C. '51, § 1934

SEC. 3112. After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other except as hereinafter provided. But the defendant may still redeem at any time before the end of the year as aforesaid.

The following provisions (§§ 3113 to 3119) apply only to redemptions after the expiration of nine months: *Goode v. Cummings*, 35–67.

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SEC. 3113. Unless the defendant thus redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely. Who gets property. R. § 3343. C. '51, § 1935.

SEC. 3114. In case it is thus held by a redeeming creditor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in the next section. Claim extinct. R. § 3344. C. '51, § 1936.

The omission to file the statement will not prejudice the right of other creditors to redeem, nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to file his statement: *Goode v. Cummings*, 35–67.

SEC. 3115. If he is unwilling to hold the property and credit the defendant therefor with the full amount of his lien, he must, within ten days after the nine months aforesaid, enter on the sale book the utmost amount that he is thus willing to credit on his claim. Exception. R. § 3345. C. '51, § 1937.

The failure of the clerk to enter in the sale book the amount a redeeming creditor is willing to allow on his judgment, when a statement thereof is furnished to the clerk by the creditor in due time, will not operate to satisfy the whole of such creditor's judgment: *Craig v. Alcorn*, 46–560.

The provisions as to entry in the sale book apply only to redemptions made after the expiration of nine months from the date of sale. Previous to that time the redemption is made between the parties themselves without the transaction being of record, the evidence thereof being the proper transfer of the certificate of sale: *Goode v. Cummings*, 35–67.

SEC. 3116. Any unsatisfied lien creditor, within ten days after the expiration of the time thus allowed to make the entry required in the last section, may redeem the property by paying the amount of the legal disbursements of the last holder as hereinbefore regulated, added to the amount thus entered on the sale book, together with interests and costs. Farther redemption. R. § 3346. C. '51, § 1938.

[The words "of the time" following "expiration" in the second line, as in the original, are omitted in the printed code.]

Whether a senior lien-holder may redeem from a junior who has already redeemed from him, *quære*, but redemption under this section must be within one year, as provided by § 3102: *Phelps v. Finn*, 45–447.

SEC. 3117. Such redemptioner shall also credit the defendant with the full amount of his lien, unless within ten days after redeeming as aforesaid, he likewise makes a like entry on the sale book, in which case any unsatisfied lien creditor may in like manner redeem within ten days as aforesaid, and so on until there are no more unsatisfied liens, or until the expiration of the year for redemption, the defendant having the final privilege of redeeming from the last redemptioner at the end of the year. Same. R. § 3347. C. '51, § 1939.

SEC. 3118. The mode of making the redemption is by paying the money into the clerk's office for the use of the persons thereto entitled. The person so redeeming, if not defendant in execution, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable the amount still unpaid and due on his own claim. Mode of redemption. R. § 3348. C. '51, § 1940.

Where the defendant pays, and the clerk in good faith receives, a banker's check, or currency not legal tender, before the expiration of the time for redemption, the redemption will be complete, although in the case of the check the money be not received thereon by the clerk until after the time for the redemption has expired: *Webb v. Watson*, 18–537.

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Whether the requirement that an affidavit be filed by a creditor redeeming, applies to redemptions made before the expiration of nine months doubted: *Wilson v. Conklin*, 22–452; and see notes to § 3106.

Same.
R. § 3349.
C. '51, § 1941.

SEC. 3119. The clerk shall thereupon give him a receipt for the money, stating the purpose for which it was paid. He must also, at the same time, enter in the sale book a minute of such redemption, of the amount paid, and the amount of the lien of the last redemptioner as sworn to by him.

Entitled to assignment.
R. § 3350.
C. '51, § 1942.

SEC. 3120. A creditor redeeming as above contemplated, is entitled to receive an assignment of the certificate issued by the sheriff to the original purchaser as hereinbefore directed.

Sale in parcels.
R. § 3351.
C. '51, § 1943.

SEC. 3121. When the property has been sold in parcels, any distinct portion may be redeemed by itself.

Tenants in common.
R. § 3352.
C. '51, § 1944.

SEC. 3122. When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

Defendant may transfer right.
R. § 3353.
C. '51, § 1945.

SEC. 3123. The rights of a defendant in relation to redemption are transferable, and the assignee has the like power to redeem.

Deed made to whom.
R. § 3354.
C. '51, § 1946.

SEC. 3124. If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person entitled be dead, the deed shall be made to his heirs, but the property will be subject to the payment of the debts of the deceased in the same manner as if acquired during his lifetime.

The sheriff in office at the time the deed is executed is the proper person to make a deed, and not a person who was sheriff at the time of the sale but whose term of office has expired: *Conger v. Converse*, 9–554, and see § 348.

When evidence of title to be recorded.
R. § 3355.
C. '51, § 1947.

SEC. 3125. The purchaser of real estate at a sale on execution, need not place any evidence of his purchase upon record until twenty days after the expiration of the full time of redemption. Up to that time, the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer.

A purchaser in good faith, more than one year and twenty days after the sale and before the execution or recording of the sheriff's deed, is not affected with constructive notice of the proceedings: *Harrison v. Kramer*, 3–543; *Churchill v. Morse*, 23–229. But a failure to record the deed is not material as against one who is not a purchaser in good faith, or who purchases with actual notice of the sale: *Harrison v. Kramer*, 3–543; *Walker v. Schreiber*, 47–529, 533.

A party cannot complain of delay in taking and recording the sheriff's deed, unless he acquires his interest after twenty days from the expiration of the period of redemption: *Wood v. Young*, 38–102.

This section applies only to persons deriving title to, or interest in the property through the judgment defendant. Parties claiming through those who are neither parties nor privies to such proceedings are not affected: *Hultz v. Zollars*, 39–589.

Deeds imply regularity.
R. § 3356.
C. '51, § 1948.

SEC. 3126. Deeds executed by a sheriff in pursuance of the sales contemplated in this chapter, are presumptive evidence of the regularity of all previous proceedings in the case, and may be given in evidence without preliminary proof.

While under the statute the sheriff's deed is prescriptive evidence of the regularity of the sale, (*Childs v. McChesney* 20–431), aside from the statute it is not evidence of the regularity of prior proceedings, nor even of the existence of the judgment or the execution; so *held*, in case of

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sale under foreclosure proceedings by notice without a proceeding in court, as provided by Code of 1851, by which the deed was not expressly made prescriptive evidence: *Seevers v. Drennon*, 29–25.

Damages. R. § 3357. C. '51, § 1949.

SEC. 3127. When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance.

"Defendant" "plaintiff." R. § 3358. C. '51, § 1951.

SEC. 3128. The term "defendant" as herein used, is intended to designate the party against whom, and the term "plaintiff" the party in favor of whom, any execution is issued.

Applicable to justice's proceedings. R. § 3359. C. '51, § 1952.

SEC. 3129. The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff" and "clerk" are accordingly to be understood, as qualified in this chapter, in the same manner in this respect as in that relative to attachment.

REVIVOR OF JUDGMENTS.

Death of plaintiff: how execution may issue. R. § 3482.

SEC. 3130. The death of one or all the plaintiffs shall not prevent an execution being issued, but on such execution the clerk shall endorse the death of such of them as are dead, and if all be dead, the names of the personal representatives, or the last survivor, if the judgment passed to the personal representatives, or the names of the survivors' heirs, if the judgment was for real property.

An execution issued in the name of a deceased plaintiff without the indorsement here required, may be enjoined: *Meek v. Bunker*, 33–169.

Officer's duty. R. § 3483.

SEC. 3131. The sheriff, in acting upon an execution endorsed as provided in the last section, shall proceed as if the surviving plaintiff or plaintiffs, or the personal representatives or heirs, were the only plaintiffs in the execution, and take bonds accordingly.

Affidavit required. R. § 3484.

SEC. 3132. Before making the endorsements named above, an affidavit shall be filed with the clerk by one of the plaintiffs or personal representatives, or heirs or their attorney, of the death of the defendant, and that the persons named as such are the personal representatives or heirs, and in the case of personal representatives, they shall file with the clerk a certificate of their qualification, according to law in this state.

[The words "of the defendant" in the fourth line should evidently be "of the plaintiff," but the section stands as here given, both in the printed Code and in the original bill.]

Death of part of defendants. R. § 3485.

SEC. 3133. The death of part only of the defendants, shall not prevent execution being issued, which, however, shall operate alone on the survivors and their property.

Execution cannot be issued upon a judgment after the decease of the defendant: *Welch v. Battern*, 47–147.

When execution may be quashed. R. § 3486.

SEC. 3134. The defendant may move the court to quash an execution, on the ground that the personal representatives or heirs of a deceased plaintiff are not properly stated in the endorsement on the execution, and, during the vacation of the court, may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued.

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CHAPTER 3.

PROCEEDINGS AUXILIARY TO EXECUTION.

Defendant examined. R. § 3375. C. '51, § 1953.

SECTION 3135. When execution against the property of a judgment debtor, or one of several debtors in the same judgment, has been issued from the district, circuit, or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered or a transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor.

Same. R. § 3376. C. '51, § 1954.

SEC. 3136. The like order may be obtained at any time after the issuing of an execution, upon proof, by the affidavit of the party or otherwise, to the satisfaction of the court or officer who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment.

By whom order granted. R. § § 3377, 3385. C. '51, § 1955.

SEC. 3137. Such order may be made by the district or circuit court of the county in which the judgment was rendered, or to which execution has been issued, or in vacation by a judge thereof. And the debtor may be required to appear and answer before either of such courts or judges, or before a referee appointed for that purpose by the court or judge who issued the order, to report either the evidence or the facts.

Debtor interrogated. R. § 3378. C. '51, § 1956.

SEC. 3138. The debtor, on his appearance, may be interrogated in relation to any facts calculated to show the amount of his property, or the disposition which has been made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made. And the interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath, and no person shall, on such examination, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud.

Witnesses examined. R. § 3379.

SEC. 3139. Witnesses may be required by the order of the court or judge, or by subpœnas from the referee, to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue.

Property found: disposition of. R. § 3380. C. '51, § 1957.

SEC. 3140. If any property, rights, or credits, subject to execution are thus ascertained, an execution may be issued and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be delivered up, or in any other mode applied towards the satisfaction of the judgment.

Receiver. R. § 3381.

SEC. 3141. The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and may also, by order,

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forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith.

Equitable interest. R. § 3382.

SEC. 3142. If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person holding the legal estate, or having any lien on, or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey such real estate or the debtor's equitable interest therein, in the same manner as is provided by this code for the sale of real estate upon execution.

Sheriff liable. R. § 3383.

SEC. 3143. If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such.

Continuance. R. § 3384.

SEC. 3144. The judge or referee acting under the provision of this chapter, shall have power to continue his proceedings from time to time until they shall be completed.

Defendant failing to appear. R. § 3386. C. '51, § 1958.

SEC. 3145. Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories thus propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party, or witness, disobey an order of the court or judge, or referee, duly served, such person, party, or witness may be punished as for contempt.

Corresponding provisions of the Rev. *held*, not to be in conflict with Const., art. 1, § 19, providing that no person shall be imprisoned for debt, etc., unless in case of fraud, but *held*, that, in so far as it authorizes the determination in a summary proceeding without a jury, of questions not adjudicated in the original judgment, as to liability of property to seizure under execution, etc., and the enforcement of an order made in such determination by imprisonment, such provisions were in conflict with Const. art. 1, §§ 9 and 10: *Ex parte Grace*, 12–203.

Service of order. R. § 3387.

SEC. 3146. The order mentioned herein shall be in writing and signed by the court or judge or referee making the same, and shall be served in the same manner as an original notice in other cases.

Compensation of officers and witnesses. R. § 3388.

SEC. 3147. Sheriffs, referees, receivers, and witnesses, shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same shall be enforced by an order.

When warrant of arrest to issue. R. § 3389. C. '51, § 1959.

SEC. 3148. Upon proof to the satisfaction of the court, or officer authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, the said court or officer, instead of the order aforesaid, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or officer authorized to take his examination as hereinbefore provided. After being thus brought before the said court or officer, he may be examined in the same manner and with the like effect as is above provided.

Defendant to give bond. R. § 3390.

SEC. 3149. Upon being brought before the court or officer, he may enter into an undertaking in such sum as the court or officer

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shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court or officer as shall be directed, and will not, in the meantime, dispose of his property, or any part thereof; in default whereof he shall continue under arrest, and may be committed to jail on the warrant of such court or officer from time to time for safe keeping until the examination shall be concluded.

EQUITABLE PROCEEDINGS.

How and when brought. R. § 3391.

SEC. 3150. At any time after the rendition of a judgment, an action by equitable proceedings may be brought to subject any property, money, rights, credits, or interest therein belonging to the defendant, to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of securities for the same, may be made defendants.

The provisions of this section are applicable to equitable interests in real estate: *Bridgman v. McKissick*, 15–260.

Answers verified: petition taken as true. R. § 3392.

SEC. 3151. The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such order made or judgment rendered as the nature of the case may require.

Lien created from time of service of notice. R. §§ 3393, 3394.

SEC. 3152. In the case contemplated in the two preceding sections, a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property or any interest therein.

While a judgment at law is a lien upon any equitable interest of the debtor in real property (§ 2882 and notes), it is not so in such sense as to affect *bona fide* purchasers without notice, and a judgment creditor may, by proceedings under this and the preceding sections, acquire a superior lien upon the property by reason of his greater diligence: *Bridgman v. McKissick*, 15–260.

Surrender of property enforced. R. § 3395.

SEC. 3153. The court shall enforce the surrender of the money, or securities therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power to do so.

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TITLE XIX.

OF PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS, OR THE PROCEEDINGS OF BOARDS OR INDIVIDUALS ACTING JUDICIALLY.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS IN THE COURTS IN WHICH RENDERED.

By court where rendered. R. § 3424.

SECTION 3154. The district or circuit court in which a judgment has been rendered, or by which, or by the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order:

1. By granting a new trial for the cause, within the time, and in the manner prescribed by the sections on new trials;

2. By a new trial granted on proceedings against defendants served by publication only, as prescribed in title seventeen, chapter nine, section two thousand eight hundred and seventy-seven;

3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order;

4. For fraud practiced by the successful party in obtaining the judgment or order;

5. For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the errors in the proceedings;

6. For the death of one of the parties before the judgment in the action;

7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

8. For error in a judgment shown by a minor within twelve months after arriving at full age.

An appeal lies from a proceeding to vacate a judgment for fraud, etc., as provided in this section: *Dryden v. Wyllis*, 51–534, but such appeal is not triable in the supreme court *de novo*: *Ind. School Dist. of Rock Rapids v. Schreiner*, 46–172.

Laches cannot be imputed to a party who brings his action within the time given: *Ibid.*

A judgment rendered by default upon a petition which was not filed by the time stated in the notice (§ 2600), *held*, at least sufficiently irregular to be set aside under ¶ 3 of this section: *Morgan v. Small*, 33–118.

A decree of divorce obtained by fraud of the successful party, may be set aside under ¶ 4, and in the petition to have the decree set aside, defendant need not allege that rights of innocent parties have not intervened, such fact being immaterial: *Rush v. Rush*, 46–648; S. C., 48–701; and the fact that the party procuring the decree has again married will not prevent its being set aside: *Whitcomb v. Whitcomb*, 46–437. Such party may

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be convicted of adultery in cohabiting with a wife married after the fraudulent decree was rendered and before it was set aside: *The State v. Whitcomb*, 52–85.

It may admit of question whether a false statement in a pleading, which the opposite party has a full and fair opportunity to deny, can amount to fraud practiced by the successful party: *Miller v. Albaugh*, 24–128.

Fraud and negligence of defendant's attorney in not interposing a valid defense, is not a ground for vacating a judgment and granting a new trial: *Jones v. Leech*, 46–186.

The fraud shown in a particular case, *held*, sufficient to warrant the setting aside of the judgment: *Ind. School Dist. of Rock Rapids v. Schreiner*, 46–172.

That a party intended to appear and defend an action, but was prevented from doing so by a severe illness which rendered him incapable of attending to and interposing his defense, *held*, sufficient ground for a vacation of the judgment against him by default: *Luscomb v. Maloy*, 26–444; and so *held*, where defendant, having left home in time to return to the trial, was prevented from doing so by sickness: *Brewer v. Holborn*, 34–473.

Where, after judgment had been rendered, all the written evidence upon which the case had been tried was lost, *held*, that this was not sufficient reason for granting a new trial, either under ¶ 7 or ¶ 1 of this section, although the party was thereby prevented from prosecuting an appeal: *Loomis v. McKenzie*, 47–416.

The evidence in a particular case *held*, not to establish casualty or misfortune sufficient under this section to warrant the setting aside of a judgment: *Niagara Fire Ins. Co. v. Rodecker*, 47–162.

The error in the judgment, referred to in ¶ 8, is not an error in fact, but error in law apparent on the face of the record, such as would be ground for reversal on writ of error or appeal: *Bickel v. Erskine*, 43–213, 222.

Petition for new trial: when proper mode. R. § 3116.

SEC. 3155. Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered.

Where the ground for a new trial is discovered so near the close of the term that application cannot be made at that term, it may be made at the following one: *Alger v. Merritt*, 16–121.

This section contemplates application for a new trial made after the expiration of the three days mentioned in § 2838. If made within the time there specified, it should be by motion; if afterwards, by petition, under this section: *First Nat'l Bank of Tama City v. Murdough*, 40–26.

The petition in the cases here contemplated, need only show the facts upon which the new trial is asked, as in other cases: *Stineman v. Beath*, 36–73.

A party asking a new trial on the ground of newly discovered evidence, must show the exercise of diligence in procuring or discovering such evidence: *Stuckslager v. McKee*, 40–212; *Miller v. Albaugh*, 24–128; but only reasonable diligence need be shown: *Stineman v. Beath*, 36–73.

Where a party bases his petition for a re-trial on the ground of accident or surprise, he must show that he could not, by reason of the accident or surprise, with reasonable diligence, properly defend the action, or could not, by such diligence, have discovered the evidence previously to the trial: *Richards v. Nuckolls*, 19–555; but he need only allege that he could not *with reasonable diligence* have discovered the testimony before the trial; what was done by him, or what facts existed to show due diligence, is matter of evidence, and need not be stated in the petition, although necessary in an affidavit for a new trial on such ground under § 2837 ¶ 7: *Woodman v. Dutton*, 49–398; but, holding contra, see *Cohol v. Allen*, 37–449.

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Where the original proceeding is by attachment, notice of petition for new trial by a plaintiff in the original action, may be served in the same manner as the original notice in an attachment proceeding; that is, by publication or personal service on defendant without the state: *Darrance v. Preston*, 18–396.

The court may first try and decide upon the grounds to vacate, etc., as provided in § 3060 (overruling *C. & N. W. R. Co. v. Gilbert*, 38–434), and such trial should be by the court without a jury. The provison that the case shall be tried as other cases, etc., refers to the mode of producing evidence in the ordinary manner instead of by affidavit: *Carpenter v. Brown*, 50–451.

Upon the trial as here provided, a change of venue may be granted as in other cases: *Gibbs v. Buckingham*, 48–96; *The State v. Whitcomb*, 52–85.

Laches cannot be imputed to a party who brings his action under this section within the time given: *Ind. Sch. Dist. of Rock Rapids v. Schreiner*, 46–172.

A court of equity will direct new trials in actions at law, in cases where such new trials would have been ordered by the courts wherein the actions were tried had timely application been made to them, provided proper reasons are shown why application was not made in time, or the grounds upon which the interference of chancery is claimed, arose after the courts of law were deprived of power to grant the relief: *Bowen v. Troy Portable Mill Co.*, 31–460.

Mistakes of clerk and irregularity. R. § 3500.

SEC. 3156. The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year; and when made to vacate a judgment because of irregularity in obtaining it, must be made on the second day of the succeeding term.

Payment and satisfaction of a judgment by defendant will not bar a proceeding by plaintiff, within proper time, to correct a mistake of the clerk: *Goldsmith v. Clausen*, 14–278.

This section does not apply to an application for the entry of a judgment *nunc pro tunc*, which has been omitted: *Fuller v. Stebbins*, 49–376; nor to a motion to correct a record, made by a party against whom the court by mistake rendered a personal judgment without having jurisdiction to do so: *Shelley v. Smith*, 50–543.

Where a mistake of the clerk has remained undiscovered until too late to correct it by motion, as here specified, the party, being without fault and remediless in law, may be granted relief in an action in equity, and the fact that the erroneous judgment has been on appeal affirmed in the supreme court, will not affect such right: *Partridge v. Harrow*, 27–99.

When petition must be filed. R. § 3501.

SEC. 3157. The proceedings to obtain the benefit of subdivisions four, five, six, seven, and eight of section three thousand one hundred and fifty-four, of this chapter, shall be by petition, verified by affidavit setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action if the party applying was a defendant, and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability.

The fact that a motion for a new trial has been previously made and overruled, does not debar the party from seeking by proceedings under this section a new trial on other grounds than those previously urged, and such application may be united with other facts than those directly connected with the cause in which the new trial is sought, when such facts constitute a defense to the claim upon which the judgment was founded: *Reno v. Teagarden*, 24–144.

The time within which the proceedings must be instituted, commences to run from the entry of the order of judgment and not from the time of final judgment on appeal. It seems that taking an appeal waives the right to this proceeding: *Gray v. Corn*, 48–424.

That the petition is not verified as

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here required, will not render the proceedings thereunder void. The defect should be taken advantage of by motion to strike: *Rush v. Rush*, 46–648, 651.

That the application for a new trial does not set forth the facts constituting a defense, etc., is a defect which must be taken advantage of by motion for a more specific statement, or, possibly, by demurrer, but cannot be made available on a trial on the merits, or by objection on appeal: *Turner v. First, etc., Bank of Keokuk*, 30–191.

The limitation here specified does not apply to actions in equity founded upon the general jurisdiction in which equity exercises to grant relief in cases of fraud: *Dist. T'p of Newton v. White*, 42–608; but a court of equity will grant a new trial in an action at law, if the time for applying for relief under this section has elapsed, only when proper reasons are shown for such application: *Ibid; Bowen v. Troy Portable Mill Co.*, 31–460; *Partridge v. Harrow*, 27–96; *Hoskins v. Hattenback*, 14–314; *Bond v. Epley*, 48–600.

Party brought into court in the ordinary way. R. § 3502.

SEC. 3158. In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that defendant shall introduce no new cause, and the cause of the petition shall alone be tried.

The proceedings having been properly commenced in the court where the judgment was rendered, a change of venue to another county may be had as in other cases: *The State v. Whitcomb*, 52–85.

Not vacated until it is adjudged there is a defense. R. § 3503.

SEC. 3159. The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

The trial is as to whether there is a valid defense. The plaintiff need not again introduce the evidence necessary in the first instance to make out his case: *Morton v. Coffin*, 29–235.

If the court finds that there are not sufficient grounds for vacating a judgment, it need not inquire into the validity of the defense offered. If it becomes necessary to do so, however, not only the sufficiency of the answer, but the truth of its averments must be determined: *Niagara Ins. Co. v. Rodecker*, 47–162.

The judgment is only to be vacated after a trial of the defense on its merits, and the finding of the sufficiency thereof: *Brewer v. Holborn*, 34–473.

Where irregularity and fraud in obtaining a judgment were found, but there was no evidence that there was a valid defense, *held*, error to order the judgment vacated: *Dryden v. Willis*, 51–534.

This section is applicable to the proceedings under § 3155: See notes to that section.

As to re-trial on judgment by default against defendant served by publication only, see § 2877.

The court, without a jury, is to try and decide upon the question of granting a new trial: *Carpenter v. Brown*, 50–451.

Section applied: *Miracle v. Lancaster*, 46–179.

See, also, notes to preceding section.

First try grounds to vacate. R. § 3504.

SEC. 3160. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action.

Injunction. R. § 3505.

SEC. 3161. The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge upon its being rendered probable, by affidavit

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or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

When judgment is affirmed. R. § 3506.

SEC. 3162. In all cases of affirmance of the judgment or order, when the proceedings have been suspended, judgment shall be rendered against the plaintiff in error for the amount of the former judgment, interests, and costs, together with damages at the discretion of the court, not exceeding ten per cent. on the amount of the judgment.

CHAPTER 2.

OF APPELLATE PROCEEDINGS IN THE SUPREME COURT.

From what appeals may be taken. R. § 2631. C. '51, § 1555.

SECTION 3163. The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character.

The supreme court has only appellate jurisdiction: *Westbrook v. Wicks*, 36–382; and it cannot, in chancery cases, although triable *de novo*, consider testimony not presented to and considered by the court below: *McGregor v. Gardner*, 16–538. In a law case it is a court for the correction of errors at law, and it will not decide a case upon an agreed statement of facts which does not purport to embody the evidence, and when no error of law is presented: *Harvey v. Miller*, 25–219.

The supreme court has appellate jurisdiction over judgments and decisions of district courts, and may overrule a decision thereof in a suit against a county, by which the right of the district attorney to appear for the county therein is denied: *Clark v. Lyon*, 37–469.

The right of appeal is governed by the law in force at the time judgment was rendered: *Rivers v. Cole*, 38–677; *City of Davenport v. D. & St. P. R. Co.*, 37–624.

As to when appeals in special cases will lie, see notes to next section.

Same. R. § 2632. C. '51, § 1556.

SEC. 3164. Appeal may also be taken to the supreme court from the following orders:

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken;

2. A final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment;

3. When an order grants or refuses, continues or modifies a provisional remedy; or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment; when it grants or refuses a new trial, or when it sustains or overrules a demurrer;

4. An intermediate order involving the merits and materially affecting the final decision;

5. An order or judgment on habeas corpus.

An appeal lies from judgment by default: *Doolittle v. Shelton*, 1 Gr. 271; *Woodward v. Whitescarver*, 6–1; also, from a final order in a proceeding to vacate a judgment for irregularity, fraud, etc., as provided in § 3154: *Dryden v. Wyllis*, 51–534; also, from an order appointing, or refusing to appoint, a receiver: *Callanan v. Shaw*, 19–183; also, from an order dismissing an action for want of a bond for costs, under § 2928, but

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not from an order requiring such bond: *D. M. V. Live Stock Ins. Co. v. Henderson*, 38–446; also, from an order dissolving or sustaining an attachment: *Johnson v. Butler*, 1–459; or, from a judgment against a garnishee: *Bebb v. Preston*, 1–460; but such appeal does not bring up the main case for review: *Berry v. Gravel*, 11–135.

An appeal lies from the action of any judge allowing or refusing an injunction (the next section having changed the law under which *Monticello Bank v. Smith*, 25–248; *Jewett v. Squires*, 30–92; *In re Curley*, 34–184, and other cases were decided): *Bennett v. Hetherington*, 41–142.

An appeal will not lie from an intermediate order or ruling, as upon questions of practice or the admission or exclusion of evidence, but only from such judgments or orders as determine the rights of the parties to the relief or remedy asked, or to a substantial right as to the course of proceedings, whereby the cause is determined or is tried in a manner not authorized by law. The decision appealed from must be one affecting the merits of the case: *Richards v. Burden*, 31–305; therefore, *held*, that appeal would not lie from the ruling upon a motion to suppress depositions: *Baldwin v. Mayne*, 40–687.

Where the record fails to show that a final judgment was rendered, advantage cannot be taken, on appeal, of any errors occurring on the trial: *Shannon v. Scott*, 40–624; but *held*, that an appeal in an *ad quod damnum* proceeding from a decision of the court overruling the motion to set aside the verdict and quash the writ, might be taken without final judgment being rendered: *Burnham v. Thompson*, 35–421.

An entry which showed that a demurrer was overruled, and that the party excepted, and elected to stand thereon, *held*, to be such an order as might be appealed from: *Cowen v. Boone*, 48–350; also, *held*, that an appeal would lie from a decision of the court overruling a motion to strike a petition of intervention from the files, on the ground that the cause, as between the original parties, was settled: *First National Bank of Leon v. Gill*, 50–425.

The fact that the cause is still pending below, does not prevent the supreme court from determining an appeal from an intermediate order involving the merits: *Stanley v. City of Davenport*, 54–463.

Where an intermediate order was one which the law did not contemplate, *held*, that it would be presumed that such order would not affect the final decision, and an appeal therefrom would not lie: *Battell v. Lowery*, 46–49.

An appeal does not lie in a proceeding for contempt: See § 3499.

Same. R. § 2633.

SEC. 3165. If any of the above orders are made by a judge, the same is reviewable in the same way as if made by a court.

This section changes the law under which previous cases were decided: See notes to preceding section.

Court may prescribe rules. R. § 2634. C. '51, § 1557.

SEC. 3166. The court may, also, in its discretion, prescribe rules for allowing appeals on such other intermediate orders or decisions as is deemed expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the court from which the appeal is taken.

Mistake of clerk below. R. § 3498.

SEC. 3167. A mistake of the clerk shall not be ground for an appeal until the same has been presented and acted upon by the court below.

Section applied: *Daniels v. Claflin*, 15–152.

When not to be reversed. R. § 3545.

SEC. 3168. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made there and overruled.

A judgment cannot be reversed for error of the court below, unless the question involved has been in some way presented to the lower court, and a ruling had thereon: *Carmichel v. Vandeburg*, 50–651; *Black v. Boyd*, 52–719.

A judgment by default will not be reviewed in the supreme court until a motion to set it aside has been made

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and overruled in the court below: *Hunt v. Stephens*, 25–261; so *held* where there was a defect in the service upon which judgment was rendered: *Pigman v. Denney*, 12–396; *McKinley v. Betchtel*, 12–561; *Bethel v. Leay*, 14–592; *Van Vark v. Van Dam*, 14–252; *Decatur Co. v. Clemens*, 18–536, and cases cited; *Pratt v. Western Stage Co*, 27–363.

Section applied where a reversal was sought, on the ground that the judgment was excessive: *Dickey v. Harmon*, 26–501.

Section applied generally: *Carleton v. Byington*, 17–579; *Berryhill v. Jacobs*, 19–346; *Boyd v. Rutledge*, 25–271; *Wile v. Wright*, 32–451; *Coakley v. McCarty*, 34–105; *Grimes v. Hamilton Co.*, 37–290; *Savings Bank of Decorah v. Horn*, 41–55; *Smith v. Warren Co.*, 49–336.

The provisions of this section, applied in case of an appeal from a justice's court: *Smith v. Parker*, 28–59; and in case of a defective service in an action brought before a justice, the judgment should not be reversed on appeal on account of such defect, unless motion to correct the same had been made before the justice and overruled: *Leonard v. Hallam*, 17–564; but where there was no service of notice, and the justice had not jurisdiction, advantage may be taken of that fact by writ of error, without having made any motion before the justice: *Holmes v. Hull*, 48–177.

A motion for new trial was held not necessary in order to enable the supreme court, on appeal, to review a decision upon the admissibility of evidence properly excepted to, when such decision virtually disposes of the whole case: *McCoy v. Julian*, 15–371; but, as to the question whether a motion for new trial on the ground of errors of law committed by the court and duly excepted to, was necessary before such errors would be reviewed on appeal, the court was subsequently equally divided: *Rindskoff v. Lyman*, 16–260. (A motion for new trial is no longer necessary; see following section.)

The necessity of a motion being made below to correct errors, etc., is not removed by the following section, making motion for new trial unnecessary to secure the review of a cause in the supreme court: *Webster v. C. R. & St. P. R. Co.*, 27–315.

Motion for new trial. 11 G. A. ch. 49, § 1.

SEC. 3169. The supreme court may review and reverse on appeal any judgment or order of the district or circuit court, although no motion for a new trial was made in such courts.

Before the passage of the act embodied in this section, the question was unsettled whether a motion for a new trial was necessary to bring up for review errors of law occurring at the trial: *Presnall v. Herbert*, 34–539; and see notes to preceding section.

This section affects the remedy, and hence is not unconstitutional as applying to actions arising before its passage: *Johnson v. Semple*, 31–49.

Nor is the section in conflict with Const., art. 5, § 4, providing that in actions at law the supreme court shall be a court for the correction of errors. Previous to the enactment of this provision, that court would review, as matter of law, the ruling of the lower court upon a motion for a new trial on the ground that the verdict was contrary to the evidence, and this act simply authorizes the court to treat the case as if such motion for a new trial was made and entered, and may be regarded as a standing motion in all cases: *Coffin v. City Council of Davenport*, 26–515.

This section does not affect the provision of the preceding one: *Webster v. C. R. & St. P. R Co.*, 27–315; nor does it dispense with the necessity of taking exceptions to rulings objected to, as required by § 2831: *Root v. Ill. Cent. R. Co.*, 29–102; *Eason v. Gester*, 31–475.

Section applied: *Drefahl v. Tuttle*, 42–177, 181.

Finding of facts: evidence certified. Same, § 2.

SEC. 3170. Where a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties or their attorneys, or, in case the evidence consists wholly of written testimony, from the

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certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below.

The certificate here provided for cannot be made by the judge in vacation, unless by agreement of parties. The term "judge" means the same as if the word "court" had been used: *Luse v. City of Des Moines*, 22–590.

The certificate of the clerk, in an action tried by ordinary proceedings, as to what evidence was introduced, cannot be regarded: See notes to § 3184.

This section does not dispense with assignment of errors: *Sisters of Visitation v. Glass*, 45–154; it refers only to actions at law, and is not in conflict with § 2742, as securing trial *de novo* otherwise than there provided: *Ibid; Vinsant v. Vinsant*, 47–594.

It is only when the evidence is all before the supreme court, that it can review a finding of the court below as to a question of fact: *Van Riper v. Baker*, 44–459, 452.

Section applied: *Wormley v. Dist. T'p of Carroll*, 45–666, 669.

As to finding of facts by the court, see § 2743.

How docketed. R. § 3508.

SEC. 3171. The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee.

Process. R. § 2635. C. '51, § 1558.

SEC. 3172. The court may issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction.

Appeals when taken: limitation on right. R. § 3507. C. '51, § 1973.

SEC. 3173. Appeals from the district and circuit courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. But no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court, but this limitation shall not affect the right of appeal in any cause in which is involved any interest in real property.

In computing the time within which an appeal may be taken, the day on which judgment was rendered will be excluded, and the corresponding day at the end of the time included: *Carleton v. Byington*, 16–588.

The service of the notice required by § 3178, within the time specified, is sufficient. It is not necessary that it be filed with the clerk within that time: *Baldwin v. Tuttle*, 23–66.

An appeal taken within six months from the decision of the court on a petition for a new trial, under § 3155, but more than six months from the rendition of the judgment upon the verdict, does not bring up for review the action of the court in rendering such judgment and its proceedings prior thereto, the appeal therefrom being barred: *Cohol v. Allen*, 37–449.

Where the judgment appealed from bore date more than the prescribed length of time before the taking of the appeal, but it appeared that the cause was held under advisement, and decided in vacation and within the prescribed time, without any agreement that judgment should be entered as of the last day of the preceding term, *held*, that the appeal was not barred by lapse of time: *Kendall v. Lucas Co.*, 26–395.

Where an action was commenced in June, 1878, to set aside a judgment rendered in June, 1877, for one hundred dollars and costs, *held*, that as the judgment bore interest from its date, the amount in controversy in the action was more than one hundred dollars, as shown by the pleading, and an appeal could be taken: *Dryden v. Wyllis*, 51–534.

Where the amount in controversy does not exceed one hunded dollars, and there is no certificate of the judge as here provided, the appeal will be dismissed: *Harrington v. Pierce*, 38–260.

Such certificate must state that the case "involves the determination of a question of *law*, etc."; a certificate that the case involves the determination of a *question*, etc., is not sufficient: *Kierulff v. Adams*, 48–31.

The parties cannot stipulate that the judge shall give a certificate in such cases. It is not a right of the

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unsuccessful party to have the certificate, and it can only properly be made where the judge believes it to be desirable for the proper administration of justice, that some specified question in the case should be settled by the court of last resort: *Fallon v. District T'p of Johnson*, 51–602.

The certificate of the judge must be made at the time of the trial, and before the adjournment of the term of court at which the judgment is rendered: *Ibid; City of Independence v. Purdy*, 48–675; *Rose v. Wheeler*, 49–52; *Lomax v. Fletcher*, 49–705; *Rivers v. Cole*, 38–677; *Hershfield v. First Nat'l Bank of Grinnell*, 39–699; *Nicely v. Rogers*, 39–441; but the certificate cannot be properly made until the case is finally disposed of, as by the ruling on a motion vacating a judgment and granting a new trial: *Hickok v. Buell*, 51–655.

A certificate of the judge may be in the language of the statute, and need not specify what question is involved. Such certificate brings up the whole case to be passed upon, the same as if the amount exceeded one hundred dollars: *Fell v. B. C. R. & M. R. Co.*, 43–177. But this is changed by Rule 12, of the Sup. Ct., requiring the certificate to state *the question* upon which the decision of the supreme court is desired, and under that rule it is held that the appeal will be dismissed where the certificate does not comply with the rule: *King v. Derby*, 51–11; *Wetz v. Austin*, 51–342; *Minnick v. C. R. I. & P. R. Co.*, 51–363; *Throckmorton v. Horton*, 52–737. And such rule of the court is not void as limiting the jurisdiction of the court further than authorized by statute: *Wilson v. Iowa Co.* (supplemental opinion) 52–339.

Whether findings of facts appear of record or not, it will be presumed that the facts were correctly found, and only questions of law presented in the certificate will be considered. If there is no finding of facts, it will be presumed that such questions of law arise on the facts as found: *Thorpe v. Dickey*, 51–676.

SEC. 3174. A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court.

Part of co-parties may appeal. R. § 3517. C. '51, § 1979.

The parties for whose benefit suit is brought or defended under § 2549, are not parties in such sense as to have the right of appeal: *Fleming v. Mershon*, 36–413.

In an action against the unknown owners of certain land, *held*, that there could be no appeal on behalf of the land, or the owners thereof, unless some one appeared in the action and made himself a party as the owner: *Fuller v. Unknown Owners, etc.*, 9–430.

SEC. 3175. If the other co-parties refuse to join, they cannot, nor can any of them, take an appeal afterwards; nor shall they derive any benefit from the appeal, unless from the necessity of the case.

When they refuse to join. R. § 3518. C. '51, § 1980.

SEC. 3176. Unless they appear and decline to join, they shall be deemed to have joined and shall be liable for their due proportion of costs.

When deemed to have joined. R. § 3519. C. '51, § 1981.

If the co-parties, upon being served, elect to join in the appeal, they are entitled to all the benefits thereof, and may be allowed to file an assignment of errors, and be heard: *Barlow v. Scott*, 12–63.

Section applied: *Engleken v. Webber*, 47–558.

SEC. 3177. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment, or part of a judgment, or order not appealed from, but the same shall proceed as if no such appeal had been made.

Appeal from part of judgment or order. R. § 3510

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NOTICE AND FILING TRANSCRIPTS.

How taken: notice. R. § 3509. C. '51, § 1974.

SEC. 3178. An appeal is taken by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part.

To give the supreme court jurisdiction, the service of notice upon appeal is as essential, where there is no voluntary appearance, as is the service of original notice in suits commenced in the lower court: *McClellan v. McClellan*, 2-312; *Lewis v. Miller*, 4 Gr. 95.

It is not necessary that the notice be filed in the office of the clerk. The service thereof is all that is necessary: *Baldwin v. Tuttle*, 23-66.

There is no authority for serving a notice of appeal upon members of a party's family, as in case of original notice: *Draper v. Taylor*, 47-497.

Service of such notice cannot be made by a party to the action: *Ibid*; *Marion Co. v. Stanfield*, 8-406.

The method of service of notice of appeal, when defendant in the court below was served by publication only, and made no appearance, discussed: *McClellan v. McClellan*, 2-312; (and now see § 3214).

An appeal from a final decree in a chancery case, deprives the trial court of all further jurisdiction in the case, until it is remanded. It cannot make an order, retax the costs, or correct the record: *Levi v. Karrick*, 15-444; *McGlaughlin v. O'Rourke*, 12-459; and this rule applies also in actions at law, when the entire cause is brought to, and pending in the supreme court on appeal: *Turner v. First National Bank of Keokuk*, 50-191; *Carmichael v. Vandebur*, 51-225; but *held*, that the appeal did not so divest the jurisdiction of the lower court but that it might order a lost record substituted, and do whatever else was proper to be done to enable the supreme court to review its alleged errors: *Steiner v. Steiner*, 49-70; *Becker v. Becker*, 50-139.

When perfected. R. § 3511. C. '51, § 1975-6.

SEC. 3179. An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured his fees for a transcript; whereupon the clerk shall forthwith transmit by mail, express, or messenger, not a party nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant in writing in the notice has directed, to which shall be appended copies of the notices of appeal, and of the supersedeas bond if any.

When tried. R. § 3513. C. '51, § 1978.

SEC. 3180. The notice of appeal must be served at least thirty days, and the cause filed and docketed at least fifteen days before the first day of the next term of the supreme court, or the same shall not then be tried unless by consent of parties. If the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term.

For failure to file transcript and docket: appeal dismissed or judgment affirmed. R. § 3514.

SEC. 3181. If the appellant fails to file a transcript and have the cause docketed as provided in the preceding section, or fails to file at the time the transcript should be filed, the certificate of the clerk of the inferior court, stating when he was served with notice, and that he has not had sufficient time to prepare the transcript, the appellee may file a certified copy of the judgment or order appealed from, and of the notice served on such clerk, and, on motion, have the appeal dismissed or the judgment or order appealed from affirmed.

Section applied: *Turner v. Hine*, 37-500; *Hunger v. Patterson*, 37-501; but *held*, that the judgment of affirmance might be set aside upon a proper showing which would authorize such action: *Scarf v. Patterson*, 37-503.

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ch. 56 (inserted following § 3182), *held*, that if appellee, upon being served with abstract, or within a reasonable time thereafter, does not indicate to appellant that he desires a transcript, but insists thereon at the term at which the cause is to be submitted, by motion to dismiss or affirm, time will be given to procure a transcript, and if necessary a continuance granted: *White v. Sarery*, 49–197; also that an appeal will not be dismissed or the judgment affirmed upon motion, on the ground that the case is not triable *de novo*, and there is no assignment of errors, and that such objection can only be raised on final hearing: *Ibid.*

Same. R. § 3515.

SEC. 3182. If the transcript has been sent up, but the appellant does not file the same when the same should be filed as herein provided, the appellee may file the same, and may, on motion, have the appeal dismissed or the judgment affirmed, as the court, from the circumstances of the case, shall determine.

The appellee can only have the appeal dismissed or judgment affirmed, when the notice of appeal has been served the proper length of time before the term, under § 3180; but a showing that the clerk was served in time, will be sufficient to secure an affirmance on motion, as here contemplated, without showing that the party has also been served: *Pratt v. Western Stage Company*, 26–241.

[Fifteenth General Assembly, Chapter 56.]

Failure to docket or file transcript not to work dismissal.

SEC. 1. No appeal to the supreme court of the state shall be dismissed or judgment of court below affirmed because the said cause was not docketed or transcript filed in supreme court, if it be made to appear that an appeal was taken in good faith and not for delay, or if, from the conduct of appellee or his counsel, appellant was induced to believe no motion to dismiss or affirm would be made.

This act applied: *Engleken v. Schultz*, 40–703; and see notes to § 3181.

Same as to assignment of errors. R. § 3516.

SEC. 3183. If, the transcript being filed, errors are not assigned and filed with the clerk of the supreme court, and a copy of the same served on the appellee or his attorney ten days before the first day of the trial term, the appellee may have the appeal dismissed or the judgment or order affirmed, unless good cause for the failure be shown by affidavit.

Appeal will be dismissed if assignment of errors is not served in time. It seems that, if properly served on the appellee, he could not complain of the mere non-filing of the same with the clerk: *Ind. Dist. of Crocker v. Ind. Dist. of Ankeny*, 48–206.

An assignment of errors presented by appellant in connection with his reply to appellee's argument, will not be considered: *Betts v. City of Glenwood*, 52–124.

What shall be sent up. R. § 3512. C. '51, § 1977.

SEC. 3184. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified when not

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material to the determination of the appeal, the court may direct the person blameable therefor to pay the costs thereof.

In an equitable action tried on written evidence, it is not necessary that such written evidence be embodied in and preserved by bill of exception, but the certificate of the clerk that it is all sent up, is sufficient to enable the supreme court to act upon it: *Ticonic Bank v. Harvey*, 16–141.

Where it does not appear from recitals in the decree or from a certificate of the judge or clerk that the evidence is all before the supreme court, the case will not be tried *de novo*: *Van Orman v. Spafford*, 16–186; *Anderson v. Easton*, 16–56; *Kellogg v. Kelsey*, 16–388; *Winslow v. Turner*, 20–294; *Pickett v. Hawes*, 20–335; *Wetherell v. Goodrich*, 22–583.

A certificate of the clerk that the transcript contains all the evidence "appearing on file," will not be sufficient: *Davenport v. Ells*, 22–296; *Grant v. Grant*, 46–478.

If the original evidence is not certified up in such cases, the same presumption obtains in favor of the correctness of the ruling below, as in an action at law: *The State v. Orwig*, 27–528.

On appeal in a case tried by ordinary proceedings, a transcript should be sent up, but if tried by equitable proceedings upon written testimony, the depositions and papers are to be sent up, in their original form: *Baldwin v. Tuttle*, 23–66.

The written evidence upon which an equity case is tried becomes a part of the record, and if it is lost, it is to be supplied by substitution. Such loss after judgment, and pending appeal, is not ground for a new trial: *Loomis v. McKenzie*, 48–416.

An abstract in the supreme court stands in place of a transcript, and should contain a statement that all the evidence is embodied therein: *Andrews v. Kerr*, 49–680.

Where the abstract purported to contain all the evidence, and recited that the evidence was taken down in writing by order of the court, and made a part of the record, *held*, that there was sufficient to entitle the appellant to a trial *de novo*: *Stoddard v. Hardwick*, 46–160.

A certificate of the clerk as to what evidence was presented in an action tried by ordinary proceedings, will not be regarded; such evidence must be made matter of record by being embodied in the bill of exceptions signed by the judge: *Jordan v. Quick*, 11–9; *Garber v. Morrison*, 5–476: a paper cannot be made a part of the record by mere certificate of the clerk: *The State v. Jones*, 11–11; *Harmon v. Chandler*, 3–150.

While a bill of exceptions in an action by ordinary proceedings should be brought to the supreme court by copy, and not in its original form, yet an error in this respect only works a continuance to obtain a corrected transcript: *Fernow v. D. & S. W. R. Co.*, 22–528.

Appeals are based upon the records of the cause remaining in the court below. The supreme court has no jurisdiction to correct mistakes or supply omissions in such records: *Bartle v. City of DesMoines*, 37–635.

A motion made in the supreme court, supported by affidavits, to strike the bill of exceptions as not correctly embodying the evidence, cannot be considered: *Hughes v. Stanley*, 45–622.

An amended record cannot be submitted upon re-hearing: See notes to § 3202.

A motion to dissolve an attachment, *held*, to be part of the record, without being incorporated into a bill of exceptions: *Ellsworth v. Moore*, 5–486; so *held*, also, as to a motion for a new trial: *Mays v. Deaver*, 1–216.

Power to obtain perfect transcript. R. § 3524.

SEC. 3185. The appellant shall file a perfect transcript, and to that end the clerk of the court below must, at any time, on his suggestion of the diminution of the record and on the payment of fees, certify up any omitted part of the record, according to the truth, as the same appears in his office of record; and such applicant shall not be entitled to any continuance in order to correct the record, unless it shall clearly appear to the court that he is not in fault. Subject to which requirement, either party may, on motion before trial day, obtain an order on the clerk below, commanding him to transmit at once tothe supreme court a true copy of such imperfect or omitted part of the record as shall be in gen-

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eral terms described in the affidavit or order. Such motion must be supported by affidavit, unless the diminution be apparent or admitted by the adverse party, and must not be granted unless the court is satisfied that it is not made for delay.

STAY OF PROCEEDINGS.

How obtained: bond: conditions and approval. R. § § 3527–8. C. '51, § 1983.

SEC. 3186. An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When such bond has been approved by the clerk, and filed, he shall issue a written order commanding the appellee and all others to stay proceedings on such judgment or order, or on such part as is superseded as the case may be. No appeal or stay shall vacate or affect the judgment appealed from.

An appeal is not perfected by the filing of a supersedeas bond alone, but service of notice of appeal is also necessary, and until such notice is served, at least on the clerk, such officer should not recall an execution or issue an order to stay proceedings thereunder: *Pratt v. Western Stage Co.*, 26–241.

Where, on appeal, the judgment as far as it concerned one party appealing, was affirmed, but as to the other it was reversed; *held*, that the party as to whom it was affirmed and his sureties were liable on their appeal bond: *Knight v Waters*, 15–420.

A bond, irregular in form, construed as a statutory appeal bond: *Field v. Schricher*, 14–119.

Section applied: *Phillips v. Germon*, 43–101.

When supreme court or judge may fix conditions of bond and approve same. 14 G. A. ch. 8.

SEC. 3187. In cases wherein the appellant has perfected his appeal to the supreme court, and the clerk of the district or circuit court has unjustly refused to approve the appeal bond offered, or makes the penalty therein too large, or the conditions thereof unjust, the appellant may move the supreme court if in session, or in its vacation, on such written notice to the appellee as the judge may prescribe, may move any judge thereof to determine the conditions, fix the penalty, and approve the appeal bond. The motion, verified by the affidavit of the appellant or his attorney, shall contain a brief statement of the nature of the action in which the appeal was taken, of the judgment or order appealed from, of the steps taken by the appellant with reference to his appeal, and of his giving, or offering to give, an appeal bond, of the action of the clerk of the court below with reference to such bond, and wherein he has acted wrongfully; and if the supreme court, or any judge thereof, considers that the clerk

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has made unjust conditions in the bond, or the penalty thereof too high, or has wrongfully refused to approve the same, such court or judge shall issue an order prescribing the conditions of the appeal bond, fixing the penalty thereof, and either approve it or direct the clerk of the supreme court so to do, which bond shall be filed with the officer last named. The supreme court, or judge thereof, may order that all or any part of the papers and records in the cause appealed, or certified copies thereof, be produced on the hearing of such motion, and pending the disposition thereof, may make an order staying the enforcement of the judgment or order appealed from, and on such terms as are just. The order, if made by the judge, shall be in writing and signed by him, and upon the service thereof, or of a certified copy, when made in court, upon the clerk of the court below, all proceedings in the court appealed from shall be stayed, and all orders, processes, executions, or other papers issued therefrom shall be recalled, and the appellant be placed in the same condition that he was when the judgment or order appealed from was made or rendered.

How and when additional surety obtained. R. § 3529.

SEC. 3188. If the appellee believe the bond defective, or the sureties insufficient, he may move the supreme court if in session, or in its vacation, on ten days written notice to the appellant, may move any judge of said court, or the judge of the court below where the appeal was taken, to discharge the bond, and if the court or such judge shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or such judge shall issue an order discharging such bond, unless a good bond, with sufficient sureties, be executed by a day by him fixed. The order, if made by a judge, shall be in writing and signed by him; and upon his filing, or the filing of a certified copy of the order when made in court, in the office of the clerk of the inferior court, execution and other proceedings for enforcing the judgment or order may be taken, if a new and good bond is not filed and approved by the day as aforesaid.

Proceedings stayed. R. § 3530.

SEC. 3189. But another order staying proceedings may be issued by the clerk, upon the execution before him of a new and lawful bond with sufficient sureties as hereinbefore provided.

Penalty of bond. R. § 3531. C. '51, § 1984.

SEC. 3190. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars.

When appeal is from a part only. R. § 3532. C. '51, § 1985.

SEC. 3191. The taking of the appeal from a part of a judgment or order, and the filing of a bond as above directed, does not cause a stay of execution as to any part of the judgment or order not appealed from.

Execution recalled. R. § 3533. C. '51, § 1987.

SEC. 3192. If execution has issued prior to the filing of the bond above contemplated, the clerk shall countermand the same.

Property surrendered. R. § 3534. C. '51, § 1988.

SEC. 3193. Property levied upon and not sold at the time such countermand is received by the sheriff, shall forthwith be delivered up to the judgment debtor.

It seems that this section refers only to personal property: *Swift v. Conboy*, 12–444.

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TRIAL—JUDGMENT.

SEC. 3194. The supreme court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the inferior court or judge should have done, according as it may think it proper.

Power of court. R. § 3536. C. 51, § 1989.

The affirmance of a general judgment is an affirmance thereof with respect to all the issues decided thereby, although the opinion be based upon but one of such issues: *Finch v. Hollinger*, 46–216.

Where a judgment is entire, it should be affirmed or reversed as to all the parties appealing: *Cavender v. Heirs of Smith*, 5–157, 195.

A cause may be remanded for new trial as to a cross-action, with an order that such trial shall extend to that alone, and that the judgment on plaintiff's original action remain undisturbed: *McAfferty v. Hale*, 24–355.

On appeal, the supreme court cannot enter a final order or judgment in a case, where the decision appealed from was not final: *Tyler v. Langworthy*, 37–555; nor can it render final judgment, when it reverses a cause on the ground that a new trial should have been granted below. It can only enter up such judgment as the court below should have rendered: *Payne v. The C., R. I. & P. R. Co*, 47–605.

Where a judgment rendered below upon a report of a referee, was set aside, on appeal, as in conflict with the law and evidence, and the case was remanded, *held*, that the lower court should have proceeded in the same manner as though such report had been set aside upon motion there made: *Gray v. Regan*, 57–688.

In actions at law it is only where the facts are settled by agreement of parties or the finding of a court or referee, or by a special verdict of the jury, that the reversal in the supreme court is final and precludes a new trial below: *Ibid; Artz v. C. R. I. & P. R. Co.*, 38–293. So where a judgment of the court below upon a special verdict was reversed on an error of law, *held* that the supreme court might render such judgment as should have been rendered below: *Gilmore v. Ferguson*, 28–422. Also, *held*, where a case was reversed on the ground that upon a finding of facts made by the court, the judgment was erroneous in law, a final judgment might be rendered on such findings; and that, after the case was sent back for further proceedings, it would be error to allow a new trial in the court below, and that a proper judgment should be at once there entered upon the facts as found: *Roberts v. Corbin*, 28–355.

The supreme court can only try issues properly presented upon appeal, and where a motion was made by defendant, appellant, that plaintiff, appellee, take nothing further in the cause and be barred from further prosecuting the same, on account of a satisfaction of the judgment below, etc., which was resisted on the ground of fraud, and an assignment of a part of the judgment before satisfaction, *held*, that such question could not be determined by the supreme court: *Simonson v. C.R.I. & P.R.Co.*, 48–19.

The supreme court having reversed a cause and remanded it for a new trial, will not at a subsequent term, on motion of appellant, render judgment in his favor. In analogy to the rule in the lower courts (§ 179), entries or orders made at a previous term will only be changed to correct an evident mistake: *Roberts v. Corbin*, 26–315, 329.

The supreme court has power to correct or cancel judgments improvidently entered through mistake or oversight: *Drake v. Smythe*, 44–410.

A procedendo is not necessary to authorize the court below to re-docket and proceed with the case in a proper manner. That may be done on proper notice to the adverse party, at any time after the time for re-hearing has expired: *The State v. Knouse*, 33–365; *Becker v. Becker*, 50–139.

Where defendant in the court below, upon his demurrer being overruled, stood thereon and appealed, and the ruling was reversed, *held*, that he was not entitled to judgment in the supreme court, but that the case must be remanded, and the plaintiff would have leave to amend: *Ware v. Thompson*, 29–65.

On an appeal in an action in which usury was pleaded as a defense, *held*, that plaintiff might remit the usury and take judgment in the supreme court for the principal, and that judgment might also be entered there for the ten per cent. penalty for the use of the school fund: *Thompson v. Purnell*, 10–205.

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Judgment against sureties on stay bond.
R. § 3537.
C. '51, § 1986.

SEC. 3195. The supreme court, where it affirms the judgment, shall also, if the appellee moves therefor, render judgment against the appellant and his sureties on the bond above mentioned for the amount of the judgment, damages, and costs referred to therein, in case such damages can be accurately known to the court, without an issue and trial.

If appellee take a new judgment against appellant and sureties on his appeal bond, the former judgment is merged therein, and its lien destroyed: *Swift v. Conboy*, 12–444.

Under Rev., which did not prohibit stay of executions when the judgment was appealed from, as does the Code (Rev., § 3293; Code, § 3061), *held*, that a judgment so rendered, on motion of appellee, might be stayed as other judgments: *Peoria F. & M. Ins. Co. v. Dickerson*, 29–98.

See, also, note to following section.

Damages for delay.
R. § 3538.
C. '51, § 1990.

SEC. 3196. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or part has been superseded by bond as above contemplated, the court shall award to the appellee damages upon the amount superseded; and, if satisfied by the record that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent. thereon, as shall effectually tend to prevent the taking of appeals for delay only.

Where there is not a money judgment in the court below against appellants, this and the preceding sections do not confer power on the supreme court, to render such judgment on the appeal bond. Although an appeal be taken solely for delay, yet it is only where the collection of money and the judgment therefor has been superseded by bond that damages may be awarded, as here contemplated, against the party taking the appeal: *Berryhill v. Keilmeyer*, 33–20.

In a particular case, *held*, that it did not appear that the appeal was taken for delay: *Ragan v. Day*, 46–239.

Cause remanded.
R. § 3539.
C. '51, § 1991.

SEC. 3197. If the supreme court affirm the judgment or order, it may send the cause to the court below to have the same carried into effect, or it may itself issue the necessary process for this purpose and direct such process to the sheriff of the proper county, as the party may require.

It is not obligatory upon the supreme court to issue process, etc., as here contemplated: *Roberts v. Corbin*, 26–315, 331.

Restitution of property.
R. § 3540.
C. '51, § 1992.

SEC. 3198. If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property or the value thereof.

Where the property, restoration of which is sought as here provided, has, by voluntary sale or by seizure and sale, passed to an innocent purchaser, or in the *bona fide* discharge of a trust, pursuant to an order of court, been turned over to another, the summary remedy here given cannot properly be administered: *Hanschild v. Stafford*, 27–301.

Where, upon appeal, it was decided that a writ of possession had been irregularly issued by the court below, *held*, that such fact did not, of itself, entitle the appellant to a restoration of the possession taken from him by such writ: *Lombard v. Atwater*, 46–501.

Title not affected.
R. § 3541.
C. '51, § 1993.

SEC. 3199. Property acquired by a purchaser in good faith under a judgment subsequently reversed, shall not be affected by such reversal.

A purchase at a sheriff's sale, by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of the

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purchaser and a person thus buying is not, within the meaning of the statute, a *bona fide* purchaser: *Twogood v. Franklin*, 27–239.

This section applies in case of a purchase by a judgment creditor, where he buys before notice of appeal, and where, on another trial, he again recovers: *Frazier v. Craft*, 40–110; and see notes to § 1941.

SEC. 3200. The supreme court shall have power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may be continued until obeyed. Power to imprison. R. § 3542.

SEC. 3201. If a petition for rehearing be filed, the same shall suspend the decision, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which case such decision shall be suspended until the next term. Re-hearing. R. § 3543.

A new case cannot be made on a petition for re-hearing, nor matters insisted upon which were not presented in the original case: *Hintrager v. Hennessy*, 46–600, 604; *Mann v. S. C. & P. R. Co.*, 46–631, 643. So the court cannot, upon re-hearing, consider an additional abstract or amended record not before them at the first hearing: *Cramer v. City of Burlington*, 45–627; *Nixon v. Downey*, 49–166.

After the decision of a cause by the supreme court, a procedendo was filed in the court below, whereupon the proper steps were taken to remove the cause to the federal court. Subsequently, and within a proper time, a petition for re-hearing was filed in the supreme court and allowed; *held*, on a motion to dismiss in the supreme court, that the cause was still pending there, and had not been removed to the federal court by proceedings in the court below: *McKinley v. C. & N. W. R. Co.*, 44–314, 3–3.

SEC. 3202. The petition for re-hearing shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow, and with a view to a re-hearing the court may extend the suspension of proceeding yet farther, if need be. Same. R. § 3544.

The statute having provided for a petition for re-hearing and not for a bill of review, an implication arises against the right to file a bill of that kind: *McGregor v. Gardner*, 16–538.

GENERAL PROVISIONS.

SEC. 3203. The clerk shall docket the causes as the same are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district, and shall cause notice of the manner he has set such causes to be published and distributed in such manner as the court may direct. Clerk to docket and arrange causes: notice of. R. § 3545.

SEC. 3204. The court shall hear all the causes docketed, when not continued by consent, or for cause shown by the party, and the party may be heard orally or otherwise, in his discretion. Hear causes: argument. R. § 3548.

SEC. 3205. No cause is decided until the opinion in writing is filed with the clerk. Opinion filed. R. § 3550.

Section construed: *Baker v. Kerr*, 12–384.

That the opinion must be in writing, see § 143.

SEC. 3206. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records of the court, shall have the same force and effect as if made and entered during the session of the court in that district. What done in court below on reversal. R. § 3551.

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Assignment of errors: form of. R. § 3546.

SEC. 3207. An assignment of error need follow no stated form, but must, in a way as specific as the case will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or rulings in an exception, it must designate which is relied on as an error, and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned.

Unless the particular points claimed to be erroneous in instructions are specifically designated, an assignment of error thereon will not be regarded: *Peck v. Hendershott*, 14-40; and see notes to § 2789.

An assignment of error in giving certain instructions, in refusing certain others, and in modifying certain others, specifying them in each case, *held*, sufficiently specific: *Sherwood v. Snow*, 46-481.

A general assignment of error in overruling motion for new trial, when such motion was based on several different grounds, is not sufficiently specific: *Reilly v. Ringland*, 44-422; *Richardson v. McCormick*, 47-80, 81.

An assignment that "the court erred in rendering judgment for appellee," is not sufficiently specific: *Tomblin v. Ball*, 46-190.

An assignment that "the court erred in overruling objections to, and admitting testimony offered by defendant, as more fully shown in the abstract." *held*, not sufficiently specific: *Walsh v. Thompson*, Dec. T., 1879.

Assignments held not sufficiently specific in the following cases: *Haues v. Twogood*, 12-582; *Wilson v. Hillhouse*, 14-199; *Morris v. C. B. & Q. R. Co.*, 45-29; *Oschner v. Schunk*, 46-293; *Bardwell v. Clare*, 47-297; *McCormick v. C. R. I. & P. R. Co.*, 47-345; *Nockles v. Eggspieler*, 47-409; *Moffatt v. Fisher*, 47-473; *Benton v. Nichols*, 47-698; *Betts v. City of Glenwood*, 52-124; *Black v. Boyd*, 52-719.

Errors assigned which were not discussed or insisted upon in argument will not be considered: *Huiras v. Berkey*, 51-701; *Hepmon v. City of Dubuque*, 52-713.

The provision requiring the court to decide on each error assigned, construed: *Baker v. Kerr*, 13-384.

Motion book. R. § 3547.

SEC. 3208. All motions must be entered in the motion book, and shall stand over till the next morning after the morning on which entered, and till after having been publicly called by the court, unless the parties otherwise agree, and the adverse party shall be deemed to have notice of such motion.

When original paper sent up. R. § 3525.

SEC. 3209. Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court.

Security for costs. R. § 3526.

SEC. 3210. The appellant may be required to give security for costs under the same circumstances as those in which plaintiffs in civil actions in the inferior court may be so required.

Does not abate by death. R. § 3520.

SEC. 3211. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district and circuit court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice.

Where, pending an appeal in a divorce case, one of the parties dies, the action abates, both as to claim for divorce and as to alimony: *Barney v. Barney*, 14-189.

Dismissal of appeal. R. § 3521.

SEC. 3212. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the

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record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit.

After payment of the amount of judgment and acceptance of same by the opposite party, neither can prosecute an appeal, and it will be dismissed: *Ind. Dist. of Altoona v. Dist. T'p of Delaware*, 44–201.

Proceedings in such case. R. § 3522.

SEC. 3213. The appellee may, by answer filed and verified by himself, agent, or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent, or attorney, and the questions of law or fact therein shall be determined by the court.

Notices: how served. R. § 3523.

SEC. 3214. The service of all notices of appeal, or in any way growing out of such rights or connected therewith, and all notices in the supreme court, shall be in the way provided for the services of like notices in the circuit or district court, and they may be served by the same person and returned in the same manner, and the original notice of the appeal must be returned immediately after service to the office of the clerk of the district or circuit court where the suit is pending.

A notice of appeal cannot be served by a party to the action, and the service thereof by leaving a copy with a member of the family, as provided in case of original notice, will not be good: See notes to § 3178.

The method of serving notice of appeal by plaintiff, in cases where defendant in original action was served by publication only, and made no appearance, discussed under Code of 1851, which contained no section similar to this: *McClellan v. McClellan*, 2–312.

Executions: form of. R. § 3552.

SEC. 3215. Executions issued from the supreme court shall be the same as those from the district or circuit court and attended with the same consequences, and shall be returnable in the same time.

CHAPTER 3.

OF CERTIORARI.

When writ may issue. R. § 3487. C. '51, § 1965.

SECTION 3216. The writ of certiorari may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the superior court there is no other plain, speedy, and adequate remedy.

The writ of certiorari is never used to correct a mere error, but only to test the jurisdiction of a tribunal, and the legality of its action: *The State v. Roney*, 37–30.

The proceedings of an inferior tribunal to establish a highway will not be annulled on certiorari unless it is shown that it has exceeded its jurisdiction, or is otherwise acting illegally: *McCollister v. Shuey*, 24–362; and in such case the writ brings up only the question of the expediency or the propriety of establishing the road, and the legality or regularity of the proceedings. The question as to the allowance of damages and the amount thereof cannot be so raised, but must be brought up by appeal from the assessment: *McCrory v. Griswold*, 7–248.

Certiorari may be granted when a

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county board of equalization acts beyond its jurisdiction, as by raising an individual assessment: *Royce v. Jenny*, 50–676.

Where a party has, through his own fault, lost a plain, speedy and adequate remedy, which he might have availed himself of, as the right of appeal, he is not entitled to a remedy in certiorari: *Fagg v. Parker*, 11–18. So he will not be allowed to select some erroneous ruling of an inferior tribunal, and have it corrected by certiorari: *O'Hare v. Hempstead*, 21–33. Thus, under Code of 1851 it was held that an error of the county court in rejecting testimony in the proceedings before it, should be corrected by appeal, and not by certiorari: *The State v. Wilson*, 12–424.

Certiorari is not the proper proceeding to control the discretion of a board of supervisors acting as a board of equalization: *Smith v. Board of Supervisors*, 30–531.

When an assessor has failed to make on his books the corrections ordered by the township board of equalization, and such books have passed beyond his control into the hands of the auditor, an action of certiorari to have the same corrected is the proper remedy: *Keck v. Board of Supervisors*, 37–547.

The judgment of a lower court being reversed on appeal and remanded for further proceedings in accordance with the opinion, such court has no jurisdiction to take any action inconsistent with such opinion, and if it attempts to do so its proceedings may be corrected by certiorari: *Edgar v. Greer*, 14–211.

The motion for the writ should point out specifically the illegalities in the proceedings complained of, and where it is sought for the purpose of correcting proceedings to assess the damages resulting from the establishment of a road, several owners of distinct pieces of land cannot join in asking it: *Chambers v. Lewis*, 9–583.

The writ should be directed to the officer against whom it issues by name, and not merely by his official title: *Ibid.*

By whom granted.
R. § 3488.
C. '51, § 1966.

SEC. 3217. The writ may be granted by the district or circuit court, or, in vacation, by a judge or clerk thereof, but if to be directed to either of such courts or judges, then by the supreme court, or, in vacation, by a judge thereof, and shall command the defendant therein to certify fully to the court from which the same issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also to have then and there the writ.

The district and circuit courts have not jurisdiction indiscriminately under this section, but the former has exclusive jurisdiction of all such proceedings in criminal cases, and the latter all those in civil cases, as provided in §§ 161, 162: *Keniston v. Hewitt*, 48–679.

When stay of proceedings is asked.
R. § 3489.
C. '51, § 1967.

SEC. 3218. If a stay of proceedings is sought, the writ can only be issued by a court or judge, who may require a bond and fix the penalty and conditions thereof; the sureties thereon may be approved by the judge granting, or clerk who issues the writ.

Petition.
R. § 3490.
C. '51, § 1968.

SEC. 3219. The petition for the writ must state facts constituting a case wherein the writ may issue, and must be verified by affidavit, and the supreme court or judge issuing the writ, may require notice of the application to be given the adverse party, or may grant the writ without notice. If a stay of proceedings is sought, the writ can only be granted on reasonable notice of the time, place, and court or judge before whom the application will be made.

In regard to this section the code commissioners say: "If no stay of proceedings is sought, the writ should issue, as of course, by the clerk, like writs of error to justices of the peace. If to be directed to a district or circuit court, as to whether it should issue with or without notice, can be well left to the discretion of the supreme court or judge. Notice should be required in all cases where proceedings are to be stayed": Code Com'rs' Rep., p. 121.

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Service and return. R. § 3491. C. '51, § 1969.

SEC. 3220. The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in a civil action, except that the original shall be left with the defendant, and the return or proof of service made upon a copy thereof.

Same. R. § 3492. C. '51, § 1970.

SEC. 3221. If the return of the writ be defective, the court may order a further return to be made, and may compel obedience to the writ and to such further order, by attachment if necessary.

Trial: judgment. R. § 3493. C. '51, § 1971.

SEC. 3222. When full return has been made, the court must proceed to hear the parties, or such of them as may attend for that purpose, on the record proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce pertinent to the issue, and may give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the party or either of them shall further proceed.

Under Rev., *held*, that the court could not, in this proceeding, consider errors or illegalities relating to, or dependent upon, facts not stated in the petition or the writ: *Everett v. C. & N. W. R. Co.*, 28–417; also, *held*, that the case could be heard only on the record returned, and that other evidence could not be introduced: *Jordon v. Hayne*, 36–9; but this section, in that respect, differs from the Rev. The code commissioners say: "The power to hear testimony will render the writ more effective. In certain cases it is an important provision. Its effect, in case the writ is used to correct the proceedings of the board of supervisors where erroneous assessments have been made, will be, it is thought, very beneficial": Code Com'rs' Rep., p. 122.

The action of township trustees under 13 G. A., ch. 102, in deciding upon their jurisdiction to submit to vote a proposition in aid of a railroad, and in passing upon the sufficiency of a petition for that purpose, *held*, to be such a proceeding as might be reviewed on certiorari: *Jordon v. Hayne*, 36–9.

Section applied: *The State v. Myers*, 44–581.

How prosecuted: appeal. R. § 3494. C. '51, § 1972.

SEC. 3223. The action shall be prosecuted by ordinary proceedings so far as applicable, and from the decision of the district or circuit court an appeal lies as in other ordinary actions, and the record shall be prepared in the same manner.

Under the Rev. *held*, that the proceeding by certiorari was a special proceeding and not a civil action: *Ainsworth v. House*, 31–507.

Limitation on right.

SEC. 3224. No writ shall be granted after twelve months have elapsed from the time the inferior court, tribunal, board, or officer has, as alleged, exceeded his proper jurisdiction, or has otherwise acted illegally.

The limitation commences to run against a proceeding by certiorari, to correct error in the action of the board of supervisors in holding a petition for the re-location of a county seat sufficient, (§ 285) from the time the board decides to submit the question to vote, and not from the time that it passes upon the petition: *Jamison v. Board of Supervisors*, 47–388, 391.

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TITLE XX.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

OF ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY.

Where brought: statements and verification of petition.
R. § 3553.
C. '51, § 1703.

SECTION 3225. An action for the recovery of specific personal property may be brought in any county in which the property or some part thereof is situated; the petition must be verified and must contain:

1. A particular description of the property claimed;
2. Its actual value, and where there are several articles, the actual value of each;
3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership;
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process;
5. The facts constituting the alleged cause of detention thereof, according to his best belief;
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

Action under this chapter may be brought by the maker, to recover the possession of a promissory note: *Graff v. Shannon*, 7–508; and it is not a valid objection in such action that the note, being paid, is of no value: *Savery v. Hays*, 20–25.

Action may also be brought for the recovery of a house which, as between the parties, is mere chattel property: *Dist. T'p of Corwin v. Moorehead*, 43–466.

The action will also lie at the instance of a party whose property has been improperly seized by an officer: *Gimble v. Ackley*, 12–27; as where the process under which levy is made is void: *Armel v. Lendrum*, 47–535; so *held*, as to process issued under an unconstitutional statute, as in case of liquors seized under 13 G. A., ch. 82: *Cooley v. Davis*, 34–128.

Property seized to satisfy a tax, may be recovered in this action when the tax is levied without authority, but not in cases where the authority exists but has been irregularly exercised: *Macklot v. City of Davenport*, 17–379; *Buell v. Ball*, 20–282. So, action will not lie in such case, when the levy was authorized and the warrant under which the treasurer acted was valid, although the assessment was erroneous: *Bilbo v. Henderson*, 21–56.

The question in replevin is, who was entitled to the possession of the property at the time action was brought: *Campbell v. Williams*, 39–646.

The gist of the action is the wrong-

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ful detention: *Draper v. Ellis*, 12–316.

Ownership is not necessary to enable a party to recover. The present possession may be recovered by one entitled thereto, even against the owner: *McCoy v. Cadle*, 4–557.

Where the possession of the property is rightful in its inception, there must be a demand before action will lie: *Gilchrist v. Moore*, 7–9. But proof of demand will only be required in cases where it is necessary to terminate defendant's right of possession, or confer such right upon plaintiff. The difference between the rule at common law and under the statute as to necessity for demand, discussed: *Smith v. McLean*, 24–322.

If the petition is not verified, the writ cannot legally issue, nor be sustained if issued: *Cure v. Wilson*, 25–205.

In such an action before a justice of the peace, a sworn petition must be filed before a writ can issue, but it need not be filed before return day. The action is sufficiently commenced by service of original notice: *Duffy v. Dale*, 42–215.

As to what is a sufficient description of the property in the petition, see *City of Ft. Dodge v. Moore*, 37–388.

The facts constituting an exemption, as contemplated in ¶ 4, are facts rendering the property exempt under § 3072: *Armel v. Lendrum*, 47–535; and replevin cannot be brought for liquors seized under a warrant (as under § 1544), although sufficient facts did not exist to authorize such seizure: *Cooley v. Davis*, 34–128; and see *Funk v. Israel*, 5–438; so *held*, also, where it was sought to recover property seized on execution, upon the ground that the judgment had been satisfied: *Armel v. Lendrum*, *supra*.

If property is erroneously seized on execution against a third party, the party entitled to the possession thereof may bring action to recover the same: *Gimble v. Ackley*, 12–27; *Shea v. Watkins*, 12–605; *Ramsden v. Wilson*, 49–211; and this is true even though the property is not in the possession of the officer, but of his bailee: *Rulston v. Black*, 15–47; and the same rule holds in case of a seizure under a writ of attachment against one not the owner: *Miller v. Bryan*, 3–58; *Smith v. Montgomery*, 5–370.

A person claiming property levied upon under execution against another, cannot maintain action therefor until service of written notice on the officer, as contemplated in § 3055: See notes to that section, but see also note to § 3058.

While a non-resident is not entitled to the benefit of the exemption laws (§ 3072), yet in a petition in an action to recover property seized under execution, on the ground that it is exempt, the fact of residence in the state need not be averred, but non-residence may be set up as a defense in the action. (Decided under Code of 1851): *Newell v. Hayden*, 8–140.

SEC. 3226. The action shall be by ordinary proceedings, but there shall be no joinder of any cause of action not of the same kind, nor shall there be allowed any counter claim. No counter claim. R. § 4175.

The right of possession, and the value of such right, recognized in the action, must be such as are recoverable in an action at law, and the accounts of partners and the extent of interest of each, as growing out of the partnership relation, cannot be determined: *Kuhn v. Newman*, 49–424.

SEC. 3227. If the plaintiff allege in his petition that he will lose his property unless process issue on Sunday, the order may be issued and served on that day. When process may issue on Sunday. 10 G. A. ch. 14.

SEC. 3228. If a third person claim the property or any part thereof, the plaintiff may amend and bring him in as a co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervenor. New parties. R. § 3561. C. 51, § 1684.

In case of an intervention, the judgment concludes both the original defendant and the intervenor: *Witter v. Fisher*, 27–9.

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BOND—ORDER.

When bond required. R. § 3554.

SEC. 3229. When the plaintiff desires the immediate delivery of the property, he shall execute a bond to the defendant, with sureties to be approved by the clerk, in a penalty at least equal to twice the value of the property sought, conditioned that he will appear at the next term of the court and prosecute his suit to judgment and return the property if a return be awarded, and also pay all costs and damages that may be adjudged against him. The bond shall be filed with the clerk of the court, and is for the use of any person injured by the proceeding, and a judgment for money rendered against the plaintiff shall go against the sureties on the bond.

Where the judgment in a replevin suit determines the title of the property, it cannot be questioned in an action on the bond; but when such judgment simply determines the right to possession, the title may be afterwards investigated, in action on the bond, to determine the amount of damages: *Harman v. Goodrich*, 1 Gr., 13; *Buck v. Rhodes*, 11–348; *Halley v. Warner*, 12–42.

The sureties are regarded as in court, and bound by the judgment against the principal; and if, by his consent, a judgment is rendered against him containing a provision that it shall be stayed a certain length of time, the sureties are not thereby released: *Hershler v. Reynolds*, 22–152.

The surety on the bond cannot appeal from a judgment against his principal in a justice's court, and relitigate his principal's claim to the property; he is bound by the judgment: *Crites v. Littleton*, 23–205.

While the judgment should direct the return of the property, nevertheless, the surety will be bound, although the judgment against the principal be only for the value of the property: *Mason v. Richards*, 12–73.

Clerk to issue order. R. § 3555. C. 51, § 1997. 14 G. A. ch. 123.

SEC. 3230. The clerk shall thereupon issue an order, under his hand and seal of the court, directed to the sheriff, requiring him to take the property therein described and deliver the same to the plaintiff. And where the petition shows that the property has been wrongfully removed into another county from the one in which the action is commenced, the order may issue from the county whence the property was so wrongfully taken, and may be served in any county where the property may be found, in the same manner and with like effect as in the county where suit is brought.

A plaintiff in an action to recover property claimed to be exempt from execution, which is levied upon by an officer, and which is returned to plaintiff upon the execution of the bond, may give good title to a third party purchasing of him, and the lien of execution will not, upon judgment being rendered against the plaintiff, revive against the property in the hands of such purchaser. The officer can only have recourse on the bond: *Gimble v. Ackley*, 12–27.

Order follow property. R. § 3556.

SEC. 3231. When any of the property is removed to another county after the commencement of the action, counterparts of the proper order may issue on the demand of the plaintiff to such other county, and may be executed upon such goods found in such county, and farther orders and the necessary counterparts thereof may issue as often as may be necessary.

ORDER—EXECUTION OF.

Execution of: duty of officer. R. § 3557.

SEC. 3232. The sheriff must forthwith execute the order by taking possession of the property therein mentioned, if it is found

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in the possession of the defendant, or of his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the order was placed in the sheriff's hands, for which purpose he may break open any dwelling house or other enclosure, having first demanded entrance and exhibited his authority, if required.

Defendant examined on oath to discover property. R. § 3558.

SEC. 3233. When it appears by affidavit that the property claimed has been disposed of, or concealed so that the order cannot be executed, the court or judge may compel the attendance of the defendant, and examine him on oath as to the situation of the property, and punish a wilful obstruction or hindrance, or disobedience of the order of the court in this respect as in case of contempt.

Evidence of the contempt should be by affidavit as provided in § 3497.

Oral evidence is not proper: *The State v. Myers*, 44–580.

Property delivered to plaintiff. R. § 3560.

SEC. 3234. The sheriff having taken the property, or any part thereof, shall forthwith deliver the same to the plaintiff.

Where the sheriff, instead of taking actual possession of the property and delivering it to the plaintiff, left it with the defendant, taking his receipt therefor, *held*, that plaintiff acquired no possession of the property and was entitled to an alternative judgment: *Davis v. Bayliss*, 51–438.

Defendant may prevent delivery of property to plaintiff.

SEC. 3235. At any time before the actual delivery to the plaintiff, the defendant may stay all proceedings under the aforesaid order and retain the property in his own possession, by executing a bond to the plaintiff, with sureties to be approved by the clerk or sheriff, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff if he recover judgment therefor, in as good a condition as it was when the action was commenced, and that he will also pay all costs and damages that may be adjudged against him for the taking or detention of the property.

The fact that the property covered by the bond, as here provided, perishes, or is destroyed, does not release defendant from liability for failure to comply with the conditions of the bond; so *held*; where a horse so released died while in defendant's possession: *Hinkson v. Morrison*, 47–167, followed in *Lillie v. McMillan*, 52–463.

Must let plaintiff inspect property: appraisement of.

SEC. 3236. But when the property is so retained by the defendant, he shall permit the sheriff and plaintiff to inspect the same; and if the plaintiff so request, the sheriff shall cause the property to be examined and appraised by two sworn appraisers, chosen by the parties to the action, or, in their default, by the sheriff himself, in the manner provided for other cases of appraisement; and he shall return their appraisement with the execution.

Return of order. R. § 3559.

SEC. 3237. The sheriff must return the order on or before the first day of the trial term, and shall state fully what he has done thereunder. If he has taken any property he shall describe particularly the same. And if he has taken a bond from the defendant as provided in the preceding section, he shall file the same with his return.

JUDGMENT AND EXECUTION.

Jury to assess value and damages. R. § 3082.

SEC. 3238. The jury must assess the value of the property, as also the damages for taking or detention, whenever by their verdict there will be a judgment for the recovery or the return of

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the property, and when required so to do by either party, must find the value of each article thereof.

Form of judgment. R. § § 3562, 3567.

SEC. 3239. The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party having no right in such property, and shall also award such damages to either party as he may be entitled to for illegal detention of such property.

The entire legal rights of the parties to the suit, in the property in controversy, should be adjudicated in the main action, and such an adjudication is as conclusive and final as in any other action: *Hayden v. Anderson*, 17–158.

Judgment for defendant should direct the return of the property: *Chadwick v. Miller*, 6–34; *Mason v. Richards*, 12–73; *Jansen v. Effey*, 10–227.

Judgment in favor of defendant may include interest on the value of the property from the time it was taken by the plaintiff: *Hurd v. Gallaher*, 14–394.

It is only in the judgment that it is necessary to specify which party is entitled to the property. Where plaintiff was in possession under the writ, a verdict of the jury for the plaintiff, simply, was held sufficient to warrant judgment that he was entitled to the possession: *Newlien v. Reed*, 30–496.

Defendant can recover only the value of his right in the property, and that value cannot exceed the amount of the claims for which he held the property when taken from him: *McNorton v. Akers*, 24–369.

A party having a lien on a stray animal for costs of taking up, keeping, etc., is entitled, in an action for the recovery thereof by the owner, to a judgment for the possession of the animal, and in default thereof, a money judgment for the amount of his lien: *Knudson v. Gieson*, 28–234.

The dismissal of the action by plaintiff will not prevent defendant from recovering judgment for "the value of his right," and the cause should be retained for the purpose of settling such right. But if such matter is pleaded by defendant after the dismissal by the plaintiff, the latter should not be regarded as in default, but should be allowed to plead and introduce evidence upon the issue raised: *Crist v. Francis*, 50–257.

Execution: form of. R. § 3253.

SEC. 3240. The execution shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered subject to execution, and the value of property for which judgment was recovered to be specified therein, if a delivery thereof cannot be had, and shall in that respect be deemed an execution against property.

Plaintiff's option as to what he will take. R. § § 3563, 3568.

SEC. 3241. If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter, or otherwise, he may, at his option, have execution for the specific delivery of the property, or for the value thereof as determined by the jury. And if any article of the property cannot be obtained on execution, he may take the remainder with the value of the missing articles.

The party found entitled to possession may have judgment for the money value, or have return of property, at his election: *McNorton v. Ackers*, 24–369; and an alternative judgment, allowing plaintiff execution for the specific property, or in case that cannot be obtained, then for its value, is proper: *Clark v. Warner*, 32–219.

If defendant is entitled to judgment, he may have a money judgment against plaintiff and his sureties, for the value of the property: *Armel v. Lendrum*, 47–535.

Upon dismissal of the action by

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plaintiff, the defendant is entitled to the return of the property, or judgment for the value of his interest therein: *Marshall v. Bunker*, 40–121.

Section applied: *Davis v. Bayliss*, 51–438.

Judgment on bond.

SEC. 3242. When property for which a bond has been given, as hereinbefore provided, is not forthcoming to answer the judgment, and the party entitled thereto elects to take judgment for the value thereof, such judgment may be entered against the principal and sureties in the bond.

See notes to preceding section.

When property has been concealed. R. § 3564.

SEC. 3243. When it appears by the return of the officer, or by the affidavit of the plaintiff, that any specific property which has been adjudged to belong to one party, has been concealed or removed by the other, the court or a judge may require him to attend and be examined on oath respecting such matter, and may enforce its order in this respect as in the case of contempt.

Exemption. R. § 4176.

SEC. 3244. A money judgment taken under the provisions of this chapter in lieu of property exempt from execution, shall also be, to the same extent, exempt from execution, and from all setoff or diminution either by the adverse party or by any other person, and such exemption may, at the option of the party, be stated in the judgment.

CHAPTER 2.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

By ordinary proceedings: counter claim. R. § 4177.

SECTION 3245. Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counter claim therein, except of like proceedings and as provided in this chapter.

Who may maintain: against whom. R. § 3569. C. '51, § 2002.

SEC. 3246. Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord, or tenant of the property claimed.

A widow may bring this action for her dower. She is not limited to the proceeding provided in § 2414, nor to an action in equity; and against her action the statute of limitations (§ 2529, ¶ 5) does not commence to run until her right is denied: *Rice v. Nelson*, 27–148; and see notes to the sections here referred to.

Although, under this section, action might be brought against the tenant of a non-resident, the statute of limitations does not run as against such non-resident. This section is not intended to constitute an exception to § 2533: *Heaton v. Fryberger*, 38–185.

A person who has taken possession of and erected improvements upon land under a parol license to mine, has such an interest in the real estate that the owner cannot revoke the license at once, and the licensee may assert his right to possession by this action: *Bush v. Sullivan*, 3 Gr., 344; *Beatty v. Gregory*, 17–109.

This action cannot be brought against the holder of a tax certificate. (*Arguendo*): *Eldridge v. Kuehl*, 27–160, 174.

Title. R. § 3591. C. '51, 2020.

SEC. 3247. The plaintiff must recover on the strength of his own title.

This provision is not applicable in actions to quiet title: *Russell v. Nelson*, 32–215.

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Joint or tenant in common.
R. § 3605.
C. '51, 2027.

SEC. 3248. In an action by a tenant in common, or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

Service on agent when.
R. § 3572.
C. '51, § 2004.

SEC. 3249. When the defendant is a non-resident, having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal.

PETITION—ANSWER—TRIAL.

Form of petition.
R. § 3570.

SEC. 3250. The petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than the rents and profits, he shall state the facts constituting the cause thereof.

Under this section, and § 3252, the general rules of pleading are suspended, and a general averment of the right claimed, without a statement of the facts upon which it is intended to sustain such right, is sufficient: *Phillips v. Blair*, 38–649. It is sufficient for plaintiff to state the extent of his interest, etc. He need not state the evidence upon which he expects to prove it: *Larum v. Wilmer*, 35–244.

Plaintiff may recover for the use and occupation, as well as for the title and possession: *Dunn v. Starkweather*, 6–466.

Abstract of title to be attached.

SEC. 3251. The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other proceedings.

Under Rev., which did not contain this section, *held*, that copies of the title papers need not be attached to the petition, Rev. § 2967 (this code § 2648, ¶ 6) not being applicable to such a case: *Boardman v. Beckwith*, 18–292.

Answer.
R. § 3573.
C. '51, § 2005.

SEC. 3252. The answer of the defendant, and of each if more than one, must set forth what part of the land he claims, and what interest he claims therein generally, and if as mere tenant, the name and residence of his landlord.

See notes to § 3250.

Landlord substituted for defendant.
R. § § 3571, 3589.
C. '51, § 2003.

SEC. 3253. Whenever it appears that the defendant is only a tenant, the landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, and the judgment shall be conclusive against him.

This section does not require the landlord to be made a party; it is only permissive: *The State v. Orwig*, 34–112.

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Possession. R. § 3575. C. '51, § 2007.

SEC. 3254. Where the defendant makes defense, it is not necessary to prove him in possession of the premises.

Alienation: effect of. R. § 3578.

SEC. 3255. An action for the recovery of real property against a person in possession, cannot be prejudiced by any alienation made by such person after the commencement of the action.

Power to enter and survey land. R. § 3592. C. '51, § 2021.

SEC. 3256. The court, on motion and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the land in controversy and make survey and admeasurement thereof, for the purposes of the action.

Same. R. § 3593. C. '51, § 2022.

SEC. 3257. The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land.

Verdict: form of. R. § 3594.

SEC. 3258. The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds and other sufficient description according to the facts as proved.

General verdict. R. § 3595.

SEC. 3259. A general verdict in favor of the plaintiff without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition.

Judgment for damages only. R. § 3579. C. '51, § 2010.

SEC. 3260. If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only.

This has reference to cases where plaintiff holds a limited or determinable interest which expires, and not to cases where he holds an absolute estate and, pending the suit, conveys to a third person. In the latter case the suit may be prosecuted to judgment in the name of the original plaintiff, under § 2561: *Jordan v. Ping*, 32-64.

Limitation of damages. R. § 3576. C. '51, § 2008.

SEC. 3261. The plaintiff cannot recover for the use and occupation of the premises for more than six years prior to the commencement of the action.

Under Code of 1851, *held*, that the widow, in an action for the recovery of dower, might recover damages from the time of demand, for a period not exceeding the six year limitation here provided, from the grantee of her husband: *O'Ferrall v. Simplot*, 4-381.

The limitation applies only to the special actions named in this chapter. General actions for rents, etc., are barred in five years under § 2529, ¶ 4: *Muir v. Bozarth*, 44-499, 505; and so are actions for use and occupations generally: *Tibbetts v. Morris*, 42-120.

This limitation does not prevent a party from setting off rents and profits of real estate against a claim for improvements under the occupying claimant law: See § 1976, and notes.

Improvements set off against damages. R. § 3596. C. '51, § 2023.

SEC. 3262. When the plaintiff is entitled to damages for withholding, or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants.

If defendant avails himself of the benefit of the occupying claimant law, rents and profits may be set off against his claim for improvements: See § 1976, and notes.

Wanton aggression. R. § 3597. C. '51, § 2024.

SEC. 3263. In case of wanton aggression on the part of the defendant, the jury may award exemplary damages.

Tenant: extent of liability. R. § 3598.

SEC. 3264. A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land, and that which may afterward accrue during the continuance of his possession.

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As to the liability of the tenant for rent after the bringing of action, this section applies only to cases where the tenant is joined as defendant, or in some manner restrained from paying rent to his landlord. Otherwise, he is not bound to retain rent in his hands to await the result of the litigation: *Gardner v. Gardner*, 25–102.

Where crop is sowed, planted or growing: finding. R. § 3599.

SEC. 3265. If the defendant aver that he has a crop sowed, planted, or growing on the premises, the jury finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes, with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date the sum so assessed. This bond shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity, the clerk, on the application of the plaintiff, shall issue execution thereon against all the obligors.

Writ of possession. R. § 3577. C. '51, § 2009.

SEC. 3266. When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and a writ of possession issued accordingly.

Judgment for rent accruing after judgment and before possession. R. § 3600.

SEC. 3267. The plaintiff may have judgment for the rent of the possession which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof.

NEW TRIAL.

When granted: grounds of. R. § 3584. C. '51, § 2014. 13 G. A. ch. 167, § 81.

SEC. 3268. In any of the cases provided for by this chapter, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown; but only one such new trial shall be granted.

Greater latitude is allowed in granting new trials under this section than in other actions, though the discretion given the court is a *legal* one: *White v. Poorman*, 24–108.

Where an appeal is taken from a judgment in an action of right, and the cause is remanded from the supreme court to the lower court, for judgment in accordance with its opinion, the judgment so rendered is a judgment of the lower court, and a new trial may be granted in the same manner as if no appeal had been taken: *Butterfield v. Walsh*, 25–263.

While these sections as to new trial apply only to the action of right provided for in this chapter, yet the fact that an equitable defense was set up and tried in such action does not prevent the granting a new trial: *Ibid.; County of Buena Vista v. I. F. & S. C. R. Co.*, 49–657.

This section does not apply in actions to quiet title: *Russell v. Nelson*, 32–215.

A showing for a new trial under this section, *held* sufficient: *Floyd v. Hamilton*, 10–552.

Notice of application to adverse party. R. § 3585.

SEC. 3269. If the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.

SEC. 3270. The result of such new trial, if granted after the

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close of the term at which the first trial took place, shall in no case affect the rights of third persons acquired in good faith for a valuable consideration since the former trial. Not to affect rights of other parties. R. § 3586. C. 51, § 2015.

SEC. 3271. But the party, who, on such new trial, shows himself entitled to lands which have thus passed to a purchaser in good faith, may recover the proper amount of damages against the other party, either in the same or a subsequent action. Damages. R. § 3587. C. 51, § 2016.

SEC. 3272. The party who has been successful in such new trial, shall, if the case require it, have his writ of restitution to restore him his property. Writ of restitution. R. § 3588. C. 51, § 2017.

QUIETING TITLE.

SEC. 3273. An action to determine and quiet the title of real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession. Who may bring action. R. § 3601. C. 51, § 2025.

An action to quiet title to real property may be brought against a person in possession thereof: *Lewis v. Soule*, 52–11.

If a tax deed upon unoccupied land has been recorded, either the tax purchaser or the original owner may bring action against the other to quiet title within the five years limitation provided by § 902: *Barrett v. Love*, 48–103.

Executors entitled to the possession and control of land for the purpose of carrying out the provisions of a will, have sufficient interest to support this action: *Laverty v. Sexton*, 41–435.

This action can only be brought against a person *claiming title* (decided under Code of 1851 and Revision): *Fejervary v. Langer*, 9–159; *Eldridge v. Kuehl*, 27–160, 176.

SEC. 3274. The plaintiff must file his petition under oath, setting forth the nature and extent of his estate, and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the petitioner, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. The notice in such action shall accurately describe the property, and, in general terms, the nature and extent of plaintiff's claim, and shall be served as in other cases. Petition: form of. R. § 3602. 13 G. A. ch. 167, § 32.

A petition substantially embodying these averments, with a general prayer for equitable relief, will justify the granting of the relief here contemplated, though it be not specifically asked: *Paton v. Lancaster*, 38–494.

The action may be brought against a non-resident defendant, on notice served by publication: *Miller v. Davison*, 31–435.

SEC. 3275. If the defendant shall appear and disclaim all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the court. If defendant disclaim title. R. § 3603. 13 G. A. ch. 167, § 33.

SEC. 3276. In all other respects, the action contemplated in the three preceding sections shall be conducted as other actions by equitable proceedings, with the modifications prescribed by this chapter so far as the same may be applicable. To be prosecuted by equitable proceedings. R. § 3604. C. 51, § 2026.

Other equitable relief, as well as a decree quieting title, may be asked in an action such as is here contemplated: *County of Buena Vista v. I. F. & S. C. R. Co*, 49–657.

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PERMANENT SURVEY OF LANDS.

[Fifteenth General Assembly, Chapter 8.]

Surveys upon agreement of owners of adjacent lands.

SECTION 1. Whenever the owner or owners of adjacent tracts of land shall desire to establish permanently the lines and corners thereof between them, he, she, or they may enter into a written agreement to employ and abide by the survey of some surveyor; and after said survey is completed, a plat thereof, with a description of all corners and lines plainly marked and described thereon, together with the written agreement of the parties, shall be recorded in the recorder's office of the county where the lands are situated; or after any survey of lands is completed and the parties interested therein as owners are satisfied with such survey, or when the owners of adjoining lands desire to perpetuate existing lines and corners heretofore made between them, it shall be lawful for them to cause a plat thereof to be made, with a description of all such lines and corners made thereon, which plat shall be acknowledged before some officer authorized to take the acknowledgment of deeds, and signed by each of said owners as an agreement between them so far as relates to such lines and corners; all of which shall be recorded in the recorder's office of the county in which the lands are situated; and the lines and corners so made and described, and recorded, shall be binding upon the parties entering into said agreement and signing said plats, their heirs, successors, and assigns, and shall never be changed.

Record.

Plats of completed surveys.

Perpetuation of existing lines and corners.

Record.

Lines and corners binding.

Mode of obtaining survey where owners do not agree to same.

SEC. 2. Whenever one or more proprietors of land in this state, the corners and boundaries of whose lands are lost, destroyed, or *are* in dispute, or who are desirous of having said corners and boundaries permanently established, *and who* will not enter into agreement as provided by section first of this act, it shall be lawful for said proprietor or proprietors that they shall cause a notice in writing to be served on the owner or owners of adjacent tract or tracts, if known and residing in the county where said lands are situated, or if not known and not residing in such county, by publishing in a newspaper published in such county, and if no newspaper shall be published, then by putting up in four different public places in said county, a written or printed notice to the effect that on a day named therein he, she, or they will make application to the district court of the county in which said lands are situated, at its next succeeding term, for the appointment of a commission of one or more surveyors to make survey of and permanently establish said corners and boundaries, which notice shall be posted up at least four weeks before the time appointed for said application; and one of said notices shall be in the precinct or township in which said corners and boundaries are situated.

Notice; and how served.

District Court to appoint commission to survey and report.

SEC. 3. Upon the filing of proper petition and proof of due notice aforesaid, the said court shall appoint a commission of one or more surveyors, entirely disinterested, to make said survey, who shall proceed to make said survey and report his or their proceedings to that or the next term of said court, accompanied by a plat and notes of said survey; and each of said surveyors shall be authorized to administer an oath to any of the

Oath.

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assistants necessary in the execution of said survey, to faithfully and impartially perform their respective duties, and take the evidence under oath administered by the surveyor, and incorporate the same with his or their survey, of any person or persons, who may be able to identify any original government corner, or witness thereto, or government line, tree, or other noted object, or any other legally established corner, or other corners that have been recognized as such by the adjoining proprietors for over ten years. Evidence.

SEC. 4. Upon the filing of said report, any person whose interests may be affected by said survey shall be at liberty to enter his objections to said report, and the court shall hear and determine said objections, and enter an order or judgment either approving or rejecting said report, or modifying and amending the same according to the rights and interests of the parties, or may refer the same back to said commission to correct their report and survey in conformity with the judgment of the court; or the court may for good reason set aside said commission and appoint a new one, who shall proceed anew, and determine the boundaries and corners of the lands in question. The corners and boundaries established in said survey, as approved in the final judgment of the court, if not appealed from within thirty days, shall be held and considered as permanently and unalterably established according to said survey. The expenses and costs of the surveys and suit shall be apportioned among all the parties according to their respective interests. Objections to report. Order of court. Report set aside. Survey final, when. Costs to be apportioned.

CHAPTER 3.

OF PARTITION.

SECTION 3277. The action for partition shall be by equitable proceedings, and no joinder or counter claim of any other kind shall be allowed therein, except as provided by this chapter. By equitable proceedings. R. § 4178.

One of several defendants in an equitable action affecting real estate, may, in a proper case, ask in a cross bill the partition of the real estate as a part of his equitable relief, notwithstanding the provision of this section as to joinder or counter claim: *Hammond v. Perry*, 38–217; so also a claim of defendants against plaintiff for rent, damages, etc., pertaining to the property, may be set up in the answer and should be heard: *Metcalf v. Hoopingardner*, 45–510.

Proceedings for partition of water-power, owned in common, should be by this action (*arguendo*, *per* Rothrock, J.): *Doan v. Metcalf* 46–120,131; See, also, *Cooper v. Cedar Rapids Water Power Co.*, 42–398.

PLEADINGS—PARTIES—TRIAL.

SEC. 3278. The petition must describe the property and respective interests of the several owners thereof, if known. If any interests, or the owners of any interests are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty. Petition, form of. R. §§ 3606–7. C. '51, §§ 2028–9.

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Abstract of title to be attached to pleading.

SEC. 3279. The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page on which the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other pleadings.

Contingent interests.
R. §§ 3647–8.
C. '51, §§ 2069–70.

SEC. 3280. Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit under like order.

Lien creditors.
R. § 3608.
C. '51, § 2030.

SEC. 3281. Creditors having a specific or general lien upon the entire property may be made parties at the option of the plaintiff or defendant.

Answer: statements of.
R. § 3610.
C. '51, § 2032.

SEC. 3282. The answers of the defendants must state among other things the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and, by supplemental pleading, if necessary, may deny the interest of any of the other defendants.

Issues: trial.
R. § 3612.
C. '51, § 2034.

SEC. 3283. Issues may thereupon be joined and tried between any of the contesting parties, the question of cost on such issues being regulated between the contestants agreeably to the principles applicable to other cases.

ENCUMBRANCES.

Reference to ascertain encumbrances.
R. §§ 3623–4.
C. '51, §§ 2045–6.

SEC. 3284. Before making any order of sale or partition, the court may refer to a clerk, or a referee, to report the nature and amount of general encumbrances by mortgage, judgment, or otherwise, if any there be upon any portion of the property.

Proof of.
R. § 3625.
C. '51, § 2047.

SEC. 3285. The referees shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amounts of such encumbrances.

Issue as to encumbrance: how tried.
R. §§ 3628–9.
C. '51, §§ 2050–1.

SEC. 3286. If any question arise as to the validity or amount of an encumbrance, or the payment of the same, the court may direct an issue to be made up between the encumbrancer and an owner, which shall be decisive of their respective rights; and upon a sale it may order the money to be retained or invested to await final action in relation to its disposition, and notice thereof to be forthwith given to the encumbrancer unless he has already been made a party.

Undivided interests: lien on.
R. § 3609.
C. '51, § 2031.

SEC. 3287. If the lien is upon one or more undivided interests, the holder thereof shall be made a party, and the lien shall, after partition or sale, remain a charge upon the particular interests of

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the proceeds thereof, but the amount of costs is a charge upon those interests, paramount to all other liens.

It is not error to make a lien-holder a party: *Metcalf v. Hoopingardner*, 45–510.

The holder of a mortgage, not made a party to the proceedings, does not lose his lien on the property: *Lewis v. Atkinson*, 15–361.

SEC. 3288. The proceedings in relation to encumbrances shall not delay the distribution of the proceeds of other shares in respect to which no such difficulties exist. Not to delay distribution. R. § 3631. C. '51, § 2053.

SEC. 3289. After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly. Judgment of confirmation. R. § 3615. C. '51, § 2037.

PARTITION.

SEC. 3290. Upon entering such judgment, the court shall appoint referees to make partition into the requisite number of shares, or if it is apparent, or the parties so agree, that the property cannot be equitably divided into the requisite number of shares, a sale may be ordered. Referees appointed to. R. §§ 3616, 3618, 3619. C. '51, §§ 2038, 2040–41.

The legislature has the power to provide, as is here done, that property may be sold to effect a division: *Metcalf v. Hoopingardner*, 45–510.

Where the shares of the parties, or the description thereof, is not settled by the law, or by consent, referees are necessary. So *held*, in an action for the partition of water power: *Doan v. Metcalf*, 46–120, 128, 131.

SEC. 3291. When a partition is deemed proper, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them therein. Shares marked out. R. § 3637. C. '51, § 2059.

SEC. 3292. The report of the referees must be in writing, signed by at least two of them. It must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot the shares to their several owners. Report of referees. R. § 3638. C. '51, §§ 2060–61.

SEC. 3293. For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value. Special allotments. R. § 3617. C. '51, § 2039.

Such "good and sufficient reasons" might be that one of the tenants in common has acquired a homestead in a portion of the undivided premises, or has made valuable improvements thereon: *Thorn v. Thorn*, 14–49.

SEC. 3294. When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold as hereinafter provided. Partition of part. R. § 3640. C. '51, § 2062.

SEC. 3295. On good cause shown, the report may be set aside and the matter again referred to the same or other referees. Report set aside. R. § 3641. C. '51, § 2063.

SEC. 3296. Upon the report of the referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever. Judgment. R. § 3642. C. '51, § 2064.

SEC. 3297. All the costs of the proceedings in partition shall be paid, in the first instance, by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for. Costs. R. § 3645. C. '51, § 2065.

In partition proceedings, where the real question in dispute was as to title, *held*, that plaintiff's attorneys' fees should not be taxed as costs: *McClain v. McClain*, 52-272.

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SALE.

Referees to give bond before selling. R. § 3620. C. '51, § 2042.

SEC. 3298. Before proceeding to sell, the referees shall give a bond, in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties. At any time thereafter, the court may require farther and additional security, and upon failure of the referees to comply with such order, they may be removed by the court and others appointed; and the court may at any time, for satisfactory reasons, remove such referees and appoint others.

Notice. R. § 3621. C. '51, § 2043.

SEC. 3299. The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner.

Report. R. § 3622. C. '51, § 2044.

SEC. 3300. After completing said sale, the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser and the price bid therefor, which report shall be filed with the clerk.

Conveyance. R. § 3633. C. '51, § 2055.

SEC. 3301. If the sale be approved and confirmed by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances pursuant to such sale. But no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage of the land so sold, or other equivalent security.

Validity of. R. § 3634. C. '51, § 2056.

SEC. 3302. Such conveyances so executed, being recorded in the county where the premises are situate, shall be valid against all subsequent purchasers, and also against all persons interested at the time who were made parties to the proceedings in the mode pointed out by law.

When parties are married. R. § 3635. C. '51, § 2057.

SEC. 3303. If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid.

Sales disapproved. R. § 3636. C. '51, § 2058.

SEC. 3304. If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto.

Security to refund money. R. § 3632. C. '51, § 2054.

SEC. 3305. The court in its discretion, may require all or any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund such moneys, with interest, in case it afterward appears that such parties were not entitled thereto.

Life estates. R. § 3630. C. '51, § 2052.

SEC. 3306. If a tenant for life or years be entitled as such to a part of the proceeds of sale, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the encumbered property to be invested and the proceeds to be paid to the encumbrancer during the lifetime of the encumbrance.

Where a wife's dower interest was only a life estate, it was held that it was not such a case as contemplated by this section, and that she could not be compelled to allow the property to be sold and the proceeds invested: *Clark v. Richardson*, 32–399.

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CHAPTER 4.

OF THE FORECLOSURE OF MORTGAGES.

Of personal property: how foreclosed. R. § 3649. C. '51, § 2071.

SECTION 3307. Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale as hereinafter provided, unless a stipulation to the contrary has been agreed upon by the parties, or may be foreclosed by action in the proper court.

A chattel mortgage may also be foreclosed by an action in equity: | *Packard v. Kingman*, 11-219.

Notice. R. § 3650. C. '51, § 2072.

SEC. 3308. The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale.

Service: on whom. R. § 3651. C. '51, § 2073.

SEC. 3309. Such notice must be served on the mortgagor, and upon all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings.

Return. R. § 3652. C. '51, § 2074.

SEC. 3310. The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication.

Notice of sale. R. § 3653. C. '51, § 2075.

SEC. 3311. After notice has been served upon the parties, it must be published in the same manner, and for the same length of time, as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner.

Title of purchaser. R. § 3654. C. '51, § 2076.

SEC. 3312. The purchaser shall take all the title and interest on which the mortgage operated.

Bill of sale. R. § 3655. C. '51, § 2077.

SEC. 3313. The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased.

Evidence of service perpetuated. R. § 3656. C. '51, § 2079.

SEC. 3314. Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof.

Same. R. § 3657. C. '51, § 2080.

SEC. 3315. Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence to prove the facts they state.

Validity of sales. R. § 3658. C. '51, § 2081.

SEC. 3316. Sales made in accordance with the above requirements, are valid in the hands of a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee.

Contest: how effected. R. § 3659 C. '51, § 2082.

SEC. 3317. The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district or circuit court, for which purpose an injunction may issue if necessary.

After the transfer of the case to the district or circuit court by injunction | or otherwise, it stands as a foreclosure in court, and where usury is made to

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appear, a judgment of forfeiture in favor of the school fund may be rendered: *Hanlin v. Parsons*, 33–207.

Deeds of trust. R. § 3673. C. '51, § 2096.

SEC. 3318. Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and shall be considered as, and foreclosed like mortgages.

OF REAL PROPERTY.

By equitable proceedings. R. §§ 3660, 3673, 4179. C. '51, §§ 2083, 2096. 11 G. A. ch. 116.

SEC. 3319. No deed of trust, or mortgage of real estate, with or without power of sale, made since the first day of April, A. D. 1861, shall be foreclosed in any other manner than by action in court by equitable proceedings.

This section simply requires that the holder of a mortgage shall proceed, if at all, in a certain manner. It does not refer to a case where a party seeks to redeem from an absolute deed as from a mortgage, and in such case the court may decree that plaintiff pay the amount necessary to redeem, within a time fixed, or the deed will become absolute: *White v. Lucas*, 46–319.

Where a mortgagee foreclosed a mortgage and bought in the property at the sale for the full amount of the judgment, *held*, that he could not recover upon the covenants of warranty in the mortgage for the amount afterward paid to discharge prior liens thereon: *Todd v. Johnson*, 51–172.

The mortgagor is entitled to possession until time for redemption expires (§ 3321). Whether a receiver may be appointed in an action to foreclose a mortgage, to receive rents and profits accruing before the expiration of the period for redemption, *quære*: *Myton v. Davenport*, 51–583.

The nature of foreclosure proceedings discussed: *Kramer v. Rebman*, 9–114.

Separate suits on note and to foreclose. R. § 3663. C. '51, § 2086.

SEC. 3320. If separate suits are brought in the same county on the bond or note, and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his cost.

[The word "discontinued" in the third line, as it is in the original, is "continued" in the printed code.]

This section *held* applicable, although the covenants on which the law action was based were contained in the mortgage itself: *Brown v. Cascaden*, 43–103.

A judgment on the note alone, does not merge the mortgage. It may be foreclosed in a subsequent action: *Morrison v. Morrison*, 38–73.

Judgment: sale and redemption. R. § 3661. C. '51, § 2084.

SEC. 3321. When a mortgage or deed of trust is foreclosed by equitable proceedings, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. A special execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under general execution.

The judgment of foreclosure does not operate to merge the mortgage. Its lien exists until the debt is paid or discharged: *Shearer v. Mills*, 35–499; and the mortgage lien remains, even after the judgment thereon ceases to be a lien: See notes to § 2882.

Notice of action to "foreclose mortgage" having been properly given, the court may, under the provisions of this section, render personal judgment for the amount due, although the notice did not claim any specific sum of money: *York v. Boardman*, 40–57.

A decree of foreclosure should only order the sale of so much of the mortgaged premises as is necessary to satisfy the amount due. To order the sale of the whole property, absolutely, and direct that the amount remaining after paying the judgment be brought into court to answer its

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order, is erroneous: *Malony v. Fortune*, 14–417.

The court cannot, on rendering decree of foreclosure, order that special execution thereon be stayed for a specified time: *Carroll v. Reddington*, 7–386.

A purchaser at a foreclosure sale is not entitled to possession until the expiration of the year for redemption: *Barrett v. Blackmar*, 47–565; *Myton v. Davenport*, 51–583.

Under the Code of 1851, which did not contain express provision for redemption from sales under foreclosure proceedings, *held*, that the general provisions as to redemption from sales under execution did not apply in such cases: *Kramer v. Rebman*, 9–114; *Stoddard v. Hays*, 12–576; *Martin v. Jones*, 15–240.

SEC. 3322. If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise. General execution; when. R. § 3662. C. '51, 2085.

This section does not apply to a case where a mortgage is given to secure the debt of another party, and the mortgagor does not sign the note or become otherwise liable for the payment of the debt than by the terms of the mortgage (overruling *Deland v. Mershon* 7–70); *Crittenden v. Gossage*, 18–157; but in *Newberry v. Rutter*, 38–179, the case of *Deland v. Mershon*, is referred to with approval, although the point is not directly involved. See, also, *Weil v. Churchman*, 52–253.

SEC. 3323. At any time prior to the sale, a person having a lien on the property which is junior to the mortgage, will be entitled to an assignment of all the interest of the holder of the mortgage, by paying him the amount secured, with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure or discontinue it at his option. Junior encumbrancer entitled to assignment. R. § 3665. C. '51, § 2088.

A tender made by junior to senior mortgagee, before sale, for principal, interest and costs then accrued, is sufficient though not accepted until after sale: *Marshall v. Ruddick*, 28–487.

SEC. 3324. If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. Overplus. R. § 3666. C. '51, § 2089.

Such overplus may be garnisheed in the hands of the sheriff by a creditor of the mortgagor: *Hoffman v. Wetherell*, 42–89; or it may be applied to another execution against defendant in the hands of the sheriff, as provided in § 3084: *Payne v. Billingham*, 10–360.

SEC. 3325. If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such, the balance will be paid to the mortgagor. In case there are other liens. R. § 3667. C. '51, 2090.

A court having jurisdiction as to an installment due, may retain jurisdiction over the parties and the cause until the whole debt falls due: *McDowell v Lloyd*, 22–448.

Where the sheriff is not directed as to the disposition of the surplus, and in good faith, without knowledge of subsequent liens, applies such surplus upon other executions in his hands against the mortgagor, he is not liable to the holders of such subsequent liens: *County of Polk v. Sypher*, 17–358.

Contests as to the surplus may be determined upon motion: *Ibid.*

SEC. 3326. As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed. How much sold. R. § 3668. C. '51, § 2091.

Where the mortgaged property is susceptible of division, only such portion should be sold as may be necessary to satisfy the debt, and a refusal

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to sell in such parcels as are sufficient for that purpose, will invalidate the sale: *Grapengether v. Fejervary*, 9-163.

Satisfaction to be acknowledged. R. § 3670. C. '51, § 2093.

SEC. 3327. Whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage, or by execution of an instrument in writing, referring to the mortgage, and duly acknowledged and recorded. If he fails to do so within sixty days after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars.

The penalty here provided is incurred by a failure to enter the satisfaction within proper time after request, and a subsequent entry of satisfaction, even before suit brought for the penalty, does not relieve therefrom. There must be *express* satisfaction, and a conveyance from the mortgagee to the mortgagor, not referring to the mortgage, will not be sufficient: *Deeter v. Crossley*, 26-180.

Same, duty of clerk. 14 G. A. ch. 67.

SEC. 3328. Whenever a judgment of foreclosure shall be entered in any court, the clerk thereof shall make upon the margin of the record of the mortgage foreclosed, in the recorder's office, a minute showing that said mortgage was foreclosed, in what court foreclosed, and giving the date of the decree; and when such decree shall be fully paid off and satisfied upon the judgment docket of said court, the clerk of said court shall enter satisfaction in full upon the margin of such mortgage, and he shall be allowed as compensation for such service the sum of twenty-five cents, to be taxed as a part of the costs in the case.

Bond given by vendor treated as mortgage. R. § 3671. C. '51, § 2094.

SEC. 3329. In cases where the vendor of real estate has given a bond or other writing to convey the same on payment of the purchase money, and such money or any part thereof remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, such vendor may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property.

The vendor is not confined to the remedy here prescribed. He may still proceed at law for any unpaid or matured installment of the purchase money: *Hershey v. Hershey*, 18-24; *Poweshiek Co. v. Dennison*, 36-244.

Upon the maturity of a portion of a series of notes for the purchase money, the vendor may bring action to foreclose his title bond, as here provided: *Tupple v. Viers*, 14-515; and a foreclosure for an installment due, and a sale thereunder, has the same effect as in a similar action on the mortgage. The purchaser takes free from any claim of the vendor for unpaid installments: *Poweshiek Co. v. Dennison*, 36-244.

In an action on a title bond for balance of purchase money, it is error to declare the bond forfeited and discharge the land therefrom. The lien of the vendor for the balance due should be foreclosed and the property sold to satisfy the judgment: *Gamut v. Gregg*, 37-573

The assignee of a note given for the purchase money by the holder of a title bond, has the same rights and remedies as the payee, and may bring action in his own name to foreclose the bond or contract: *Zebley v. Sears*, 38-507, 511.

Subsequent lien-holders not made parties may redeem as from sale on foreclosure of mortgage: *Dukes v. Turner*, 44-575.

This section is merely permissive and does not take away any right which the grantor may have under the instrument by way of forfeiture, etc: *The Iowa R. L. Co. v. Mickel*, 41-402. 409.

An action to foreclose a title bond is barred in the same time that an action on a mortgage would be: *Day v. Baldwin*, 34-380.

Under Rev. § 3671 (similar to this except that it did not specify "a bond or writing,") *held*, that a vendor who had given a deed without reserving any lien by written agreement might avail himself of the provisos of that section: *Johnson v. McGrew*, 42-555.

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SEC. 3330. The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. Parties in such case. R. § 3672. C. '51, § 2095.

A judgment against the vendee and a foreclosure of the bond may be had in the same action, as in a suit to foreclose a mortgage: *Hartman v. Clarke*, 11–510.

Section applied: *Mullin v. Bloomer*, 11–360; see also notes to preceding section.

CHAPTER 5.

OF ACTIONS FOR NUISANCE, WASTE, AND TRESPASS.

SECTION 3331. Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought thereon by any person injured thereby; in which action the nuisance may be enjoined or abated, and damages also recovered therefor. Nuisance: definition of. R. § § 3713–15. C. '51, § § 2131–3.

An individual suffering an injury, distinct from the public, as a consequence of a public nuisance, as the obstruction of a highway which he frequently uses in the use and enjoyment of his property, may maintain an action for injunction to abate such nuisance and for damages: *Ewell v. Greenwood*, 26–377.

SEC. 3332. If a guardian, tenant for life or years, joint tenant or tenant in common, of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor. Waste by guardian or tenants: damages. R. § 3716. C. '51, § 2134.

SEC. 3333. Judgment of forfeiture and eviction may be rendered against the defendant, whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property wasted, and when the action is brought by the person entitled to the reversion. Forfeiture and eviction. R. § 3717. C. '51, § 2135.

SEC. 3334. Any person whose duty it is to prevent waste, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it. Who deemed to have committed. R. § 3718. C. '51, § 2136.

SEC. 3335. For wilful trespass in injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any town, or any land held by this state for any purpose whatever, the perpetrator shall pay treble damages of the suit of any person entitled to protect or enjoy the property aforesaid. Treble damages: who liable for. R. § 3719. C. '51, § 2137.

SEC. 3336. Nothing herein contained authorizes the recovery of more than the just value of timber taken from uncultivated wood-land, for the repair of a public highway or bridge upon the land in its immediate neighborhood. Timber taken to repair highway. R. § 3720. C. '51, § 2138.

SEC. 3337. The owner of an estate in remainder or reversion, may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years. Remainder and reversion. R. § 3721. C. '51, § 2139.

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Heir.
R. § 3722.
C. '51, § 2140.

SEC. 3338. An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations.

Purchaser under execution.
R. § 3723.
C. '51, § 2141.

SEC. 3339. Whenever lands or tenements are sold by virtue of an execution, the purchaser at such sale may maintain his action against any person for either of the causes above mentioned, occurring or existing after his purchase.

Suitable repairs.
R. § 3724.
C. '51, § 2142.

SEC. 3340. This provision is not intended to prevent the person who occupies the lands in the meantime, from using them in the ordinary course of husbandry, or from using timber for the purpose of making suitable repairs thereon.

Same.
R. § 3725.
C. '51, § 2143.

SEC. 3341. But if for this purpose he employs timber vastly superior to that required for the occasion, he will be deemed to have committed waste and will be liable accordingly.

Settlers on public lands.
R. § 3726.
C. '51, § 2144.

SEC. 3342. Any person settled upon and occupying any portion of the public lands held by the state, is not liable as a trespasser for improving it or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials be taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him.

Holder of tax certificate.
9 G. A. ch. 154, § 1.
10 G. A. ch. 93.
Disposition of money.
9. G. A. ch. 154, § 2.

SEC. 3343. The owner of a treasurer's certificate of purchase of land sold for taxes, may recover treble damages of any person committing waste or trespass thereon as hereinbefore provided.

SEC. 3344. All moneys recovered in an action brought under the preceding section, shall be paid by the officer collecting the same, to the auditor of the county in which such lands are situated, and the same shall be held by such auditor, and an entry thereof made by him in a book kept for that purpose, until such lands are redeemed or a treasurer's deed therefor shall have been executed to the holder of said certificate. If redemption be made, the money shall be paid to the owner of the land, and if not redeemed, to the person to whom such deed is executed.

CHAPTER 6.

OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

Where state is plaintiff: for what causes brought.
R. §§ 3732, 3757.
C. '51, §§ 2151, 2175.

SECTION 3345. A civil action by ordinary proceedings may be brought in the name of the state as plaintiff in the following cases:

1. Against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by this state;

2. Or against any public officer who has done or suffered any act which works a forfeiture of his office;

3. Or against any person acting as a corporation within this state without being authorized by law;

4. Or against any corporation doing or omitting acts, which

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amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law;

5. Or against any persons claiming under any letters patent, granted by the proper authorities of this state, for the purpose of annulling or vacating the same, as having been obtained by fraud, or through mistake or ignorance of a material fact, or when the defendants have done or omitted an act in violation of the terms or conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.

It would seem that *quo warranto* will not lie for the purpose of declaring void, or annulling, a legislative act passed by a state or an inferior municipal corporation; at least, such proceedings will not be entertained to compel a city council to show by what authority they do an act which they have power to do, but are doing in an irregular or unlawful manner. If the power exists, the manner of its exercise cannot be challenged by *quo warranto*, nor is it competent to render null and void that which has already been done: so, *held*, where it was claimed that a city had irregularly exercised the power of vacating a street: *The State v. The City of Lyons*, 31–432.

This is the proper method of determining the right to an office. That cannot be done by bringing replevin for the records, etc., of such office: *Desmond v. McCarthy*, 17–525; but this does not prevent a court from determining, without an action, which of two persons claiming to be sheriff is the lawful officer authorized to serve its process: *McCue v. Circuit Court, etc.*, 51–60.

The right of a party to an office cannot be tested in a *habeas corpus* proceeding: *Ex parte Strahl*, 16–369.

Where the council of a city is, by its charter, the judge of the election and qualification of its own members, but has never provided any method of trying contested election cases, a person claiming to be elected mayor may, by proceeding by information as here contemplated, have his right to such office determined: *The State v. Funck*, 17–365.

The right to preside at the meeting of a city council is a franchise which may be contested by this proceeding. An original bill for an injunction is not the proper remedy: *Cochrane v. McCleary*, 22–75.

Action in the name of the state to determine whether the electors of a certain territory are authorized to exercise the corporate powers of a school district, should be against such electors in person and not against the school district as such: *The State v. Ind. Sch. Dist. of Dallas Centre*, 44–227.

The section applied generally: *The State v. Minton*, 49–591.

SEC. 3346. To such action there shall be no joinder of any other cause of action, nor any counter claim. Joinder: counter claim. R. § 4180.

SEC. 3347. Such action may be commenced by the district attorney at his discretion, and must be so commenced when directed by the governor, the general assembly, or a court of record. When and by whom commenced. R. §§ 3733–4. C. '51, §§ 2152–3

SEC. 3348. If the district attorney, on demand, neglect or refuse to commence the same, any citizen of the state having an interest in the question, may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may prosecute the action to final judgment in other respects as provided. By private person. R. § 3735.

SEC. 3349. The petition shall contain a plain statement of the facts which constitute the grounds of the proceeding, and, with the notice, and all the subsequent pleadings and proceedings, shall conform to the rule given for procedure in civil actions in title seventeen of this code, except so far as the same are modified by this chapter. Petition: statements of. R. §§ 3736–8. C. '51, §§ 2154–6.

SEC. 3350. When such action is brought upon the relation of a private individual, that fact shall be stated in the petition, and the order allowing him to prosecute may require that he shall Private individual: costs. R. § 3746. C. '51, § 2164.

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be responsible for costs in case they are not adjudged against the defendant. In other cases the payment of costs shall be regulated by the same rule as in criminal actions.

When defendant holds an office. R. § 3739. C. '51, § 2157.

SEC. 3351. When the defendant is holding an office to which another is claiming the right, the petition shall set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties.

Same. R. § 3743. C. '51, § 2161.

SEC. 3352. When several persons claim to be entitled to the same office or franchise, a petition may be filed against all or any portion thereof, in order to try their respective rights thereto, in the manner provided by this chapter.

JUDGMENT.

Effect of. R. § 3740. C. '51, § 2158.

SEC. 3353. If judgment be rendered in favor of such claimant, he shall proceed to exercise the functions of the office after he has qualified as required by law.

Books and papers. R. § 3741. C. '51, § 2159.

SEC. 3354. The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office.

Suit for damages. R. § 3742. C. '51, § 2160.

SEC. 3355. When the judgment has been rendered in favor of the claimant, he may at any time within one year thereafter, bring suit against the defendant and recover the damages he has sustained by reason of the act of the defendant.

Judgment of ouster against corporation. R. § 3744. C. '51, § 2162.

SEC. 3356. If the defendant be found guilty of unlawfully holding or exercising any office, franchise, or privilege, or if a corporation be found to have violated the law by which it holds its existence, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office, franchise, or privilege, and also that he pay the costs of the proceeding.

Same. R. § 3745. C. '51, § 2163.

SEC. 3357. If the defendant be found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges.

Pretended corporation: costs. R. § 3747. C. '51, § 2165.

SEC. 3358. In case judgment is rendered against a pretended but not real corporation, the cost may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.

Action against officers. R. § 3755. C. '51, § 2173.

SEC. 3359. When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby.

TRUSTEES APPOINTED.

When corporation is dissolved. R. § 3748. C. '51, § 2166.

SEC. 3360. If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders.

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Bond. R. § 3749. C. '51, § 2167.

SEC. 3361. Said trustees shall enter into a bond in such a penalty and with such security as the court approves, conditioned for the faithful discharge of their trust.

Action on. R. § 3750. C. '51, § 2168.

SEC. 3362. Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties.

Duty of trustees. R. § 3751. C. '51, § 2169.

SEC. 3363. The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.

Books delivered to. R. § 3752. C. '51, § 2170.

SEC. 3364. The court shall, upon application for that purpose, order any officer of such corporation or any other person having possession of any of the effects, books, or papers of the corporation, in any wise necessary for the settlement of its affairs, to deliver up the same to the trustees.

Inventory. R. § 3753. C. '51, § 2171.

SEC. 3365. As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court, an inventory of all the effects, rights, and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to.

Power of. R. § 3754. C. '51, § 2172.

SEC. 3366. They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders respectively, to the extent of the effects which come into their hands.

Penalty for refusing to obey order of court. R. § 3756. C. '51, § 2174.

SEC. 3367. Any person who, without good reason, refuses to obey any order of the court, as herein provided, shall be deemed guilty of contempt of court, and shall be fined in any sum not exceeding five thousand dollars and imprisoned in the county jail until he comply with said order, and shall be farther liable for the damages resulting to any person on account of his refusal to obey such order.

CHAPTER 7.

OF ACTIONS ON OFFICIAL SECURITIES, AND FINES AND FORFEITURES.

Official bonds: construed. R. § 3727. C. '51, § 2145.

SECTION 3368. The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and also to all the members thereof, severally, who are intended to be thereby secured.

Where the bond of a county treasurer was given "to the County of Warren and State of Iowa," *held*, that it should be construed as a security to the county. Whether the state can maintain action on a county treasurer's bond *quære: The State v. Henderson*, 40–242.

Judgment no bar. R. § 3728. C. '51, § 2147.

SEC. 3369. A judgment in favor of a party for one delinquency, does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking.

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Fines and forfeitures.
R. § 3729.
C. '51, § 1158.
9 G. A. ch. 35, § 3.
11 G. A. ch. 10, § 3.

SEC. 3370. Fines and forfeitures not otherwise disposed of, go into the treasury of the county where the same are collected for the benefit of the school fund.

Suit for the penalty on a bail bond may be brought by the county. It is the trustee, and entitled to sue under the provisions of § 2544: *Shelby Co. v. Simmonds*, 33–345.

The fact that a fine or forfeiture is to go into the county treasury does not make the county a party to the action within the provisions of § 2590 so as to give the defendant the right to a change of venue: *The State v. Merrihew*, 47–112.

That fines and forfeitures are to go to school fund, see § 1838 and Const. art. 9, § 4.

By whom prosecuted.
R. § 3730.
C. '51, § 2149.

SEC. 3371. Actions for the recovery thereof may be prosecuted by the officers or persons to whom they are by law given in whole or in part, or by the public officer into whose hands they are to be paid when collected.

Collusion.
R. § 3731.
C. '51, § 2150.

SEC. 3372. A judgment for a penalty or forfeiture rendered by collusion, does not prevent another prosecution for the same subject matter.

CHAPTER 8.

OF ACTIONS OF MANDAMUS.

Definition of.
R. §§ 3761, 3763.
C. '51, § 2180.

SECTION 3373. The action of mandamus is one brought in a court of competent jurisdiction, to obtain an order of such court commanding an inferior tribunal, board, corporation, or person, to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act but cannot control such discretion.

The action of mandamus is a "civil action at law": *Brown v. Crego*, 29–321.

The holding of the federal courts is that a proceeding by writ of mandamus to enforce a judgment is not a suit in the jurisdictional sense, but a proceeding auxiliary to the judgment, whether brought before or after it is rendered; and therefore, in a case where the writ is issued by the federal court to enforce judgment rendered therein, a state court will be bound by the decisions of the federal courts as to the nature of the writ and the proceedings thereunder: *Ex parte Holman*, 28–88, 102.

Mandamus proceedings in the U. S. courts in this state are not governed by the provisions of the state statutes in relation to such proceedings: *U. S. Ex rel. etc. v. U. P. R Co.*, 2 Dillon (U. S. C. C.), 527.

In a matter of public right, any citizen may be a relator in an application for a mandamus: *The State ex rel. etc., v. County Judge, etc.*, 7–186; *The State ex rel. etc. v. Bailey*, 7–390.

A mandamus will not be granted on a petition of a party who has no interest in the matter: *The State ex rel. etc. v. County Judge, etc.*, 2–280.

The common law rule that a party in his individual capacity cannot bring an action against a partnership, board of trustees, or other body of which he is a member, does not apply to this proceeding: *Cooper v. Nelson*, 38–440.

Proceedings in case of mandamus discussed, generally, with reference to the provisions of the Code of 1851: *Chance v. Temple*, 1–179; *Price v. Harvel*, 1–473.

An action by mandamus will lie to compel a treasurer to pay over a tax levied and collected to pay a judgment as provided in § 3049: *Brown v. Crego*, 32–498; so also to pay over to a railroad company a tax collected for its benefit: *McG. & S. C. R. Co. v. Birdsall*, 30–255.

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Mandamus is the proper remedy to compel a board of canvassers to declare the proper party elected and so certify under § § 638, 639: *Bradfield v. Wart*, 36–291; and the board of county canvassers may be compelled by mandamus to re-assemble, after having declared the result of their canvass, and re-canvass the returns, to correct a mistake: *Price v. Harned*, 1–473; *The State v. County Judge, etc.*, 13–139.

Mandamus is the proper remedy to compel a supervisor to remove obstructions in a highway, under § 993: *Larkin v. Harris*, 36–93; *Patterson v. Vail*, 43–142; also to compel an officer of a corporation, after resignation, to produce and turn over the books of his office to his successor. In such case replevin would not lie: *City of Keokuk v. Merriam*, 44–432.

A treasurer who has executed a tax deed which is so irregular or imperfect as not to convey the title which the purchaser acquired at the tax sale, may, by mandamus, be compelled to execute a second and corrected deed. *(Arguendo): McCready v. Sexton*, 29–356, 377.

Held, that the district court might, by writ of mandamus, compel the auditor of state to draw a warrant on the treasurer of state for the sum due a public officer on his salary: *Bryan v. Cattell*, 15–538.

Mandamus may be brought against a county auditor to compel him to attach the county seal to a warrant issued by him or his predecessor: *Prescott v. Gonser*, 34–175.

An action by mandamus may be continued until the acts required are performed: *Palmer v. Jones*, 49–405. So, where a city council is directed by mandamus to levy a tax not exceeding the limit of taxation to pay off a judgment against the city, the order may direct that, in case the amount realized is not sufficient to pay off the judgment, an additional tax for that purpose shall be levied for subsequent years: *Coy v. City Council of Lyons*, 17–1.

Courts cannot, by mandamus, control the discretion of officers or tribunals. So, a board of supervisors cannot thus be compelled to build a bridge, or rebuild one when fallen down: *The State v. Morris*, 43–192; and where a board of school directors have a discretion in a particular matter, such discretion cannot be controlled, whether they have exercised it wisely or not: *Clark v. Board of Directors, etc.*, 24–266. So, mandamus will not lie to control the action of a board of equalization under § § 829, 831; it can only be brought to compel them to act: *Meyer v. City of Dubuque*, 43–592. So, also, a county superintendent cannot be compelled to issue a certificate under § 1767: *Bailey v. Ewart*, 52–111. So, (under Code of 1851), it was held that mandamus could not be brought to compel a county judge to allow a claim against the county, the party having an adequate remedy by ordinary action against the county: *The State ex rel. etc. v. County Judge, etc.*, 5–380.

The publisher of a newspaper has no such personal interest in the action of the board of supervisors or a county officer authorized to make publication in a newspaper, as to compel by mandamus the selection of his paper for that purpose: *Welch v. Board of Supervisors, etc.*, 23–193; and see notes to § 307.

The board of supervisors cannot, by mandamus, be compelled to do an act which they are not by law authorized to do; as, for instance, to levy a tax beyond the limit of taxation: *Polk v. Winett*, 37–34.

Where the facts stated in an application for mandamus do not entitle plaintiff to the relief asked, a demurrer, and not a motion to dismiss, is the proper remedy: *Meyer v. City of Dubuque*, 43–592.

SEC. 3374. The order may be issued by the district or circuit court, to any inferior tribunal, or to any corporation, officer, or person; and by the supreme court, to any district or circuit court, if necessary, and also in any other case where it is found necessary for that court to exercise its legitimate power. Issued by whom. R. § § 3761, 3764. C. '51, § § 2179, 2181.

Mandamus cannot issue from the supreme court, except to a court of record: *Westbrook v. Wicks*, 36–382.

SEC. 3375. The plaintiff in any action, except those brought for the recovery of specific, real, or personal property, may also as an auxiliary relief have an order of mandamus to compel the Extent of remedy by. R. § 3767.

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performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance.

When not to issue. R. § 3765. C. '51, § 2182.

SEC. 3376. An order of mandamus shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of the law, except as herein provided.

That a judgment creditor has an effectual remedy against one of two joint debtors, will not prevent him from proceeding by mandamus against the other, where that is a proper remedy against the latter: *Palmer v. Stacy*, 44–340.

Where a positive official duty is enjoined by law upon an officer, as to the manner of performance of which he has no discretion, the only adequate remedy, ordinarily, is the writ of mandamus: *Benjamin v. Dist. T'p of Malaka*, 50–648.

Mandamus will not lie against a board of school directors, where the party has the right of appeal to the county superintendent, under § 1829: *Marshall v. Sloan*, 35–445.

Who entitled to benefit of. R. § 3761.

SEC. 3377. The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the district attorney, when the public interest is concerned, and is in the name of such private party or of the state, as the case may be in fact brought.

The order is granted upon the petition of a private party *aggrieved*. Therefore, *held*, that under the act allowing townships to vote a tax to aid in the construction of railroads (12 G. A., ch. 48) the company could not, by mandamus, compel a treasurer to collect the tax until it showed itself entitled to receive the tax, and the whole amount thereof: *Harwood v. Case*, 37–692.

Petition: form of. R. § 3762.

SEC. 3378. The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray an order of mandamus commanding the defendant to fulfil such duty.

As to the interest which a private individual must show to enable him to maintain an action to compel the opening of a highway, see *Moon v. Cort*, 43–503.

Other pleadings. R. § 3766.

SEC. 3379. The pleadings and other proceedings in any action in which a mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party as in an ordinary action for the recovery of damages.

Injunction may issue: when: joinder. R. § 4181.

SEC. 3380. When the action is brought by a private person, it may be joined with a cause of action for such an injunction as may be obtained by ordinary proceedings, or with the causes of action specified in section three thousand three hundred and seventy-five, but no other joinder, and no counter claim shall be allowed.

Peremptory order. R. § 3768.

SEC. 3381. When the plaintiff recovers judgment, the court may include therein a peremptory order of mandamus, directed to the defendant, commanding him forthwith to perform the duty

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to be enforced, together with a money judgment for damages and costs, upon which an ordinary execution may issue.

The writ of mandamus is only issued after judgment, and not as an original or intermediate process: *Wright v. Connor*, 34–240.

SEC. 3382. The order shall simply command the performance of the duty, shall be directed to the party and not the sheriff, and may be issued in term or vacation, and returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds, be allowed by the court or judge, either with or without terms. Same: no return but compliance allowed. R. § 3769.

It is not proper to grant a peremptory writ of mandamus commanding that which it is not within the power of defendant to do. If defendant has wrongfully put it out of his power to do the act, he may be liable in damages: *Rice v. Walker*, 44–458, 461.

SEC. 3383. The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done, may be done by the plaintiff or some other person appointed by the court at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution. Acts performed by another at defendant's costs. R. § 3770.

SEC. 3384. During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damage or injury to the plaintiff until the case is decided. Temporary orders. R. § 3771.

SEC. 3385. When the state is a party, it may appeal without security. Security. R. § 3772.

CHAPTER 9.

OF INJUNCTIONS.

SECTION 3386. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of this code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress. When and for what causes obtained. R. §§ 3773, 3774. C. '51, § 2185.

An injunction will be granted by a court of equity to restrain the collection of an illegal tax, notwithstanding there is a remedy at law: *Zorger v. Tp. of Rapids*, 36–175; *Brandirff v. Harrison Co.*, 50–164; and in such action a number of persons having separate interests, but equally interested in the relief, may join as plaintiffs: *Brandirff v. Harrison Co.*, *supra*.

Those persons who are citizens and

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tax-payers may maintain an action as parties plaintiff for themselves, or for themselves and all others in like manner interested, to restrain a county officer from doing an act detrimental to their interests and those of the county: *Collins v. Ripley*, 8–129; *Rice v. Smith*, 9–570.

A resident and tax-payer of a school district may maintain a suit to enjoin the collection of a tax levied without authority of law: *Williams v. Peinny*, 25–436.

Injunction is the proper remedy to restrain the levy and collection of an illegal tax on shares of stock in a national bank: *Olmstead v. Board of Supervisors*, 24–33.

An injunction is not the proper remedy against an erroneous or excessive assessment; the tax-payer should apply to the board of equalization, but *aliter*, if the law authorizing the tax is unconstitutional, or the levy is without authority or jurisdiction: *Macklot v. City of Davenport*, 17–379.

An injunction will lie to restrain the sale of personal property levied on to satisfy a tax illegally levied. Replevin would not be a full remedy: *Spencer v. Wheaton*, 14–38.

Injunction will be granted to prevent the sale on execution of real property, when such property does not belong to the judgment debtor, and the sale would cast a cloud upon the title: *Key State Gas Light Co. v. Munsell*, 19–305.

Action by original bill for an injunction is not the proper method for trying the right to a public office or franchise. The remedy by information in *quo warranto* should be adopted. But it would seem that a temporary injunction might be granted as an auxiliary remedy in such case: *Cochran v. McCleary*, 22–75.

The filing of a petition and service of the writ operate as the commencement of the injunction proceedings so as to bring them within the period of limitation, although the original notice be not served until the limitation has expired: *Sweatt v. Faville*, 23–321, 328.

Though an injunction be improperly issued, on account of defects in the petition, yet, if these defects are corrected by amendment, the injunction should not be dissolved: *Ibid.*; *D. M. Nav. & R. Co. v. Carpenter*, 27–487, even though the amendment is made after the motion to dissolve: *Crawford v. Paine*, 19–172.

In an injunction proceeding the validity of an election to remove a county seat may be tried: *Sweatt v. Faville*, 23–321.

This section does not confer upon a court of law, in an action by ordinary proceedings, either general or special chancery powers, nor clothe it with power to grant any other relief or remedy not before possessed, except that of an injunction. The last clause as to "other redress" refers to remedies before fully within its power: *Richmond v. D. & S. C. R. Co.*, 33–422, 475.

Where an injunction is asked in an action at law, as here contemplated, it is not necessary for the party to bring himself within the rules and usages of a court of chancery in granting such relief: *Hall v. Crouse*, 14–487.

An injunction may be granted to prevent the continuance of an alleged breach of contract, and may be obtained before the case is determined, the other party, of course, being heard: *Ewell v. Greenwood*, 26–377.

To entitle plaintiff to an injunction, as here provided, he need not allege that he will sustain irreparable injury, or that the defendant is insolvent, and where the facts stated warrant such relief, the party should not be deprived of it by reason of error in bringing his action by equitable instead of by ordinary proceedings: *Mills v. Hamilton*, 49–105.

A petition for injunction in ordinary proceedings must show a continuance or repetition of the injury: *Berger v. Armstrong*, 41–447.

A creditor who has not yet recovered a judgment cannot have an injunction to restrain the debtor from disposing of his property: *Buchanan v. Marsh*, 17–494.

Same. R. § 3775. C. '51, § 2191.

SEC. 3387. In any of the cases mentioned in the preceding section, the injunction may either be a part of the judgment rendered in the action, or it may, if proper grounds therefor are shown, be granted by order at any stage of the case before judgment, and shall then be known as a temporary injunction.

Final or temporary.

SEC. 3388. Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act which would produce great or irreparable injury to the plaintiff; or

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where, during litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

A temporary injunction will not be issued where the facts stated in the petition, if proved, would not entitle the party to relief: *Zorger v. T'p of Rapids*, 36–175.

By whom granted.

SEC. 3389. A temporary injunction may be granted:

1. By the court or judge thereof in which the action is pending or is to be brought;

2. By any judge of the district or circuit court of such district;

3. By any judge of the supreme, or a judge of any other district or circuit court.

But in cases where an action is pending, and it is applied for to affect the subject matter of such action, it can only be granted by the court, or judge thereof, in which such action is pending. Nor shall it be granted by any judge mentioned in the second subdivision hereof, unless it satisfactorily appears by affidavit that the court or judge thereof in which the action is brought, cannot, for want of time, sickness, or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. Nor shall it be granted by any judge mentioned in the third subdivision hereof, unless it be made satisfactorily to appear to such judge, by affidavit, that the application therefor cannot, for some sufficient reason, be made to either of the courts or judges mentioned in the first or second subdivision of this section.

An injunction relating to property held under attachment, where the attachment is the gist of the proceeding, must be brought in the same court where the attachment suit is pending: *Cooney v. Moroney*, 45–292.

Notice: when required.

SEC. 3390. An injunction shall not be granted against a defendant who has answered, unless he has had notice of the application.

Same.

SEC. 3391. An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined.

Section applied: *Dist. T'p of Soldier v. Barrett*, 47–110.

Not by judge when overruled by court.

SEC. 3392. No injunction shall be granted by a judge, after the application therefor has been overruled by the court; nor by a court or judge when it has been refused by the court or judge thereof in which the action is brought. A judge refusing an injunction, shall, if requested by either party, give him a certificate thereof.

Motion to dissolve.
R. § 3790.
C. '51, § 2206.

SEC. 3393. The defendant may move to dissolve the injunction, either before or after the filing of the answer.

Issued by clerk.
R. § 3776.
C. '51, § 2190.

SEC. 3394. If the order is made by the court, the clerk shall make an entry thereof in the court record, and issue the order accordingly. If made in vacation, the judge must indorse said order upon the petition.

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Bond.
R. § 3777.
C. '51, § 2193.

SEC. 3395. In the cases contemplated in the preceding sections, the order of allowance must direct the injunction to issue only after the filing of a bond in the office of the clerk of the proper court, in a penalty to be therein fixed, with sureties to be approved by such clerk, and conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction.

In an action on the bond, reasonable compensation for legal services in securing a dissolution of the injunction may be recovered; but not attorneys' fees for services in defending the entire suit: *Behrens v. McKenzie*, 23–333; *Langworthy v. McKelvey*, 25–48. However, where the motion to dissolve was made in good faith and affidavits filed in support thereof, but the court declined to pass upon it until final hearing, when the injunction was dissolved after hearing upon the merits, *held*, that counsel fees for preparation of motion, etc., might be recovered in suit upon the bond: *Wallace v. York*, 45–81.

Condition of bond when to restrain judgment.
R. § 3778.
C. '51, § 2197.

SEC. 3396. When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the suit must be brought in the county and court in which such action is pending, or the judgment or order was obtained. The bond must also in that case be further conditioned to pay such judgment, or comply with such final order if the injunction is not made perpetual, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined.

Proceedings to enjoin an execution should be brought in the county where the judgment was obtained; and the rule is applicable whether the execution be general or special: *Anderson v. Hall*, 48–346; *Bennett v. Hanchett*, 49–71.

This provision *held* applicable in case of a special execution, but *held*, *arguendo*, that it would not apply where it is sought to enjoin the sale of property not belonging to the defendant in execution, but to a third person, who seeks the injunction: *Lockwood v. Kitteringham*, 42–257.

When a transcript of a judgment before a justice of the peace is filed in the office of the clerk of the circuit court, it becomes a judgment of that court, and a suit to enjoin proceedings thereon must be brought in that court: *Anderson v. Hall*, 48–346.

If the action is brought in the wrong county, the court acquires no jurisdiction even by consent, and the action cannot be removed to the proper county under § 2589: *Ibid.*

Where an execution issuing from the supreme court, is sought to be enjoined, the action may properly be brought in the court of any county where it is sought to enforce such execution: *Davis v. Bonar*, 15–171; *Massie v. Mann*, 17–131.

Under Rev. § 3778, which did not contain the provision as to judgment or final order, *held*, that an injunction to restrain the collection of a judgment was not to enjoin proceedings in a civil action, within the meaning of the section, and the bond need not be conditioned to pay a judgment finally recovered: *Way v. Lamb*, 15–79.

Penalty.
R. § 3779.
C. '51, § 2195.

SEC. 3397. The penalty of the bond must be fixed by the court or judge who makes the order, and must be doubly sufficient to cover any probable amount of liability to be thereby incurred.

Defendant to show cause.
R. § 3781.
C. '51, § 2197.

SEC. 3398. The court or judge before granting the writ, may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted.

VACATION OF.

Application for; to whom made.
R. § 3782.
C. '51, § 2198.
14 G. A. ch. 112.

SEC. 3399. If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of the court, apply to the judge who made the order to vacate or

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modify the same; or the application may be made to the judge of the court in which the action is pending.

Notice of application. R. § 3783. C. '51, § 2199.

SEC. 3400. Such application must be with notice to the plaintiff, and may rest upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits. In the latter case the plaintiff may fortify his application by counter affidavits, and have reasonable time therefor.

Where the facts alleged in the petition as a ground for the injunction are plainly, directly and fully denied by the answer, the injunction may be dissolved upon the answer alone: *Russell v. Wilson*, 37–377; *Anderson v. Reed*, 11–177; *Stevens v. Myers*, 11–183; *Taylor v Dickinson*, 15–483; *D M. Nav & R. Co. v. Carpenter*. 27–487 *Ingraham v C D & M. R. Co.*, 34–249.

To warrant the dissolution upon answer alone, the answer must be upon personal knowledge, and of such character as to entitle it to as much credit as the averments of the bill. If its statements are such as to leave the mind of the court in reasonable doubt as to whether the equities are sufficiently answered, the injunction ought not to be dissolved: *Sinnett v. Moles*. 38–25; *Fargo v. Ames*. 45–494.

Even where all the equity of the bill is denied by the answer, it does not follow, as a matter of course, that the injunction will be dissolved; its dissolution or continuance rests very much in the sound discretion of the court, to be governed by the nature of the case. There is no rule requiring proof in addition to the answer, when complainant's equity is fully denied, but it may be necessary where the answer confesses the bill and sets up new matter: *Shricker v. Field*, 9–366.

An injunction should not be dissolved without proof, on an answer which admits the allegations of the petition and seeks to avoid their effect by pleading affirmative matter: *Judd v. Hatch*, 31–491; *Fargo v. Ames*, 45–494.

Where fraud is the gravamen of a petition, or it is apparent that by dissolution a party will lose all benefit to accrue from final success, the court may refuse to dissolve the injunction until final hearing: *Stewart v. Johnson*, 44–435; *Brigham v. White*, 44–677; *Fargo v. Ames*, 45–944.

Where the court has refused to dissolve an injunction, the supreme court will not reverse its action if no abuse of discretion is shown: *Stewart v. Johnson*. 44–435.

The dissolution of the injunction does not necessarily operate to dismiss the bill: *Russell v. Wilson*, 37–377; *Massie v. Mann*, 17–131; *Walters v. Fredericks*, 11–181.

Dissolution. R. § 3784. C. '51, § 2200.

SEC. 3401. The judge may thereupon decide the matter at once, unless some good cause for delay is shown. But the vacation of the order shall not prevent the cause from proceeding if anything be left to proceed upon.

The dissolution of the injunction does not operate to dismiss the action: See notes to preceding section.

Only one motion. R. § 3793.

SEC. 3402. Only one motion to dissolve or modify an injunction upon the whole case shall be allowed.

VIOLATION OF.

Disobedience of: how punished. R. § 3785. C. '51, § 2201.

SEC. 3403. Any judge of the supreme, district, or circuit court, being furnished with an authenticated copy of the injunction, and also with satisfactory proof that such injunction has been violated, shall issue his precept to the sheriff of the county where the violation of the injunction occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach said defendant, and bring him forthwith before the same or some other judge, at a place to be stated in said precept.

Proof of the violation of the injunction should usually be made by affidavit: *The State v. Myers*, 44–580.

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Contempt purged. R. § 3786. C. '51, § 2202.

SEC. 3404. If, when thus produced, he files his affidavit denying or sufficiently excusing the contempt charged, he shall be released, and the affidavit shall be filed with the clerk of the court for preservation.

Bond required. R. § 3787. C. '51, § 2203.

SEC. 3405. But if he fail to do so, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction, which bond shall be filed with the clerk.

Committed to jail. R. § 3788. C. '51, § 2204.

SEC. 3406. If he fail to give such security, he may be committed to the jail of the county where the proceedings are pending until the next term of the court.

Contempt punished. R. § 3789. C. '51, § 2205.

SEC. 3407. If the security be given, the court at the next term shall act upon the case and punish the contempt in the usual mode.

The contempts here contemplated are to be dealt with as other contempts. (See § § 3491, *et seqq.*) The proceedings are merely incidental to the original proceeding, and there is no appeal, (§ 3499): *First Cong. Church v. City of Muscatine*, 2-69.

CHAPTER 10.

OF SUBMITTING CONTROVERSIES WITHOUT ACTION OR IN ACTION.

Agreed statement of facts. R. § 3408. C. '51, § 1843.

SECTION 3408. Parties to a question in difference which might be the subject of a civil action, may, without action, present an agreed statement of the facts thereof to any court having jurisdiction of the subject matter.

Pleadings are not necessary in the presentation of a case, as here contemplated: *Donald v. St. L. K. C. & N. R. Co.*, 52-411.

Controversy real. R. § 3409. C. '51, § 1844.

SEC. 3409. It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto.

Judgment. R. § 3410. C. '51, § 1845.

SEC. 3410. The court shall thereupon hear and determine the case, and render judgment thereon as if an action were pending.

Record. R. § 3411.

SEC. 3411. The statement, the submission, and the judgment, shall constitute the record.

How enforced. R. § 3312.

SEC. 3412. The judgment shall be with costs, and it may be enforced, and shall be subject to review, in the same manner as if it had been rendered in an action, unless otherwise provided for in the submission.

Pending cause. R. § 3413.

SEC. 3413. The same may be also done at any time before trial in any action then pending, subject to the same requirements and attended by the same results as in a case without action, and such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide also for any lien had by any attachment, and for any property in the custody of the law, else such lien and such legal custody will be held waived.

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SEC. 3414. The parties may, if they think fit, enter into an agreement in writing, that upon the judgment of the court being given in the affirmative or negative of the questions of law raised by such special case, particular property therein described, or a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be delivered to and vested in one of the parties by the other, or in case of money, shall be paid by one of such parties to the other of them, either with or without costs of the action, and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed or ascertained, with or without costs, as the case may be.

Agreement when facts are found: judgment accordingly. R. § 3414.

SEC. 3415. In case no agreement shall be entered into as to the costs of such action, the same shall follow the event, and be recovered by the successful party.

Costs. R. § 3415.

CHAPTER 11.

OF ARBITRATIONS.

SECTION 3416. All controversies which might be the subject of civil action, may be submitted to the decision of one or more arbitrators, as hereafter provided.

What may be. R. § 3675. C. '51, § 2098.

The term "civil action," as here used, includes everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8–40.

SEC. 3417. The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted, the names of the arbitrators and court by which the judgment on their award is to be rendered.

How done. R. §§ 3676, 3677. C. '51, §§ 2099, 2100. 9 G. A. ch. 174, § 5.

The subject matter of the award must be definitely specified: *Woodward v. Atwater*, 3–61.

The parties may agree that judgment on the award shall be rendered by a justice of the peace, and, if so, he will have jurisdiction, provided the amount is such as to bring the case within his cognizance: *Van Horn v. Bellar*, 20–255; *King v. Hampton*, 4 Gr. 401; *Whitis v. Culrer*, 25–30.

Where it was provided in the agreement that judgment should be rendered "by any court having jurisdiction," and judgment was rendered by the district court of the county where both parties resided, *held*, that as such court was the only one which (at that time) had jurisdiction, the agreement was sufficient to warrant such judgment: *McKnight v. McCullough*, 21–111.

An agreement for submission must contain a provision for judgment by some court upon the award. Without this, it will not be such a submission as here contemplated, though it may be binding at common law as a settlement; but, in such cases, it cannot be treated as an award under the statute: *Lore v. Burns*, 35–150.

If not acknowledged, the award cannot be received as made under a statutory submission, although it may be good as at common law and an action maintained thereon: *Fink v. Fink*, 8–313; but, *held*, (under Rev. § 3677) that the same degree of particularity was not required in the acknowledgment of such an agreement as in case of an instrument conveying real property: *McKnight v. McCullough*, 21–111.

The provisions of this chapter as to

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the method of submission, etc., must be followed, if the parties desire judgment upon the award; but a submission and award may be good as at common law between the parties, although these provisions are not observed, as for instance, where the submission is in parol; and an award so made may be enforced by action thereon, and may be set up as a defense to an action brought for the subject matter therein settled: *Conger v. Dean*, 3–463.

What submitted.
R. § 3678.
C. '51, § 2101.

SEC. 3418. The submission may be of some particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides.

Of action pending.
R. § 3679.
C. '51, § 2102.

SEC. 3419. A submission to arbitration of the subject matter of a suit, may also be made by an order of court, upon agreement of parties after suit is commenced.

A submission of matters involved in a pending suit may be made by agreement of parties without an order of court: *Higgins v. Kennedy*, 20–474.

In case of submission, by order of court, upon agreement of parties, the pleadings constitute the submission, and an agreement that judgment may be rendered on the award is not necessary. The court does not lose its control of the matter, and may render judgment upon the award, or may set it aside, in whole or in part: *Schohmer v. Lynch*, 11–461.

Rules.
R. § 3680.
C. '51, § 2103.

SEC. 3420. All the rules prescribed by law in cases of referees, are applicable to arbitrators except as herein otherwise expressed, or except as otherwise agreed upon by the parties.

The parties may, by agreement, determine the rules that shall govern the arbitrators, as that the award of the majority shall be binding: *Thompson v. Blanchard*, 2–44.

The arbitrators are not required, like referees, to make separate return of facts found and conclusions of law thereon: *McKnight v. McCullough*, 21–111.

It need not appear affirmatively from the return that the witnesses were examined under oath, nor, it seems, that the arbitrators were sworn: *Tomlinson v. Hammond*, 8–40.

Revocation.
R. § 3681.
C. '51, § 2104.

SEC. 3421. Neither party shall have the power to revoke the submission without the consent of the other.

Neglect to appear.
R. § 3682.
C. '51, § 2105.

SEC. 3422. If either party neglect to appear before the arbitrators after due notice, except in case of sickness, they may, nevertheless, proceed to hear and determine the cause upon the evidence which is produced before them.

Award.
R. § 3683.
C. '51, § 2106.

SEC. 3423. If the time within which the award is to be made is fixed in the submission, no award made after that time shall have any legal effect, unless made upon a recommitment of the matter by the court to which it is reported.

Same.
R. § 3684.
C. '51, § 2107.

SEC. 3424. If the time of filing the award is not fixed in the submission, it must be filed within one year from the time such submission is signed and acknowledged, unless by mutual consent the time is prolonged,

Same.
R. § 3685.
C. '51, § 2108.

SEC. 3425. The award must be in writing, and shall be delivered by one of the arbitrators to the court designated in the agreement, or it may be enclosed and sealed by them and transmitted to the court, and not opened until the court so orders.

The arbitrators need not return separate findings of facts and conclusions of law: See notes to § 3420.

A delivery of the award to the clerk in person in vacation, *held*, sufficient: *McKnight v. McCullough*, 21–111.

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HEARING IN COURT.

Hearing in court. R. § 3686. C. '51, § 2109.

SEC. 3426. The cause shall be entered on the docket of the court at the term to which the award is returned, and shall be called up and acted upon in its order. But the court may require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award.

Rejection: re-hearing. R. § 3687. C. '51, § 2110.

SEC. 3427. The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon by the parties.

An award which does not pass upon questions which have been referred to the arbitrators and are essential to determine the rights of the parties, will be set aside: *M. & M. R. R. Co. v. S. C. & St. P. R. Co.*, 49–604.

Under the corresponding provisions of R. S., *held*, that an award should only be rejected for the want of jurisdiction in the arbitrators; but that it should be re-committed for any reason which would justify the granting of a new trial after verdict: *Depew v. Davis*, 2 Gr. 260.

An award should not be set aside for newly discovered evidence which is merely cumulative: *McDaniels v. VanFosen*, 11–195.

To entitle a party to have an award set aside on the ground of mistake, he must not only clearly show a mistake, and that he was prejudiced thereby, but also that if it had not occurred the award would have been different: *Tomlinson v. Tomlinson*, 3–575; *Gorham v. Millard*, 50–554.

An award may be impeached by showing that no evidence was taken upon a particular point, or that the arbitrators omitted to consider certain questions, etc.: *Thompson v. Blanchard*, 2–44; *Sharp v. Woodbury*, 18–195.

Where a justice of the peace rendered judgment on an award, and an appeal from his judgment was taken to the district court, *held*, that as a trial of the case upon its merits cannot be had in the court to which an award is returned, the only power which such court can exercise being to render judgment thereon, or reject the same and re-commit it for a re-hearing, therefore, no trial upon the merits could be had upon such appeal: *Whitis v. Culver*, 25–30.

Force and effect of award. R. § 3688. C. '51, § 2111.

SEC. 3428. When the award has been adopted, it shall be filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly.

Judgment on an award may be rendered by a justice of the peace: See notes to § 3417.

Appeal. R. § 3689. C. '51, § 2112.

SEC. 3429. When an appeal is brought on such judgment, copies of the submission and award, together with all affidavits, shall be returned to the supreme court.

An appeal will not lie from the judgment of a justice of the peace on an award. Any error committed by him in rejecting or re-committing an award, or failing to do so may be reviewed on writ of error: *Whitis v. Culver*, 25–30.

Costs. R. § 3690. C. '51, § 2113

SEC. 3430. If there is no provision in the submission respecting costs, the arbitrators may award them in their discretion.

Rights saved. R. § 3692. C. '51, § 2115.

SEC. 3431. Nothing herein contained shall be construed to affect in any manner the control of the court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award, or upon any bond or other engagement to abide an award.

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CHAPTER 12.

OF ACTIONS AGAINST BOATS OR RAFTS.

Boats: when and for what liable. R. § 3693. C. '51, § 2116.

SECTION 3432. In an action brought against the owners of any boat to recover any debt contracted by such owner, or by the master, agent, clerk, or consignee thereof, for supplies furnished, or for labor done, in, about, or on such boat, or for materials furnished in building, repairing, fitting out, furnishing or equipping the same, or to recover for the non-performance of any contract relative to the transportation of persons or property thereon, made by any of the persons aforementioned, or to recover injuries to persons or property by such boat, or the officers or the crew thereof, done in connection with the business of such boat, a warrant may issue for the seizure of such boat, as hereinafter provided.

The jurisdiction of the federal courts over maritime torts on navigable rivers is not exclusive. The judiciary act of 1789, and the act of congress of February 26, 1845, discussed: *Treror v. Steamboat Ad. Hine*, 17–349; but so much of the corresponding chapter (ch. 148) of the Rev., as provided for an action *in rem* against a boat, was held to be in conflict with art. 3, § 2, of the U. S. Constitution, and § 9 of the judiciary act of 1789, by which admiralty and maritime jurisdiction was invested exclusively in the district court of the U. S.: *Walters v. Steamboat Mollie Dosier*, 24–192.

Under Rev., *held*, that the petition need not aver that the boat was within the jurisdiction of the state at the time suit was commenced. It is the service of warrant that brings the property within the jurisdiction of the court. If the contract for the breach of which action is brought is violated within the waters of this state, and the boat is seized under warrant properly issued, the court will have jurisdiction although such contract was made elsewhere: *Baker v. Steamboat Milwaukee*, 14–214.

Under the provisions of the Code of '51, which made certain charges a lien against the boat, *held*, that the seizure and sale of the boat under the laws of another state did not divest it of such lien: *Haight v. Steamboat Henrietta*, 4–472; *Ogden v. Ogden*, 13–176; also, *held*, that the boat was liable for money collected from consignments of goods for freight due a railroad company from whom the goods were received to be forwarded to their destination, and that such transaction was a "contract relative to the transportation of" freight: *C. B. & Q. R. Co. v. Steamboat, etc.*, 10–465.

Petition and warrant. R. § 3701. C. '51, § 2121.

SEC. 3433. The original petition must be in writing, sworn to and filed with the clerk or justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat, its apparel, tackle, furniture, and appendages, and detain the same until released by due course of law.

Warrant issued on Sunday. R. § 3702.

SEC. 3434. And the warrant may be issued on Sunday, if the plaintiff, his agent or attorney, shall state in his petition and swear thereto, that it would be unsafe to delay proceedings till Monday.

Service of notice. R. § 3703. C. '51, § 2122.

SEC. 3435. It shall be sufficient service of the original notice in such an action, to serve it on the defendant, or on the master, agent, clerk or consignee of such boat; and if none of them can be found, the notice may be served by posting up a copy thereof on some conspicuous part of the boat. The warrant shall be served according to the direction it contains.

By whom served. R. § 3704.

SEC. 3436. Any constable or marshal of any corporate town may serve and execute the warrant provided for in said section,

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whether the same issue from the office of the clerk of the district or circuit court, or of a justice.

Who may appear for boat. R. § 3705. C. '51, § 2123.

SEC. 3437. Any person interested in the boat may appear for the defendant by himself, his agent or attorney, and conduct the defense of the suit, and no continuance shall be granted to the plaintiff while the boat is held in custody.

Discharge by giving bond. R. § 3706 C. '51, § 2124.

SEC. 3438. The boat may be discharged at any time before final judgment, by the giving a bond with sureties, to be approved by the officer serving the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with the costs.

A formal entry of discharge under the bond is not necessary to render the principal and sureties liable thereon. Nor need the bond be formally approved, if it is accepted by the officer and the boat released: *White v. Tisdale*, 12–75.

Special execution. R. § 3707. C. '51, § 2125.

SEC. 3439. If judgment be rendered for the plaintiff before the boat is thus discharged, a special execution shall be issued against it. If it have been previously discharged, the execution shall issue against the principal and sureties in the bond without further proceedings.

A judgment may be rendered against a boat and at the same time against the sureties on a bond on which the boat has been discharged: *Ogden v. Ogden*, 13–176.

What first to be sold. R. § 3708. C. 51, § 2126.

SEC. 3440. The officer may sell any of the furniture or appendages of the boat, if by so doing he can satisfy the demand. If he sell the boat itself, he must sell it to the bidder who will advance the amount required to satisfy the execution, for the lowest fractional share of the boat, unless the person appearing for the boat desire a different and equally convenient mode of sale.

Fractional share sold. R. § 3709. C. '51, § 2127.

SEC. 3441. If a fractional share of the boat be thus sold the purchaser shall hold such share or interest jointly with the other owners.

Appeal. R. § 3710. C. '51, § 2128.

SEC. 3442. If an appeal be taken by the defendant before the boat is discharged as above provided, the appeal bond, if one be filed, will have the same effect in discharging the boat as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner.

Saving clause. R. § 3711. C. '51, § 2129.

SEC. 3443. Nothing herein contained is intended to affect the rights of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted.

Petition: allegation of. R. § 3712. C. '51, § 2130.

SEC. 3444. In actions commenced in accordance with the provisions of this chapter, it is sufficient to allege the contract to have been made with the boat itself.

RAFTS.

Rafts: liability of. R. § 3698.

SEC. 3445. Any raft found in the waters of this state, shall be liable for all debts contracted by the owner, agent, clerk, or pilot thereof, on account of work done or services rendered for such raft.

The lien will attach under a contract with the pilot, although between the pilot and the owner there is an agreement that the former shall bear all the expenses for men, etc.: *Hanson v. Hiles*, 34–350.

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Lien.
R. § 3699.

SEC. 3446. Claims growing out of either of the above causes shall be liens upon the raft, its tackle, and appendages, for the term of twenty days from the time the right of action therefor accrued.

Action against raft.
R. § 3700.

SEC. 3447. The action may be brought directly against the raft, and the same rules shall govern, and the same process shall be had in such action, as are in this chapter prescribed for actions against owners of boats.

Appearance: what deemed.
R. § 4130.

SEC. 3448. The execution by or for the owner of such boat or raft, of a bond, whereby possession of the same is obtained or retained by him, shall be an appearance of such owner as a defendant to the action.

CHAPTER 13.

OF HABEAS CORPUS.

Petition sworn to: statements of.
R. § 3801.
C. '51, § 2213.

SECTION 3449. The petition for the writ of habeas corpus must be sworn to, and must state:

1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom, and the place where he is so restrained, mentioning the names of the parties, if known, and if unknown, describing them with as much particularity as practicable;

2. The cause or pretense of such restraint, according to the best information of the applicant; and if it be by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence;

3. It must state that the restraint is illegal, and wherein;

4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;

5. It must also state whether application for the writ has been before made to, and refused by, any court or judge, and if such application has been made, a copy of the petition in that case, with the reasons for the refusal thereto appended, must be produced, or satisfactory reasons given for the failure to do so.

If the officer issuing the writ under which the prisoner is restrained acted under color of office, the question whether he is such officer *de jure* cannot be raised in a habeas corpus proceeding, but *aliter*, if he is a mere usurper without color of office. The right to an office cannot be contested in this proceeding: *Ex parte Strahl*, 16–369.

Where the allegations of the petition are sufficient to authorize a writ, the judge acquires jurisdiction of the parties and the subject matter, and an order made by him is not void. It is but voidable, at most, and can only be attacked or changed in a direct proceeding, by appeal or otherwise: *Shaw v. McHenry*, 52–182.

Same.
R. § 3802.
C. '51, § 2214.

SEC. 3450. The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ.

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Writ: by whom allowed. R. § 3803. C. '51, § 2215.

SEC. 3451. The writ of habeas corpus may be allowed by the supreme, district, or circuit court, or by any judge of either of those courts, and may be served in any part of the state.

Application: to whom made. R. § 3805. C. '51, § 2217.

SEC. 3452. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court, or a judge thereof.

The applicant, as here contemplated in determining before what judge the application should be brought, is the person whose liberty is restrained, and not the one by whom the petition is presented on behalf of such person: *Thompson v. Oglesby*, 42–598.

May refuse writ. R. § 3806. C. '51, § 2218.

SEC. 3453. If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse to allow the writ.

Reasons for endorsed on. R. § 3809. C. '51, § 2221.

SEC. 3454. If the writ is disallowed, the court or judge shall cause the reasons of said disallowance to be appended to the petition and returned to the person applying for the writ.

WRIT ALLOWED.

Form of writ. R. § 3807. C. '51, § 2219.

SEC. 3455. But if the petition show a sufficient ground for relief, and is in accordance with the foregoing requirements, the writ shall be allowed, and may be substantially as follows:

THE STATE OF IOWA,

To the sheriff of, etc., [or to A.... B...., as the case may be.]

You are hereby commanded to have the body of C.... D...., by you unlawfully detained, as is alleged, before the court [or before me, or before E.... F...., judge, etc., as the case may be] at ....., on ....., [or immediately after being served with this writ,] to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

By court: by judge. R. § 3808. C. '51. § 2220.

SEC. 3456. When the writ is allowed by a court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, subscribing his name thereto without any seal.

Penalty for refusing. R. 3810. C. '51, § 2222.

SEC. 3457. Any judge, whether acting individually or as a member of the court, who wrongfully and wilfully refuses such allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars.

Judge to issue on his own motion. R. § 3811. C. '51, § 2223.

SEC. 3458. Whenever any court or judge authorized to grant this writ, has evidence, from a judicial proceeding before them, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue or cause to be issued, the writ as aforesaid, though no application be made therefor.

District attorney notified. R. § 38:8. C. '51, § 2240.

SEC. 3459. The court or officer allowing the writ, must cause the district attorney of the proper county to be informed of the issuing of the writ, and of the time and place, where and when it is made returnable.

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SERVICE.

By whom. R. § 3812. C. '51, § 2224.

SEC. 3460. The writ may be served by the sheriff, or by any other person appointed for that purpose, in writing, by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power, and is liable to the same penalty for a non-performance of his duty, as though he were the sheriff.

How. R. § 3813. C. '51, § 2225.

SEC. 3461. The proper mode of service is by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service.

When defendant not found. R. § 3814. C. '51, § 2226.

SEC. 3462. If the defendant cannot be found, or if he have not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody, in the same manner and with the same effect as though he had been made defendant therein.

Power of officer when defendant is concealed. R. § 3815. C. '51, § 2227.

SEC. 3463. If the defendant conceal himself, or refuse admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county or the state, after the service of the writ as aforesaid, the sheriff, or the person who is attempting to serve, or who has served the writ as above contemplated, is authorized to arrest the defendant, and bring him, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable.

Arrest. R. § 3816. C. '51, § 2228.

SEC. 3464. In order to make such arrest, the sheriff or other person having the writ, possesses the same power as is given to a sheriff for the arrest of a person charged with a felony.

Same. R. § 3817. C. '51, § 2229.

SEC. 3465. If the plaintiff can be found and if no one appear to have the charge or custody of him, the person having the writ may take him into custody, and make return accordingly. And to get possession of the plaintiff's person in such cases, he possesses the same power as is given by the last section for the arrest of the defendant.

Want of form. R. § 3822. C. '51, § 2234.

SEC. 3466. The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent of the writ.

Penalty for eluding writ. R. § 3841. C. '51, § 2253.

SEC. 3467. If the defendant attempt to elude the service of the writ of habeas corpus, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall, on conviction, be imprisoned in the penitentiary or county jail not more than one year, and fined not exceeding one thousand dollars. And any person knowingly aiding or abetting in any such act, shall be subject to the like punishment.

Refusal to give copy of process. R. § 3842. C. '51, § 2254.

SEC. 3468. An officer refusing to deliver a copy of any legal process by which he detains the plaintiff in custody, to any person who demands such copy, and tenders the fees therefor, shall forfeit two hundred dollars to the person so detained.

PRECEPT.

When to issue. R. § 3818. C. '51, § 2230.

SEC. 3469. The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings

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as above authorized, may issue a precept to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge.

Evidence. R. § 3819. C. '51, § 2231.

SEC. 3470. When the evidence aforesaid is farther sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the precept must also contain an order for the arrest of the defendant.

How served. R. § 3820. C. '51, § 2232.

SEC. 3471. The officer or person to whom the precept is directed, must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued.

Examination. R. § 3821. C. '51, § 2233.

SEC. 3472. The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case.

PLEADINGS—TRIAL—JUDGMENT.

Presumption. R. § 3823. C. '51, § 2235.

SEC. 3473. Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description or to another person.

Appearance. R. § § 3824. 4182 C. '51, § 2236.

SEC. 3474. Service being made in any of the modes hereinbefore provided, the defendant must appear at the proper time and answer the said petition, but no verification shall be required to the answer.

Body of plaintiff. R. § 3825. C. '51, § 2237.

SEC. 3475. He must also bring up the body of the plaintiff, or show good cause for not doing so.

Penalty for wilful failure. R. § 3826. C. '51, § 2238.

SEC. 3476. A wilful failure to comply with the above requisitions, renders the defendant liable to be attached for contempt, and to be imprisoned till a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved.

Attachment: how served. R. § 3827. C. '51, § 2239.

SEC. 3477. Such attachment may be served by the sheriff, or any other person thereto authorized by the judge, who shall also be empowered to bring up the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases.

Answer. R. § 3829. C. '51, § 2241.

SEC. 3478. The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so, the cause thereof.

Same. R. § 3830. C. '51, § 2242.

SEC. 3479. If he has transferred him to another person, he must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.

Same. R. § 3831. C. '51, § 2243.

SEC. 3480. If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed.

Demur or reply. R. § 3832. C. '51, § 2244.

SEC. 3481. The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court.

The trial in this proceeding is to be as in ordinary proceedings: *Drum v. Keen*, 47–435; and there cannot be a trial *de novo* on appeal: *Ex rel. Shaw v. Nachtwey*, 43–653.

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Replication: statement of. R. § 5833. C. '51, § 2245.

SEC. 3482. Such replication may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge in connection with any other testimony which may then be produced.

That the petitioner, when brought before a committing magistrate, waived examination, does not debar him from introducing evidence in a habeas corpus proceeding to show that he is wrongfully detained: *Cowell v. Patterson*, 49–514.

Grand jury. R. § 3834. C. '51, § 2246.

SEC. 3483. But it is not permissible to question the correctness of the action of the grand jury in finding a bill of indictment, or of the trial jury in trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner.

A state court cannot, on habeas corpus, release a person held in custody by the U. S marshal by order of a federal court: *Ex parte Holman*, 28–88.

One court will not interfere by habeas corpus with proceedings in another court to punish a party for contempt, unless such proceedings are so grossly irregular as to be void: *Ibid.; Robb v. McDonald*, 29–330.

After conviction by a court having jurisdiction, though such conviction be irregular or erroneous, the party is not entitled to the writ, and this is true of a conviction before a magistrate; and where the defendant was found guilty before the proper police magistrate of a city, for violation of an ordinance of such city, and sentenced to imprisonment, *held*, that he could not be released on the ground that the ordinance, under which he was convicted, was invalid: *Platt v. Harrison*, 6–79.

Habeas corpus will not lie to correct errors of a court having jurisdiction of the subject matter, and the person charged: *Ex parte Holman*, 28–88, *Zelle v. McHenry*, 51–572.

Discharge. R. § 3835. C. '51, § 2247.

SEC. 3484. If no sufficient legal cause of detention is shown the plaintiff must be discharged.

Irregularity of commitment. R. § 3836. C. '51, § 2248.

SEC. 3485. Although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them, that he ought to be held to bail, or committed either for the offense charged, or any other, the order may be made accordingly.

Bail increased or diminished. R. § 3837. C. '51, § 2249.

SEC. 3486. The plaintiff may also, in any case, be committed, let to bail, or his bail be mitigated or increased, as justice may require.

Defendant retained in custody. R. § 3838. C. '51, § 2250.

SEC. 3487. Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose.

Right to be present waived. R. § 3839. C. '51, § 2251.

SEC. 3488. The plaintiff, in writing, or his attorney, may waive his right to be present at the trial, in which case the proceedings may be had in his absence. The writ will in such cases be modified accordingly.

Penalty for disobeying any order. R. § 3840. C. '51, § 2252.

SEC. 3489. Disobedience to any order of discharge subjects the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience.

Papers filed with clerk. R § 3843. C. '51, § 2253.

SEC. 3490. When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a brief

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memorandum thereof shall be entered by the clerk upon his judgment docket.

Under the Rev., an appeal did not lie from an order made by the judge of the supreme court in a habeas corpus proceeding: *In re Curley*, 34–184. (But see now § 3165.)

CHAPTER 14.

OF CONTEMPTS.

SECTION 3491. The following acts or omissions are deemed to be contempts, and are punishable as such by any of the courts of this state, or by any judical officer acting in the discharge of an official duty, as hereinafter provided: What are. R. § 2688. C. '51, § 1598

1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;

2. Any wilful disturbance calculated to interrupt the due course of its official proceedings;

3. Illegal resistance to any order or process made or issued by it;

4. Disobedience to any subpœna issued by it and duly served, or refusing to be sworn, or to answer as a witness;

5. Unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to or remaining at the place where the action or proceeding is thus pending;

6. Any other act or omission specially declared a contempt by law

The proceeding to punish a contempt of process is merely incidental to, and, to a great extent, independent of the original proceeding in which it may be invoked. It is in its nature criminal: *First Cong Church, etc., v. City of Muscatine*, 2–69.

Where a court having jurisdiction is proceeding against a party by arrest for contempt, no other court will interfere by writ of habeas corpus: See notes to § 3483.

Under Code of '51, *held*, that to constitute a contempt under ¶ 1, the act must be done in the actual or constructive presence of the court, and that newspaper comments upon the action of the court could not amount to a contempt, as specifically defined here or elsewhere; and that it would seem that the provisions of the Code must be regarded as a limitation upon the power of courts to punish for any other contempts than those therein specified: *Dunham v. The State*, 6–245.

Publication of articles in a newspaper reflecting upon the conduct of a judge in relation to a cause disposed of before such publication, does not amount to a contempt: *The State v. Anderson*, 40–207.

Evidence may be received as to the meaning and intent of language published concerning the court, which is alleged to have been contemptuous: *Henry v. Ellis*, 49–205.

A witness may be punished for contempt in refusing to make an affidavit, and to answer questions as provided by § § 3692, 3693, and the fact that the affidavit desired would not be legally admissible in the proceeding in which it is sought, is no excuse for such refusal: *Robb v. McDonald*, 29–330.

SEC. 3492. In addition to the above, any court of record may punish the following acts or omissions as contempts: In courts of record. R. § 2689. C. '51, § 1599.

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1. Failure to testify before a grand jury, when lawfully required to do so;

2. Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority;

3. Misbehavior as a juror, by improperly conversing with a party, or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court;

4. Disobedience by an inferior tribunal, magistrate, or officer, to any lawful judgment, order, or process of a superior court, or proceeding in any matter contrary to law, after it has been removed from such tribunal, magistrate, or officer.

How punished. R. § 2690. C. '51, § 1600.

SEC. 3493. The punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars.

The court cannot punish an attorney for contempt by revoking or suspending his license. That can only be done in the manner provided by § 217 *et seq.*: *The State v. Start*, 7-499. Nor can it, by summary proceeding for contempt, compel a party to deliver to the sheriff a key or property claimed by another: *Ibid.*

The judge of a court of record in vacation has the same power to impose punishment as the court has when in session: *The State v. Myers*, 44-580.

Same. R. § 2691. C. '51, § 1601.

SEC. 3494. But if the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of the commitment.

When affidavit necessary. R. § 2692. C. '51, § 1602.

SEC. 3495. Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises.

Notice to show cause. R. § 2693. C. '51, § 1603.

SEC. 3496. Before punishing for contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved.

Where a reasonable time is asked to prepare a written explanation, it should be granted: *The State v. Duffy*, 15-425.

A warrant may be made returnable on a certain day, which may be at a subsequent term, and it may direct the arrest of a person in contempt, in vacation, and provide for his release on bail: *The State v. Archer*, 48-310.

Testimony reduced to writing. R. § 2694. C. '51, § 1604.

SEC. 3497. Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved, and if the court act upon their own knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record.

These provisions apply to all proceedings for contempt, including those in § 3233: *The State v. Myers*, 44-580.

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An order entering a fine for contempt, will be reversed when a statement of facts, upon which the order is founded, is not entered on the record in a case where the court acts upon its own knowledge: *The State v. Utley*, 13–593; *Skiff v. The State*, 2–550: *The State v. Dougherty*, 32–261.

Where neither the record nor the warrant of commitment show upon what evidence or facts an order of commitment is based, nor whether the same were within the knowledge of the court, the order will be reversed on certiorari: *The State v. Folsom*, 34–583.

SEC. 3498. When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was in the knowledge of the court, or was proved by witnesses. Warrant: statement of. R. § 2695. C. '51, § 1605.

See notes to preceding section.

SEC. 3499. No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari. Certiorari. R. § 2696. C. '51, § 1606.

This special provision controls the general provision as to appeals, and extends to contempts by disobedience of injunction, as well as other process: *First Cong. Church, etc., v. City of Muscatine*, 2–69.

Section applied: *Dunham v. The State*, 6–245.

SEC. 3500. The punisment for a contempt constitutes no bar to an indictment; but if the offender is indicted and convicted for the same offense, the court in passing sentence must take into consideration the punishment before inflicted. No bar to indictment. R. § 2697. C. '51, § 1607.

SEC. 3501. Any officer authorized to punish for contempt, is a court within the meaning of this chapter. "Court" defined. R. § 2698. C. '51, § 1608.

CHAPTER 15.

OF CHANGING NAMES.

SECTION 3502. The district or circuit court has power to change the names of persons in the following manner: Courts may. R. § 3844. C. '51, § 2256.

SEC. 3503. The applicant for such change must file his petition verified by his oath, stating that he is a resident of the county, and has for one year then last past, been an actual resident of the state. It must also give a description of his person, stating his age, height, the color of his hair and eyes, the place of his birth, and who were his parents. Petition. R. § 3845. C. '51, § 2257.

SEC. 3504. An order of the court shall thereupon be made and entered of record, giving a description of the applicant as set forth in the petition, the new name given, the time at which the change shall take effect, which shall not be less than thirty days thereafter, and directing in what newspaper of general circulation in the county, notice of such change shall be published. Order. R. § 3846. C. '51, § 2258.

SEC. 3505. Previous to the time thus prescribed for the taking effect of such change, the applicant shall cause notice thereof to be published for four successive weeks in the newspaper directed by the court. Publication. R. § 3847. C. '51, § 2259.

SEC. 3506. The ordinary proof of such publication being filed in the office of the clerk of the court, shall be by him filed for preservation, and on the day fixed by the court as aforesaid the change shall be complete. Proof filed. R. § 3848. C. '51, § 2260.

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TITLE XXI.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

Jurisdiction: local. R. § 3849. C. '51, § 2261.

SECTION 3507. The jurisdiction of justices of the peace, when not specially restricted, is co-extensive with their respective counties; but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand five hundred and thirteen of this chapter.

A justice does not acquire jurisdiction over an action against a resident of another county, even though he appear and proceed to trial without objection: *Chapman v. Morgan*, 2 Gr. 374; *Boyer v. Moore*, 42–544; nor does he acquire jurisdiction by notice served in the township where suit is brought, upon a resident of another county, and a judgment rendered thereon is void; defendant is not required to appear and plead, suggesting want of jurisdiction: *Hamilton v. Millhouse*, 46–74.

If a suit be for the recovery of money, the fact that a judgment is sought against property in the county where suit is brought will not enable a justice of another county than that of defendant's residence to take jurisdiction: *Gates v. Wagner*, 46–355.

But this section does not limit § 3513 to cases where defendant resides in the county in which a written contract is made payable: *Klingel v. Palmer*, 42–166.

As to amount. R. § 3850. C. '51, § 2262.

SEC. 3508. Within the prescribed limit, it extends to all civil cases, except cases by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties, it may be extended to any amount not exceeding three hundred dollars.

The amount claimed, and not the amount appearing to be due on the instrument in suit, is the criterion for jurisdiction: *Stone v. Murphy*, 2–35.

If the amount in controversy exceeds one hundred dollars, the justice has no jurisdiction to even render judgment for less than one hundred dollars: *Gillett v. Richards*, 46–652.

A justice, in a garnishment proceeding, may render judgment for any amount for which he properly acquired jurisdiction to render judgment against the original defendant, although that amount may exceed one hundred dollars: *Ibid.; Hodye v. Ruggles*, 36–42.

In an attachment proceeding, the amount in controversy is the claim plaintiff seeks to enforce, and not the value of the attached property: *Hoppe v. Byers*, 39–573.

Where the claim stated in the notice was for one hundred dollars with interest and costs, *held*, that such a statement entitled plaintiff to interest on the amount demanded, from the time of commencement of suit, and therefore the amount claimed was over one hundred dollars, and the justice had no jurisdiction: *Galley v. County of Tama*, 40–49. But where the petition claimed one hundred dollars, and the notice stated that

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that amount was claimed, but also stated that unless defendant appeared etc., judgment would be rendered "for the whole amount with interest and costs", *held*, that the amount claimed did not exceed one hundred dollars, and the justice had jurisdiction: *Moran v. Murphy*, 49–68.

The jurisdiction of justices over cases where the amount does not exceed one hundred dollars, is not exclusive: *Nelson v. Gray*, 2 Gr. 397; *Hutton v. Drebilbis*, 2 Gr. 593.

A justice has no equitable jurisdiction: *David v. Ryan*, 47-642, 646.

WHERE SUITS MAY BE BROUGHT.

SEC. 3509. Suits may in all cases be brought in the township where the plaintiff or defendant, or one of several defendants, resides.

Where parties reside. R. § 3851. C. '51, § 2263. 12 G. A. ch. 149.

That a suit before a justice is brought in the wrong township, is not ground for change of venue. Such fact should be pleaded in abatement. Whether a motion to dismiss would be proper in such case, *quære:* *Meunch v. Breitenbach*, 41–527.

A trial had before the proper justice, but taking place outside of his township, by consent of parties, *held*, not to be void for want of jurisdiction: *Rogers v. Loop*, 51–41.

SEC. 3510. They may also be brought in any other township of the same county, if actual service on one or more of the defendants is made in such township.

Where served. R. § 3852. C. '51, § 2264.

Defendant may be sued in any township where service is obtained on him, provided he be a resident of the county: *Klingel v Palmer*, 42–166.

SEC. 3511. Actions to recover personal property, and suits commenced by attachment, may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county.

To recover personal property: attachment. R. § 3853. C. '51, § 2265.

In the cases here provided for, the jurisdiction of a justice is not limited to the township in which the defendant resides, or in which the property may be found, but is co-extensive with the county: *Leversee v. Reynolds*, 13–310; *Biddle v Allender*, 14–110.

These provisions relate to the location of the property at the time the case is commenced, and not at the time it is seized under the writ. The removal of the property from the county after the commencement of the action, but before seizure, will not defeat the jurisdiction of the justice or the right to levy on the property: *Craft v. Franks*, 34–504.

In actions of replevin and attachment, justices have jurisdiction throughout the county, without regard to the township of the residence of parties, or where the property is situated (overruling *Meunch v. Breitenbach*, 41–527, and citing the previous cases): *Knowles v. Picket*, 46–503.

If the action be for the recovery of money against a resident of another county, the justice does not have jurisdiction, though an attachment be sought against property in the county where suit is brought (explaining *Craft v. Franks*, 34–504): *Gates v. Wagner*, 46–355.

SEC. 3512. If none of the defendants reside in the state, suit may be commenced in any county and township wherein either of the defendants may be found.

Non-resident. R. § 3854. C. '51, § 2266.

SEC. 3513. On written contracts, stipulating for payment at a particular place, suit may be brought in the township where the payment was agreed to be made.

Contracts in writing. R. § 3855. C. '51, § 2267.

Under this section, a justice may entertain jurisdiction in a suit upon a written contract stipulating for payment in his township, although the defendant be a resident of another county, and not served within the township where the suit is brought. This section is not limited by §§ 3507, 3510: *Klingel v. Palmer*, 42–166.

For similar provision as to place of bringing action in courts of record, see § 2581.

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In adjoining township. R. § 3856. C. '51, § 2268.

SEC. 3514. If there is no justice in the proper township qualified or able to try the suit, it may be commenced in any adjoining township in the same county.

JUSTICE'S DOCKET.

Docket and contents. R. § 3857. C. '51, § 2269.

SEC. 3515. Every justice of the peace shall keep a docket in which shall be entered, in continuous order, with the proper date to each act done:

1. The title to each cause;
2. A brief statement of the nature and amount of the plaintiff's demand, and defendant's counter claim, if any, giving date to each where dates exist;
3. The issuing of the process, and the return thereof;
4. The appearance of the respective parties;
5. Every adjournment, stating at whose instance and for what time;
6. The trial, and whether by the justice or by a jury;
7. The verdict and judgment;
8. The execution, to whom delivered, the renewals, if any, and the amount of debt, damages, and costs endorsed thereon;
9. The taking and allowance of an appeal, if any;
10. The giving a transcript for filing in the clerk's office, or for counter claim, if one is given;
11. A note of all motions made, and whether refused or granted.

The provision of ¶ 3 is directory, and the failure to note the return of an execution, before judgment against a garnishee garnished thereunder, cannot be taken advantage of by the garnishee to reverse a judgment against him: *Houston v. Walcott*, 1–86. Also, *held*, that failure of the justice to note in his docket the return of notice would not affect his jurisdiction: *Bridges v. Arnold*, 37–221.

The last subdivision does not refer to motions made on the trial to exclude evidence. Objections to evidence, and rulings thereon, need not be entered on the docket: *Miller v. O'Neal*, 9–446.

SUITS—HOW BROUGHT.

Practice. R. § 3858. C. '51, § 2270.

SEC. 3516. The parties to the action may be the same as in the circuit court, and all the proceedings prescribed for that court, so far as the same are applicable and not herein changed, shall be pursued in justices' courts. The powers of the court are only as herein enumerated.

Same. R. § 3859. C. '51, § 2271.

SEC. 3517. Actions in justices' courts are commenced by voluntary appearance or by notice.

Filing of petition is not necessary to the commencement of an action before a justice, even when the action is such that a sworn petition must be filed. If the petition is filed on the return day of the notice, it is sufficient: *Duffy v. Dale*, 42–215; and see next section.

As to appearance by agent, see § 3524 and notes.

The rule that a special appearance to object to the sufficiency of service, confers jurisdiction (§ 2626, ¶ 3.) is applicable in proceedings before a justice: *Church v. Crossman*, 49–444; so also, an appearance to cross-examine witnesses, even though general appearance is disclaimed, will confer jurisdiction: *Rahn v. Greer*, 37–627.

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SEC. 3518. When by notice, no petition need be filed, except where the petition must be sworn to, but the notice must state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him. Petition not necessary. R. § 3860. C. '51, § 2272.

A technical setting forth of the cause of action is not demanded, but a notice stating it in general terms, if sufficient to apprise the defendant of the nature of the claim against him, is all that is required: *Fauble v. Stewart*, 35–379.

Where the cause of action stated in the notice was "forty dollars damages in the sale of oxen," plaintiff was allowed to prove and recover upon a warranty made in such sale; and it was held that the notice sufficiently set forth such cause of action: *Dilley v. Nusum*, 17–238.

Where the claim was upon a written instrument of guaranty of a promissory note, and the notice stated the claim as upon "a promissory note," *held*, that the action being before a justice, the notice was sufficient: *Francis v. Bentley*, 50–59.

When the cause of action is such that it must be sworn to, the petition need not be filed until the return day. An original notice alone is sufficient to commence an action before a justice: *Duffy v. Dale*, 42–215.

Technical precision in pleading is not required: See notes to § 3530.

As to defective notice, see § 3520.

SEC. 3519. It must be addressed to the defendant by name, but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff, or the justice before whom it is returnable. Notice to whom. R. § 3861. C. '51, § 2273.

As to proceeding against a defendant whose name is unknown, see § 2557.

SEC. 3520. It must state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer at the time and place therein fixed. State amount. R. § 3862. C. '51, § 2274.

A defective notice, if service is properly had, does not affect the jurisdiction of the court, nor the validity of the proceeding. If the justice err in holding the notice sufficient, advantage thereof must be taken on appeal if at all: *Dougherty v. McManus*, 36–657; and see notes to next section.

The notice should state the hour when defendant is required to appear, (§ 3525), and where the notice fixed the time as "11 o'clock M.," *held* that it was not sufficient: *Hodges v. Brett*, 4 Gr. 345.

In stating the place, it is not essential that the notice give the township of the justice: *Johnson v. Dodge*, 19–106.

SEC. 3521. The time thus fixed in the notice must not be more than fifteen days from the date, and the notice must be served not less than five days previous to the trial. Limit of time. R. § 3863. C. '51, § 2275.

Where the notice was served less than five days previous to trial, *held*, that judgment thereon was erroneous, but not void. Judgment on a defective or insufficient notice can only be attacked by appeal, and not collaterally: *Shea v. Quinton*, 30–58; *Ballinger v. Tarbell*, 16–491; and see notes to preceding section.

SEC. 3522. The service and return thereto must be made in the same manner as in the circuit court, except that no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to. Service and return. R. § 3864. C. '51, § 2276.

SEC. 3523. The defendant may at any time pay to the officer having the process, or to the justice of the peace, the amount of the claim, together with the costs which have then accrued, and thereupon the proceedings shall cease. Defendant may pay officer. R. § 3865. C. '51, § 2277.

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APPEARANCE OF PARTIES.

Agent's authority. R. § 3866. C. '51, § 2278.

SEC. 3524. An agent appearing for another may be required by the justice to show his authority, if written, or prove it by his own oath or otherwise, if verbal.

A service of original notice upon the agent will not constitute service upon the principal, though the agent may bind the principal by appearance: *Brown v. Newman*, 13–546.

One hour given. R. § 3867. C. '51, § 2279.

SEC. 3525. The parties in all cases are entitled to one hour in which to appear after the time fixed for appearance, and neither party is bound to wait longer for the other.

Where the record of a judgment by default recited that it was entered after the expiration of the hour here allowed, *held*, that the record was conclusive in that respect, and could not be impeached by affidavits that the hour had not expired: *Cory v. King*, 49–365.

Postponement. R. § 3868. C. '51, § 2280.

SEC. 3526. Upon the return day, if the justice be actually engaged in other official business, he may postpone proceedings in the case until such business is finished.

Adjournment. R. § 3869. C. '51, § 2281.

SEC. 3527. If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury be demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments.

Same. R. § 3870. C. '51, § 2282.

SEC. 3528. In case of the absence of witnesses, either party at his own cost may obtain an adjournment, not exceeding sixty days, by filing an affidavit like that required to obtain a continuance in the circuit court for the like cause.

Condition of. R. § 3871. C. '51, § 2283.

SEC. 3529. Either party applying for an adjournment, must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken to be used on the trial of the cause.

Pleadings. R. § 3872. C. '51, § 2284.

SEC. 3530. The pleadings must be substantially the same as in the circuit court. They may be written or oral. If oral, they must in substance be written down by the justice in his docket, and sworn to when such verification is necessary.

Technical exactness and nicety in pleading are not required before a justice of the peace: *Wright v. Phillips*, 2 Gr. 191; *Taylor v. Barber*, 2 Gr. 350; *Packer v. Cockayne*, 3 Gr 111; *Burton v. Hill*, 4 Gr. 379; *Hall v. Monahan*, 1–554; *Greff v. Blake*, 16–222; *Root v. Ill. Cent. R. Co.*, 29–102.

If the cause of action is stated in general terms, with sufficient certainty to apprise the defendant of the nature of plaintiff's demand, it is sufficient: *Shea v. Livingstone*, 32–158.

Great liberality of construction should be indulged in relation to such pleadings: *Blake v. Graves*, 18–312; *Emerick v. Clemens*, 26–332.

But pleadings are required to be substantially the same as in the district court, and, therefore, it was held error, even in a trial before a justice, to admit evidence of defect in the proper execution of an instrument under a denial of indebtedness thereon: *Glidden v. Higbee*, 31–379.

Technical rules of pleading which prevail in courts of record are not applicable to proceedings in justices' courts: *Francis v. Bentley*, 50–59; and the same technical precision is not required in stating a cause of action or defense: *Finch v. Central R. of Iowa*, 42–304.

Where the pleadings are oral, or even where they are written, exact correspondence in the proof is not required: *West v. Moody*, 33–137.

The requirement that an oral pleading be written down by the justice in his docket is merely directory, and a failure to comply therewith should not be allowed to prejudice a party so pleading: *Ibid.*; and where, on appeal, it appears that a trial was had before the justice on the merits, a denial of plaintiff's right to recover

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will be presumed to have been made, although it does not appear of record: *Sinnamon v. Melbourn*, 4 Gr. 309; *Heath v. Coltenback* 5-490; *Hall v. Denise*, 6-534; *Clark v. Barnes*, 7-6; *Weimer v. Linhard*, 12-359; *Richman v. Brown*, 25-33; but where the entry of the justice indicates that there was no denial of a set-off, it should be regarded as admitted: *Brock v. Manatt*, 5-270.

It is not necessary that the justice should set out the claim with the particularity required in a formal petition: *Stone v. Murphy*, 2-35.

Irregularities, etc., are to be disregarded: See § 3590.

SEC. 3531. A counter claim must be made, if at all, at the time the answer is put in. Counter claim. R. § 3873. C. '51, § 2285.

SEC. 3532. The original, or a copy of all written instruments upon which a cause of action or counter claim is founded, must be filed with the claim founded thereon, or a sufficient reason given for not doing so. Written instruments. R. § 3874. C. '51, § 2286.

The failure of a justice to mark a paper as filed, will not prevent the introduction thereof in evidence in a trial on appeal: *Eggleston v. Collis*, 10-554.

SEC. 3533. Either party, before the trial is commenced, may have the place of trial changed, upon filing an affidavit that the justice is prejudiced against him, or is a near relation to the other party, or is a material witness for the affiant, or that the affiant cannot obtain justice before him; but no more than one change shall be allowed to each party, unless the justice to whom the case shall be transmitted is related to either party by consanguinity or affinity within the fourth degree, or is a witness, or has been an attorney employed in the action, in either of which events, a second change may be allowed to the same party. Change of place of trial. R. § 3875. 14 G. A. ch. 127.

Change of place of trial, when suit is brought in the wrong county, as provided in § 2509, cannot be had in proceedings before a justice: *Post v. Brownell*, 36-497.

It is not error to refuse a change after the trial is commenced: *McKinney v. Hopkins*, 20-405.

Where there was one trial in which the jury disagreed, and the cause was continued; and before the second trial an affidavit was filed asking a change, on the ground that the justice was a material witness for affiant; *held*, that the application was made in time: *Marshall v. Kinney*, 1-580.

That a suit before a justice is brought in the wrong township is not ground for change of venue: See note to § 3509.

SEC. 3534. When said change is allowed, said justice shall transmit all the original papers in said case, and a transcript of his proceedings to the next nearest justice in the township, if there be any, if not, to the next nearest justice in his county, and said justice shall proceed to try said case, and if he cannot try the same immediately, he shall then fix a time therefor, of which all parties shall take notice. Case sent to another justice. R. § 3876.

SEC. 3535. If the title to real property be put in issue by the pleadings, supported by affidavit, or shall manifestly appear from the proof on the trial of the issue, the justice shall, without further proceedings, certify the cause and papers, with transcript of his docket showing the reason of such transfer, to the circuit court, where the same shall be tried on the merits. No cause so transferred shall be dismissed because the justice erred in transferring the same. When title to real property is plead. R. §§ 3877-8. C. '51, §§ 2287-8.

SEC. 3536. But when a case is thus transferred, or dismissed on account of the title to land being involved, if there are other Same. R. § 3879. C. '51, § 2289.

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causes of action not necessarily connected, they may be severed and the latter tried before the justice.

THE TRIAL.

By justice. R. § 3880. C. '51, § 2290.

SEC. 3537. Unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice.

Dismissal of action. R. § 3881. C. '51, § 2291.

SEC. 3538. If the plaintiff fails to appear by himself, his agent or attorney, on the return day, or at any other time fixed for the trial, the justice shall dismiss the case and render judgment against him for costs, except in the case provided in the next section.

Not when founded on writing. R. § 3882. C. '51, § 2292.

SEC. 3539. When the suit is founded on an instrument of writing, purporting to have been executed by the defendant, in which the demand of the plaintiff is liquidated, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice previous to the day for appearance, he may proceed with the cause whether the plaintiff appear or not.

Default. R. § 3883. C. '51, § 2293.

SEC. 3540. In the case provided for in the last section, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim.

A judgment by default cannot be set aside on a showing, supported by affidavits, that the justice entered judgment by default before a particular time of day. The recitals of the judgment are conclusive upon that point: *Cory v. King*, 49–365.

Same. R. § 3884. C. '51, § 2294.

SEC. 3541. But if, where the plaintiff's claim is not founded on such written instrument, the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice.

Counter claim. R. § 3885. C. '51, § 2295.

SEC. 3542. In the cases contemplated in the last two sections, if the defendant has previously filed a counter claim, founded on a written instrument purporting to have been signed by the plaintiff, calling for a certain sum, the justice shall allow such counter claim in the same manner as though the defendant had appeared, and shall render judgment accordingly.

Judgment set aside. R. § 3886. C. '51, § 2296.

SEC. 3543. Judgment dismissing the cause, or by default, may be set aside by the justice at any time within six days after being rendered, if the party applying therefor can show a satisfactory excuse.

A judgment of a justice will not be reversed on writ of error for error in rendering default, which might have been corrected by motion under this section, when no such motion was made before the justice; § 3168 is applicable in such case: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

As to what is a satisfactory excuse, much is left to the discretion of the justice: *Stivers v. Thompson* 15–1.

No notice to the opposite party of a motion to set aside a default is necessary: *Ibid.*; *Park v. Ratcliffe*, 42–42.

Where defendant appeared and filed an answer, but at the time fixed for trial did not appear, and judgment was entered against him, *held*, that it was not a case of default which might be set aside under this section: *Douglass v. Langdon*, 29–245.

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SEC. 3544. In such case a new day shall be fixed for trial, and notice thereof given to the other party or his agent. New trial. R. § 3887. C. '51. § 2297.

SEC. 3545. Such orders shall be made in relation to the additional costs thereby created as the justice shall think equitable. Costs. R. § 3888. C. '51, § 2298.

SEC. 3546. Any execution which may in the meantime have been issued, shall be recalled in the same manner as in cases of appeal. Execution recalled. R. § 3889. C. '51, § 2299.

SEC. 3547. If a jury trial be demanded, the justice shall issue his precept to some constable of the township, directing him to summon the requisite number of jurors possessing the same qualifications as are required in the circuit court. Jury summoned. R. § 3890. C. '51, § 2301. 9 G. A. ch. 174, § 6

SEC. 3548. The jury shall consist of six jurors, unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges and no more. Any deficiency in their number, arising from any cause, may be supplied by summoning others in the manner above directed. Number of jurors. R. § 3891. C. '51, § 2302.

SEC. 3549. The justice may discharge the jury, when satisfied that they cannot agree, and shall immediately issue a new precept for summoning another, to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree. Discharge of jury. R. § 3892. C. '51, § 2303.

SEC. 3550. No motion in arrest of judgment, or to set aside a verdict, can be entertained by a justice of the peace. Motion in arrest. R. § 3893. C. '51, § 2304.

A justice has no power to set aside the verdict of a jury: *Dupont v. Downing*, 6–173.

SEC. 3551. The verdict of the jury must be general. But where there are several plaintiffs or defendants, the verdict may be for or against one or more of them. Verdict. R. § 3894. C. '51, § 2305.

JUDGMENT AND PROCEEDINGS INCIDENT THERETO.

SEC. 3552. In cases of dismissal, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, the same shall be done within three days after the cause is submitted to the justice for final action. Judgment. R. § 3895. C. '51, § 2306.

A justice in rendering judgment need follow no particular form: *Stowers v. Milledge*, 1–150.

The judgment is not rendered until entered upon the docket: *Brown v. Scott*, 2 Gr. 454.

A judgment on the verdict of a jury should be entered up forthwith; and where there was a delay of sixty days in entering judgment, *held*, that the judgment so entered was void: *Harper v Albee*, 10–389. Such proceeding might be reversed on a writ of error, but cannot be appealed from: *Brown v. Scott*, 2 Gr. 454; *Guthrie v. Humphrey*, 7–23.

"Forthwith" means within a reasonable time; and *held*, that where a confession was made on Saturday night before a justice, and entered up Monday morning, it was in time, and that even when there is unreasonable delay, the judgment would, as between the parties, be voidable, but not void: *Burchett v. Casady*, 18–342.

Where a verdict was rendered at 10:30 p. m. on one day and judgment entered on the docket at 11 a. m. the next day, it was held, that the statute was sufficiently complied with: *Davis v. Simma*, 14–154.

Entries of judgments, irregular in form, *held*, sufficient: *Stowers v. Milledge*, 1–150; *Moore v. Manser*, 9–47.

In a collateral proceeding liberal rules are recognized in relation to judgments of justices of the peace: *Williams v. Brown*, 28–247.

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In excess of jurisdiction. R. § 3896. C. '51, § 2307.

SEC. 3553. If the sum found for either party exceed the jurisdiction of the justice, such party may remit the excess and take judgment for the residue, but he can never afterward sue for the amount so remitted.

Same. R. § 3897. C. '51, § 2308.

SEC. 3554. Instead of so remitting the excess, the party obtaining such verdict may elect to have judgment dismissing the action, in which case the plaintiff shall pay the costs.

[The word "plaintiff" in the last line is "said parties" in the original, but as the Revision and the code commissioners' report each have the section as here given, the word "plaintiff" is retained as in the printed code, "said parties" being probably a clerical error corrected by the editor.]

Mutual judgments. R. § 3898. C. '51, § 2309.

SEC. 3555. Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other.

Same. R. § 3899. C. '51, § 2310.

SEC. 3556. When rendered by the same court, the same course shall be pursued as is prescribed in the circuit court.

By different justices. R. § 3900. C. '51, § 2311.

SEC. 3557. If the judgment proposed to be set off was rendered by another justice, the party offering it must obtain a transcript thereof, with a certificate of the justice who rendered it indorsed thereon, stating that no appeal has been taken, and that the transcript was obtained for the purpose of being used as a counter claim in that case.

Time. R. § 3901. C. '51, § 2312.

SEC. 3558. Such transcript shall not be given until the time for taking an appeal has elapsed.

Docket entry. R. § 3902. C. '51, § 2313.

SEC. 3559. The justice so giving a transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed.

Execution for balance. R. § 3903. C. '51, § 2314.

SEC. 3560. Such transcript being presented to the justice who has rendered a judgment between the same parties as aforesaid, if execution has not been issued on the judgment rendered by him, he shall strike a balance between the judgments and issue execution for such balance.

Same. R. § 3904. C. '51, § 2315.

SEC. 3561. If execution has already issued, the justice shall also issue execution on the transcript filed with him, and deliver it to the same officer who has the other execution.

Duty of officer. R. § 3905. C. '51, § 2316.

SEC. 3562. Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance accordingly.

Costs. R. § 3906. C. '51, § 2317.

SEC. 3563. The above rules as to counter claim are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceeding in the circuit court.

Transcript filed. R. § 3907. C. '51, § 2318.

SEC. 3564. When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the papers of the case in which it is to be so used, and the proper entry made in the justice's docket.

Refusal to allow counter claim. R. § 3908. C. '51, § 2319.

SEC. 3565. If the justice refuses the judgment as a set-off, he shall so certify on the transcript, and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be had by him in the same manner as though no transcript had been certified by him.

SEC. 3566. A judgment by confession without action, may be

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entered by a justice of the peace for an amount within his jurisdiction, and the provisions of law regulating judgments by confession in courts of record, shall, as far as applicable, apply to confessions of judgment before a justice of the peace, and the justice shall enter such judgments on his docket, and may issue execution thereon as in other cases.

Judgment by confession.
R. §§ 3397, 3401.
C. '51, §§ 1837, 1841.

FILING TRANSCRIPTS IN THE CLERK'S OFFICE.

SEC. 3567. The party obtaining a judgment in a justice's court for more than ten dollars, may cause a transcript thereof to be certified to the office of the clerk of the circuit court in the county.

May be done when.
R. § 3909.
C. '51, § 2320.

A transcript of a judgment before a justice can only be filed and become a lien in the county where rendered. To make it a lien in another county, a transcript must be taken to such county from the judgment as filed in the office of the clerk of the circuit court: *Blaney v. Hanks*, 14–400.

SEC. 3568. The clerk shall forthwith file such transcript, and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects, as to its effect and mode of enforcement, as a judgment rendered in the circuit court as of that date. And no execution can thereafter be issued by the justice on the judgment.

Manner and effect.
R. § 3910.
C. '51, § 2321.

EXECUTIONS AND PROCEEDINGS THEREON.

SEC. 3569. Executions for the enforcement of judgments in a justice's court, may be issued as provided in this chapter, at any time within ten years from the entry of the judgment, but not afterward.

When and by whom issued.
R. § 3911.
C. '51, § 2322

SEC. 3570. Such execution shall be against the goods and chattels of the defendant therein, and shall be directed to any constable of the county.

Substance of.
R. § 3912.
C. '51, § 2323.

SEC. 3571. It must be dated on the day on which it is issued, and made returnable within thirty days thereafter.

Return.
R. § 3913.
C. '51, § 2324.

SEC. 3572. If not satisfied when returned, it may be renewed from time to time by an indorsement thereon to that effect, signed by the justice, and dated of the date of such renewal.

Renewable.
R. § 3914.
C. '51, § 2325.

SEC. 3573. Such indorsement must state the amount paid on such execution, and shall continue the execution in full force for thirty days from the date of renewal.

For thirty days.
R. § 3915.
C. '51, § 2326.

SEC. 3574. Property levied on before such renewal, may be retained by the officer and sold after renewal.

Property.
R. § 3916.
C. '51, § 2327.

APPEALS.

SEC. 3575. Any person aggrieved by the final judgment of a justice, may appeal therefrom to the circuit court in the county. But no appeal shall be allowed in any case where the amount in controversy does not exceed twenty-five dollars.

When allowed.
R. § 3917.
C. '51, § 2328.

[As amended by 18th G. A., ch. 163, adding the last sentence of the section.]

Where a justice renders judgment without having jurisdiction, the proper remedy is by writ of error and not by appeal: *Craine v. Fulton*, 10–457; *Leftwick v. Thornton*, 18–56; as, where a justice errs by refusing to take ju-

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risdiction when he should do so: *Belding v. Torrence*, 39-516; but errors of law, committed in proceedings which end in final judgment, may be reviewed on appeal, unless waived: *Ibid.; Griffin v. Moss*, 3-261; and see notes to § 3597, as to when writ of error is the proper remedy.

Whenever in any case there is final judgment before a justice, the right of appeal is given, unless denied by express provision or necessary implication; so *held* in an action against a defendant for violation of a city ordinance under a charter giving justices jurisdiction in such cases: *City of Dubuque v. Rebman*, 1-444.

An appeal will lie from a judgment by default: *Butler v. Heeb*, 38-429; also from the action of a justice in dismissing an action against a garnishee: *Hodge v. Ruggles*, 36-42.

If the final judgment of the justice upon the evidence is wrong, the proper remedy is by appeal and not by writ of error: *Lane v. Goldsmith*, 23-240.

A party cannot appeal from the verdict of a jury. There must first be a judgment by the justice upon such verdict: *Kimble v. Riggin*, 2 Gr. 245; *Brown v. Scott*, 2 Gr. 454; *Guthrie v. Humphrey*, 7-23.

Appeal will not lie from a judgment dismissing an action on account of plaintiff's non-appearance, nor from a judgment thereon rendered against plaintiff for costs: *Sticker v. Holtz*, 5?-291; nor from the judgment of a justice upon an award, the proper remedy being by writ of error: *Whitis v. Culver*, 25-30.

A party may, by agreement before or after the judgment is rendered, relinquish or waive his right of appeal from such judgment: *Lyon v. Sanders*, 3 Gr 352.

It is only parties to the action that have a right to appeal. A surety on a replevin bond cannot appeal from a judgment against his principal, and re-litigate his principal's claim to the property: *Crites v. Littleton*, 23-205.

Time.
R. § 3918.
C. '51, § 2329.

SEC. 3576. The appeal must be taken and perfected within twenty days after the rendition of the judgment.

An appeal is not perfected until the bond is filed and the sureties approved: *Brown v. Beeset'*, 13-185; *McKeever v. Horine*, 12-227.

By clerk.
R. § 3919.
C. '51, § 2330.

SEC. 3577. If within twenty days the appellant is prepared to take his appeal, and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the circuit court of the county for the allowance of his appeal.

And how.
R. § 3920.
C. '51, § 2331.

SEC. 3578. Such application shall be founded on an affidavit, stating the amount and nature of the judgment, and the time of the rendition thereof, as nearly as practicable, and the reason why he thus applies.

Same.
R. § 3921.
C. '51, § 2332.

SEC. 3579. The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice.

Form of bond.
R. § 3922.
C. '51, § 2333.

SEC. 3580. The appeal shall in no case be allowed until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

The undersigned acknowledge ourselves indebted to..... in the sum of.....dollars, upon the following condition: Whereas.....has appealed from the judgment of..... a justice of the peace, in an action between.....as plaintiff and.....defendant.

Now, if said appellant pays whatever amount is legally adjudged

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against him in the further progress of this cause, then this bond to be void.

Approved. A....B...., principal.
E....F...., justice. C....D...., surety.

If the judgment be affirmed, or if on a new trial the appellee recovers, or if the appeal be withdrawn or dismissed, judgment shall be rendered against the principal and surety in said bond.

Proceedings suspended. R. § 3923. C. '51, § 2334.

SEC. 3581. Upon the appeal being taken in accordance with the foregoing provisions, all farther proceedings in the cause by him shall be suspended.

A party may waive his appeal, at least with the acquiescence of the other party: *McKeever v. Horine*, 12-227.

If execution is sued. R. § 3924. C. '51, § 2335.

SEC. 3582. If, in the meantime, an execution has been issued, the justice shall give the appellant a certificate that the appeal has been allowed. Upon that certificate being presented to the constable, he shall cease farther action, and release any property that may have been taken in execution.

Papers filed. R. § 3925. C. '51, § 2336.

SEC. 3583. Upon the taking of any appeal, the justice shall file in the office of the clerk of the circuit court, all the original papers relating to the suit, with a transcript of all the entries in his docket.

A party cannot, on appeal, file new or amended pleadings as matter of right, but he may be allowed to do so upon proper terms, after showing sufficient excuse for the omission to file the same in the justice's court: See notes to § 2689.

This section simply requires the justice to deposit the papers referred to with the clerk, and does not require him to pay the clerk's fee for filing and docketing the appeal; he cannot, therefore, demand a payment of such fee from the appellant as a condition of filing the papers: *McKay v. Maloy*, 53-33.

Same. R. § 3926. C. '51, § 2337.

SEC. 3584. Upon the return of the justice being filed in the office of the clerk, the cause will be deemed in the circuit court.

Notice of appeal is not essential to give the circuit court jurisdiction: *Bond v. Davis*, 37-163.

A party may be allowed to dismiss his appeal in the court to which it is taken: *Harper v. Albee*, 10-389: *Goodenow v. Perry*, 12-350.

Return amended. R. § 3927. C. '51, § 2338.

SEC. 3585. The circuit court may, by rule, compel the justice to allow an appeal, or to make or amend his return according to law.

Mistakes corrected. R. § 3928. C. '51, § 2339.

SEC. 3586. Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the circuit court may correct the mistake or supply the omission, or direct the justice to do so.

A court may hear testimony explaining a mistake or showing an omission in the record: *Brown v. Beesett*, 13-185.

When a mistake in the justice's entry is unquestionably established, it may be corrected so as to fully try the case upon the same issues which were tried before the justice: *Cooper v. Woodhow*, 3-189.

Return: when made. R. § 3929. C. '51, § 2340.

SEC. 3587. If an appeal is allowed ten days before the next term of the circuit court, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause.

The term of court referred to in this and the next section, is the next regular term. The return should not be made to a special term: *Coon v. Mathews*, 10-290.

A failure of the justice to file

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his transcript at the proper term is not sufficient ground for an affirmance of the judgment: *Fisher v. Harber*, 10–293

If the appellant fails to have a transcript filed, it may be filed by appellee, and he may then have the appeal dismissed, or the judgment affirmed: *Holloway v. Baker*, 6–52.

Nor is the neglect of the justice to make the return in the proper time a ground for dismissing the appeal: *Whitcomb v. Holloway*, 4 Gr., 311.

Unless ten days intervene between the taking of the appeal and the commencement of the next term, neither party can be required to go to trial at that term: *Seeberger v. Miller*, 20–428.

Notice of appeal.
R. § 3930.
C. '51, § 2341.

SEC. 3588. If an appeal is not allowed on the day on which judgment is rendered, written notice thereof must be served on the appellee or his agent, at least ten days before the term of the court to which the cause is returnable, provided there be ten days intervening, or the suit, on motion of the appellee, shall be continued at the cost of the appellant.

The notice of appeal is not essential to give the circuit court jurisdiction: See § 3584 and note. Failure to give such notice, simply entitles appellee to a continuance: *Bond v. Davis*, 37–163.

The appearance of an appellee in the court to which the appeal is taken will amount to a waiver of any irregularity or defect in the taking of the appeal, provided the court has jurisdiction of the subject matter: *Wilgus v. Gettings*, 19–82.

Where it does not appear affirmatively that proper notice was given, or that appellee appeared, the judgment on such appeal is erroneous and will be reversed: *McQuillan v. Windsor*, 6–396.

How served.
R. § 3931.
C. '51, § 2342.

SEC. 3589. Such notice may be served like the original notice, and if the appellee or his agent have no place of residence in the county, it may be served by being left with the justice.

Effect of appeal.
R. § 3932.
C. '51, § 2343.

SEC. 3590. An appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities, and illegalities are to be disregarded under such circumstances, if the cause might have been prosecuted in the circuit court.

Objections to depositions other than for incompetency or irrelevancy, should not be regarded, unless made in the justice's court: *Alverson v. Bell*, 13–308.

An error of the justice in overruling a demurrer is waived by an appeal which brings up the case for trial on its merits. Advantage of such errors should be taken by writ of error, if at all: *Leftwick v. Thornton*, 18–56. But where the justice improperly sustained a demurrer to an answer, *held*, that such action should be disregarded and evidence under the answer admitted: *Oleson v. Hendrickson*, 12–222.

Section applied: *King v. Gottschalk*, 21–512.

When it appears that there was a trial before a justice on the merits, it will be presumed that plaintiff's claim was denied, though there is no entry of such denial by such justice: See notes to § 3530.

New demand.
R. § 3933.
C. '51, § 2344.

SEC. 3591. No new demand or counter claim can be introduced into a case after it comes into the circuit court, unless by mutual consent.

Appellant pay costs.
R. § 3934.
C. '51, § 2345.

SEC. 3592. The appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed.

Sec. 2933, as to apportionment of costs, does not apply to a case of this kind. If the judgment is less favorable to the appellant than that before the justice, he must pay all the costs of appeal: *Best v. Dean*, 8–519.

This section is only applicable to appeals taken by the party who recovers the judgment: *Howder v. Overholster*, 48–365; and where, in an action before a justice upon separate items of demand, plaintiff recovered

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judgment, and on appeal by defendant to the circuit court, the amount recovered was less, *held*, that it was a proper case for apportionment of costs: *Ibid.*

When appellee to pay. R. § 3935. C. '51, § 2346.

SEC. 3593. If the judgment below is against the appellant, he may proffer to pay a certain amount, with costs, and if the final amount recovered be less favorable to the appellee than such proffer, he shall pay costs of appeal.

The proffer must be of a certain amount *with costs;* otherwise the appellee, if he recover judgment on appeal, is entitled to judgment for the entire costs, although he did not recover more than the amount proffered: *Powell v. Western Stage Co.*, 2–50.

The provisions of this section do not limit those of § 2899, as to offer to confess judgment: *Watts v. Lamberson*, 39–272.

Sureties. R. § 3936. C. '51, § 2347.

SEC. 3594. Any judgment in the circuit court against the appellant shall be entered up against him and his sureties jointly.

Damages. R. § 3937. C. '51, § 2348.

SEC. 3595. If an appeal is taken for delay, the circuit court shall award such damages, not exceeding ten per cent. on the amount of the judgment below, as may seem right.

Pleadings filed in circuit court.

SEC. 3596. If the appeal is taken from a judgment by default, the defendant may file in the circuit court, and the plaintiff reply thereto, any pleadings necessary to properly set forth any defense he may have to the action. In such case, the costs of the trial before the justice shall be taxed to the defendant.

The default here referred to may be either default for want of appearance, or for failure to plead: *McFarland v. Lowry*, 40–467.

Under Rev., which did not contain this section, *held*, that where a judgment by default was rendered before a justice, the defendant could not, as a matter of right, demur or answer on appeal (though he might be allowed to do so on good cause shown), and could only contest the amount of plaintiff's recovery, and not his right to recover: *Leftwick v. Thornton*, 18–56.

This provision refers only to cases where there is judgment by default; in other cases, parties have no absolute right to file further pleadings on appeal: *Griswold v. Bowman*, 40–367; but may be allowed to do so for good cause shown: See notes to § 2689

Section applied: *Park v. Ratcliffe*, 42–42.

WRITS OF ERROR.

When allowed. R. § 3938. C. '51, § 2349.

SEC. 3597. Any person aggrieved by an erroneous decision in a matter of law, or other illegality in the proceedings of a justice of the peace, may remove the same, or so much thereof as is necessary, into the circuit court for correction.

Decisions of justices upon matters of law, are reviewable upon writ of error; and where the decision of the justice is final, and does not affect the right of the plaintiff to recover in another action, but is upon a question affecting the jurisdiction of the justice, the capacity of the parties to sue or be sued, etc., it is to be reviewed on writ of error, and not upon appeal: *Belding v. Torrence*, 39–516. And this is a proper remedy where a justice errs, by refusing to take jurisdiction: *Ibid.*; or where he improperly takes jurisdiction, or renders judgment by default: *Craine v. Fulton*, 10–457.

Error of the justice in overruling a demurrer, should be taken advantage of by writ of error. It would be waived by appeal: *Leftwick v. Thornton*, 18–56.

The action of the justice in rejecting or re-committing an award, or refusing to do so, may be reviewed by appeal: *Whitis v. Culver*, 25–30.

Upon writ of error from a justice, the appellate court will not review his findings as to questions of fact. Appeal is the proper remedy: *Taylor v. Rockwell*, 10–530; *The State v. Roney*, 37–30; and this is true, although all the evidence before the justice is set out in the bill of excep-

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tions: *Lane v. Goldsmith*, 23–240.

As to when appeal and not writ of error is the proper remedy, see notes to § 3575.

There is no provision for writ of error from a justice in criminal cases. Appeal is the only method of review. (See § § 4697, 4702): *The State v. Flinn*, 51–133; *Part of Lot, etc., v. The State*, 1–507.

Affidavit.
R. § 3939.
C. '51, § 2350.

SEC. 3598. The basis of the proceedings is an affidavit filed in the office of the clerk, setting forth the errors complained of, and must be filed in the same time, and the notice must be the same as in case of appeal.

The affidavit may be made by the attorney of the party asking the writ, when he shows himself sufficiently acquainted with the facts to make the necessary statements: *Dixon v. Brophey*, 20–460.

The affidavit need not show that the party rested the decision of the justice of which he complains, or excepted thereto, or that he applied to the justice to correct it: *Ibid.*

It is upon the return of the justice, and not upon the affidavit, that the question of error is to be determined: *Stone v. Murphy*, 2–35; *Lane v. Goldsmith*, 23–240.

If the return of the justice does not show the error complained of, the affidavit on which the writ is procured amounts to nothing for that purpose: *Vance v. Kirfman*, 20–13.

Writ.
R. § 3940.
C. '51, § 2351.

SEC. 3599. The clerk shall thereupon issue an order commanding the justice to certify the record and proceedings so far as they relate to the facts stated in the affidavit.

A mere failure to issue the writ of error, *held*, not to render subsequent proceedings erroneous, the return having been properly made by the justice, in answer to the affidavit for the writ: *Rhodes v. De Bow*, 5–260.

Copy.
R. § 3941.
C. '51, § 2352.

SEC. 3600. A copy of the affidavit shall accompany the order, and be served upon the justice, who shall, with the least practicable delay, make the return required.

The justice should not only certify matters appearing of record, but the entries upon his docket, or any other proceedings stated in the affidavit for the writ, and may be required to certify as to objections made to evidence, and as to the evidence received, so far as it is within his recollection, although not preserved by bill of exceptions; but this is only for the purpose of enabling the court, to determine as to the correctness of rulings upon objections to evidence, etc., and not for the purpose of trying again questions of fact, which can only be done on appeal: *Miller v. O'Neal*, 9–446.

It is upon the return of the justice, and not upon the affidavit, that the question of error is to be determined: See notes to § 3598.

Proceedings stayed.
R. § 3942.
C. '51, § 2353.

SEC. 3601. All proceedings in the justice court subsequent to judgment, may be stayed by a bond, entered into like that required in cases of appeals, and on which judgment shall be entered against the principal and surety in like manner and under like circumstances.

Amended return.
R. § 3943.
C. '51, § 2354.

SEC. 3602. The circuit court may compel an amended return when the first is not full and complete.

Judgment.
R. § 3944.
C. '51, § 2355.

SEC. 3603. The circuit court may render final judgment, or it may remand the cause to the justice for a new trial, or such further proceedings as shall be deemed proper, and may prescribe the notice necessary to bring the parties again before the justice.

The question to be determined is whether the justice erred in the particular decision complained of in the affidavit for the writ of error: *Hays v. Gorby*, 3–203.

Though the justice may not have had jurisdiction, yet upon the removal to the circuit court, that court obtains jurisdiction, and its judgment is not void, although erroneous: *Finch v. Hollinger*, 47–173, 176.

The circuit court can render final judgment only where no trial is necessary. If there must be a new trial,

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the case should be sent back to the justice. The circuit court has no authority to retain and try the case itself: *Sican v. Bournes*, 47–501.

The judgment of a justice should not be reversed on writ of error for any error which might have been corrected by the justice on motion, unless such motion is made, and overruled; § 3168 is applicable in such cases: *Leonard v. Hallem*, 17–564; *Smith v. Parker*, 28–359.

Also, as to what questions can be tried on writ of error, see notes to § 3597.

SEC. 3604. If the circuit court render a final judgment, reversing the judgment of the justice of the peace after such judgment has been collected in whole or in part, it may award restitution with interest and issue execution accordingly, or it may remand the cause to the justice for this purpose.

Restitution. R. § 3945. C. '51, § 2356.

RECOVERY OF PERSONAL PROPERTY—ATTACHMENT.

SEC. 3605. The proceedings to gain possession of personal property wrongfully withheld, will be the same as are prescribed in such cases in the circuit court, except as modified in this chapter.

Action to recover personal property. R. § 3946. C. '51, § 2357.

SEC. 3606. Attachments are not allowable in justices' courts, if the sum claimed is less than five dollars. And if more is claimed and less recovered, the plaintiff shall pay all the costs of the proceedings so far as they relate to the attachment.

Attachments. R. § 3947. C. '51, § 2358.

Under R. S., *held*, that the fact that plaintiff in such an action recovered less than five dollars, did not render him liable on his attachment bond: *Bradley v. McCall*, 2 Gr. 214; and see notes to § 2953.

SEC. 3607. The constable has the same power to administer an oath to the garnishee and to take his answer, as is given to the sheriff in cases of attachment in the circuit court.

Garnishee. R. § 3948. C. '51, § 2360.

SEC. 3608. Garnishees may be required to appear and answer at the time fixed for the appearance of the parties to the action.

Appearance. R. § 3949. C. '51, § 2361.

SEC. 3609. When an attachment or order for the delivery of property has been issued by any justice of the peace in any action, and it shall be found that the defendant is absent so that personal service cannot be had, the justice, upon the return day, unless the defendant appear, shall make an order fixing the day for the trial, not less than sixty days thereafter, and requiring notice to be given by any constable as provided in the next section.

Against non-residents. R. § 3950.

SEC. 3610. Upon such order being made, at least sixty days' notice of the pendency of such action shall be given by posting up written or printed notices in three public places in the township where the action was commenced, and such notices shall have the effect of a service by publication in the circuit court, and the justice shall proceed to hear the cause upon the day specified for that purpose; but no bond shall be required of the plaintiff after judgment as may be in the circuit court.

Notice to be given. R. § 3951.

That the notice so posted does not state the township in which the action is pending, will not invalidate the judgment: *Johnson v. Dodge*, 19–106.

FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

SEC. 3611. A summary remedy for forcible entry or detention of real property is allowable:

Action for: when allowed. R. § 3952. C. '51, § 2362. 9 G. A. ch. 174, § 7.

1. Where the defendant has by force, or intimidation, or fraud,

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or stealth, entered upon the prior actual possession of another in real property, and detains the same;

2. Where a lessee holds over after the termination, or contrary to the terms of his lease;

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases, such title shall be clearly and concisely set forth in the defendant's pleading.

Threats sufficient to induce fear of violent ouster, *held*, sufficient to bring the case within the corresponding provision of R. S., although personal violence was not threatened: *Harrow v. Barker*, 2 Gr. 201.

The question involved in this action is the *fact* of possession alone, and not the *right* to possession. A person may render himself liable to this action by entering on his own premises by force, fraud, or stealth, even when he has the right to immediate possession: *Stephens v. McCloy*, 36–659; *Emsley v. Bennett*, 37–15; and, even though the party whose possession he invades is a mere trespasser: *Lorimier v. Lewis*, Mor. 253.

Section considered: *Jordan v. Walker*, 52–647.

Rent in arrear. R. § 3953. C. '51, § 2363.

SEC. 3612. The mere non-payment of rent by the time stipulated in the lease, does not enable a plaintiff to resort to this action unless expressly so stipulated in the lease.

Who may bring. R. § 3954. C. '51, § 2364.

SEC. 3613. The legal representative of a person who might have been plaintiff if alive, may bring this suit after his death.

The "legal representative" is the executor or administrator. The right of the heirs to bring such action exists without statutory enactment: *Beezley v. Burgett*, 15–192.

Notice to quit. R. § 3955. C. '51, § 2365.

SEC. 3614. Before suit can be brought in any except the first of the above classes, three days' notice to quit must be given to the defendant in writing.

Petition. R. § 3956. C. '51, § 2366.

SEC. 3615. The petition must be in writing and sworn to.

Before what justice brought. R. § 3957. C. '51, § 2367.

SEC. 3616. The proceedings may be had before a justice of the peace of the township where the premises are situated, or if there is no justice therein able or qualified to act, they may be brought before some justice in any adjoining township. They shall be governed by the same rules as other cases before justices of the peace except as herein modified.

A justice of the peace alone has original jurisdiction in such proceedings, and, therefore, when an appeal is taken from his judgment, the appellate court should try the case as made before the justice, and not allow it to be changed and entirely new issues made: *Dicks v. Hatch*, 10–380.

The district court can acquire no jurisdiction in such cases, not even by stipulation of the parties: *Easton v. Flemming*, 51–305.

Time for appearance. R. § 3958. C. '51, § 2368.

SEC. 3617. The time for appearance and pleading must not be less than two, nor more than six days from the time the notice is served on the defendant.

Adjournment. R. § 3959. C. '51, § 2369.

SEC. 3618. No adjournment shall be made for more than ten days, nor to any other place except by consent of parties.

Judgment. R. § 3960. C. '51, § 2370.

SEC. 3619. If the defendant is found guilty, judgment shall be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an order of removal shall issue accordingly, to which shall be added a clause commanding the officer to levy the costs as in ordinary cases.

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SEC. 3620. The question of title cannot be investigated in this action. And nothing herein contained prevents a party from suing for a trespass, or from testing the right of property in any other manner. Title not investigated. R. § 3961. C. '51, § 2371.

The question of title, or right of possession, cannot be investigated in this action: See notes to § 3611.

SEC. 3621. Thirty days' peaceable and uninterrupted possession with the knowledge of the plaintiff after the cause of action accrued, is a bar to this proceeding. Bar. R. § 3962. C. '51, § 2372.

Neither the good faith with which the defendant went into possession, nor the fact that he made improvements on the property, are material under this section, nor sufficient, in the absence of the kind and length of possession here contemplated: *Fultz v. Black*, 3–569.

SEC. 3622. An action of this kind cannot be brought in connection with any other, nor can it be made the subject of counter claim. No joinder. R. § 3963. C. '51, § 2373.

SEC. 3623. The order for removal can be executed only in the day time. Order for removal. R. § 3964. C. '51, § 2374.

SEC. 3623½. An appeal or writ of error, taken in the usual way, if the proper security is given, suspends the execution for costs, and may, with the consent of the plaintiff, prevent the warrant of removal from being executed, but not otherwise. Effect of appeal or writ of error. R. § 3965. C. '51, § 2375.

[This section was inserted by 15th G. A., ch. 41. It was in the Revision, but was omitted from the Code, probably by mistake.]

SEC. 3624. The circuit court, on the trial of the appeal, may issue an order of removal or restitution as the case may require. Restitution. R. § 3966. C. '51, § 2376.

GENERAL PROVISIONS.

SEC. 3625. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets, as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor. Official papers to successor. R. § 3967. C. '51, § 2377.

SEC. 3626. If his office becomes vacant by death, removal from the township, or otherwise, before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, to be by him turned over to the successor of the justice when elected and qualified. Or county auditor. R. § 3968. C. '51, § 2378.

SEC. 3627. The justice with whom the docket of his predecessor is thus deposited, may issue execution on or give a transcript of any judgment there entered, in the same manner and with like effect as the justice who rendered the judgment might have done; and in case of the death, absence, or inability to act of any justice, or in case of the vacation of the office of any justice from any cause, then in such case, execution may be issued from the docket of said justice or transcript given therefrom, by any other justice in said township with like effect as might have been done by the justice who rendered the judgment. Successor may issue execution. R. § 3969. C. '51, § 2379. 13 G. A. ch. 188

The certificate of an ex-justice in relation to proceedings had before him, while in office, is not entitled to legal consideration: *Brown v. Scott*, 2 Gr. 454.

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Successor: how determined. R. § § 3970-1. C. '51, § § 2380-1.

SEC. 3628. When two or more justices are equally entitled to be deemed the successor in office of any justice as aforesaid, the county auditor shall determine by lot which is the successor, and certify accordingly; such certificate shall be in duplicate, one copy of which shall be filed in the office of such auditor, and the other given to such successor.

Interchange. R. § 3972. C. '51, § 2382.

SEC. 3629. In case of sickness or other disability, or necessary absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may, at his request, attend and transact the business for him without any transfer to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no such interchanging of official service had taken place.

Special constables. R. § 3973. 9 G. A. ch. 174, § 8.

SEC. 3630. Any justice of the peace may, in writing, specially depute any person of suitable age to perform any particular duty properly devolving upon a constable, and for that particular purpose he shall be subject to the same obligations and receive the same fees. If such person be appointed to serve an attachment, execution, or order, for the delivery of property, he shall, before levying upon such property, execute a bond to the state of Iowa in a penal sum of not less than two hundred dollars, to be fixed by the justice, with one or more freeholders as sureties, to be approved by and filed with the justice making the appointment, and the usual official oath shall be endorsed thereon and signed. For any breach of such bond, any person injured thereby may bring suit thereon in his own name, and recover the same damages as upon a constable's bond in like cases.

A special constable appointed under this section is not a peace officer within the meaning of § 4109. The appointment may be to perform a particular duty, but it cannot be general, as to assist peace officers to seize liquors: *Foster v. Clinton Co.*, 51-541.

No process. R. § 3974. C. '51, § 2384.

SEC. 3631. No process can issue from a justice's court into another county, except when specially authorized.

"Process," as here used, does not include original notices, which may be served out of the county in some cases: *Klingel v Palmer*, 42-166.

Sheriff and constable. R. § 3975. C. '51, § 2385.

SEC. 3632. The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the circuit court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court.

Justice his own clerk. R. § 3976. C. '51, § 2386.

SEC. 3633. The justice may be regarded as his own clerk and perform the duty of both judge and clerk.

Successor to renew execution. R. § 3977. C. '51, § 2387.

SEC. 3634. When the term of office of a justice of the peace for any cause expires, his successor may issue execution, or renew execution in the same manner and under the same circumstances as the former justice might have done if his term of office had not expired.

Board of supervisors furnish docket. 11 G. A., ch. 53.

SEC. 3635. The board of supervisors of each county shall furnish to each justice of the peace of such county, a well bound blank record book of not less than four quires, with index, suitable for a docket, upon the certificate of such justice that the same is necessary for the business of the office.

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TITLE XXII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

Who competent. R. § 3978. C. '51, § 2388.

SECTION 3636. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state; and should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial, refer to the fact that the defendant did not testify in his own behalf; and should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial.

Defendant may testify in his own behalf.

[As amended by 17th G. A., ch. 168, § 1, which added all after the word "declared" in the fourth line.]

This section, in so far as it limits witnesses to human beings "of sufficient capacity to understand the obligation of an oath," is not in conflict with Const., art. 1, § 4, such qualification being assumed therein; and where a little girl of less than nine years of age was not allowed to testify, it not appearing what other inquiry was made as to her capacity, the supreme court refused to interfere: *Kilburn v. Mullen*, 22–498.

Lack of belief in God, or future conscious existence, does not render a witness incompetent, nor does it render incompetent a party's dying declaration; but proof of such fact is admissible to lessen the credibility of his testimony or of such declaration: *The State v. Elliott*, 45–486.

In a criminal prosecution, an accomplice is a competent witness for the state: *The State v. Hudson*, 50–157, 161.

The code commissioners, in their report, recommended the adoption of a section as a substitute for Rev. § 3981, rendering the defendant in a criminal prosecution a competent witness in his own behalf (*Code Com'rs' Rep., p.* 137), but this substitute was rejected by the legislature, and § 4556 enacted, which (as it originally stood) made the defendant, in such cases, incompetent as a witness, and it was therefore *held*, that § 4556 was a limitation upon the general provisions of this section, and that the defendant in a criminal prosecution was not a competent witness: *The State v. Laffer*, 38–422; *The State v. Bixby*, 39–465. Also, *held*, under a similar section of Revision, that, if this section had not been so limited by the latter portion of § 4556, it would probably give a defendant in a criminal case the right to testify in his own behalf: *The State v. Gigher*, 23–318. (The latter portion of § 4556 has since been repealed, and the defendant rendered a competent witness in such cases.)

As to evidence in criminal cases, see § § 4556–4572.

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Credibility. R. § 3979. C. '51, § 2389.

SEC. 3637. Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility.

Proof that a person does not believe in God, or a future conscious state, is admissible to lessen his credibility as a witness, and also to affect the credibility of his dying declaration; but does not affect his competency: See notes to preceding section.

Interest. R. § 3980.

SEC. 3638. No person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in this chapter.

This section is broad enough in its language to embrace criminal cases, and did it stand alone, would probably be held to give defendant in a criminal case the right to testify in his own behalf: *The State v. Gigher*, 23–318; and see note to § 3636.

Same: when one party is deceased. R. § 3982.

SEC. 3639. No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence.

This section excludes as to certain matters the testimony, first, of *parties* to the action, and, secondly, of *persons interested therein;* that a party is shown not to have any interest in the matter, will not render him competent: *Williams v. Barrett*, 52–637.

The interest contemplated as sufficient to exclude a witness, is such as would, at common law, disqualify him. Where the witness has equal interest on both sides, he will not be disqualified: *Goddard v. Leffingwell*, 40–249.

The interest sufficient to disqualify must be present, certain, and vested. It will not be sufficient that at a prior time the witness might have been a holder of an equitable interest in the property in controversy: *Zerbe v. Reigart*, 42–229. The true test of such interest is, that the witness will either gain or lose by the direct, legal operation and effect of the judgment, or, that the record will be legal evidence for or against him in some other action. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency: *Wormley v. Hamburg*, 40–22.

The section explained, and *held*, that a plaintiff coming within its terms could not testify as to personal transactions between himself and deceased, even to rebut the testimony of decedent's widow: *Canaday v. Johnson*, 40–587; and that the fact that defendant was introduced as a witness, would only remove this prohibition as to those personal transactions to which he testified, and not as to others: *Wood v. Brolliar*, 40–591.

It is only as to personal transactions between himself and deceased that a party is, under this section, prohibited from testifying: *Sypher v. Savery*, 39–258, 264: and, *held*, that this section would not exclude the evidence of an heir, as to conversations which he heard between deceased and defendant: *Sweezey v. Collins*, 40–540.

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The personal transactions and communications which, under this section, may not be testified to by the wife, are those had between her and the deceased, personally. She is not incompetent to testify thereto, if had between the deceased and her husband; therefore, *held*, that she might testify in regard to conversations between her husband and deceased, as to which she was a mere listener: *Johnson v. Johnson*, 52–586.

The wife of plaintiff was not allowed to testify, in a particular case, as to labor performed by her for deceased, where such labor was claimed to be the consideration for a note of deceased, sued on by plaintiff: *Ashworth v. Grubbs*, 47–353.

A party is not allowed to give evidence of work, etc., done with the knowledge or assent of deceased, in such way as to raise an implied promise: *Peck v. McKean*, 45–18; *Smith v. Johnson*, 45–308. But where the plaintiff, as executor, testified as to facts from which an implied promise of defendant to pay rent of premises occupied during decedent's lifetime could be inferred; *held*, that defendant might testify to an arrangement with de eased, by which he was to occupy rent free: *Bailey v. Keyes*, 52–90.

The contestants of a will in an action to probate the same, having testified only as to their relations with deceased, *held*, that it was not competent for one of the proponents to testify as to matters proposed to be proved by him: *Sisters of Visitation, etc., v. Glass*, 45–154.

The payment of a note to the deceased is a personal transaction within the meaning of this section: *Williams v. Brown*, 45–102.

Where an administrator, though a party, was not a necessary party, and the suit was dismissed as to him, *held*, that the testimony of plaintiff as to a personal transaction between himself and decedent was competent: *Campbell v. Mayes*, 38–9.

Under Rev. § 3982, in many respects differing from this section, *held*, that where an action was pending against a defendant who subsequently d ed, and whose administrator was then substituted, a deposition of the plaintiff, taken before defendant's death, was not admissible in evidence: *Quick v. Brooks*, 29–484; also, *held*, that that section was not applicable to a case where the deceased party was merely a trustee and the person beneficially interested was living: *Watson v. Russell*, 18–79. That section referred to and considered in the following cases: *Burroughs v. McLean*, 37–189; *Cummins v. Hull*, 35–253; *Keech v. Cowles*, 34–259; *Ruddick v. Otis*, 33–402.

Depositions taken conditionally.

SEC. 3640. Any person may have his own deposition, or that of any other person, read and used as evidence in all cases where his evidence would be incompetent by the provisions of the preceding section, by causing such deposition to be taken, either before or after suit brought, during the lifetime or sanity of the person against whom, his executor, heir, or other representative, the same is to be used; *provided*, such deposition shall have been taken and filed ten days prior to the death or insanity of such person. If after suit brought, such deposition may be taken in the usual manner; if before, then the same may be taken *de bene esse*, as provided by law.

Husband and wife. R. § 3983. C. '51, § 2391.

SEC. 3641. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other; but they may in all civil and criminal cases be witnesses for each other.

[A substitute for the original section; 15th G. A., ch. 33. The original section was as follows: "The husband nor wife shall in no case be a witness for or against the other except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding one against the other; but they may, in all civil and criminal cases, be witnesses for each other."]

The wife being a competent witness for the husband in a criminal prosecution, it is error to charge the jury that her testimony is to be received with great caution, or that it should be given but little weight. Her credi-

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bility is to be tested by the same rules which apply to other witnesses: *The State v. Guyer*, 6–263; *The State v Rankin*, 8–355; *The State v. Bernard*, 45–234; *The State v. Collins*, 20–85.

An objection under this section lies to the competency of the witnesses and should be taken when they are sworn, or when it is proposed to examine them, and not afterwards: *Watson v. Riskamire*, 45–231.

Where husband and wife are joint defendants, the wife may be called to testify for plaintiff. In such case she is not a witness against her husband, within the meaning of this section: *Richards v. Burden*, 31–305.

Where husband and wife are indicted together, the husband is entitled to the wife's evidence, in the same manner as any other defendant may have the evidence of a co-defendant, under the decision in *The State v. Gigher*, 23–318: *The State v. Donovan*, 41–587.

Adultery is a "crime committed by the one against the other," within the meaning of this section, and in a prosecution for such crime, the husband or wife, as the case may be, is a competent witness against the other: *The State v. Bennett*, 31–24; *The State v. Hazen*, 39–648

Under Rev., § 3983, which prohibited the husband or wife being witnesses for or against each other, except in criminal cases, *held*, that this was a privilege which rested with the other party to the marriage relation, and might be waived by such party under Rev., § 3986 (present Code, § 3643, last clause), and was not intended for the benefit of the *opposite* party in the suit: *Russ v. Steamboat War Eagle*, 14–363; *Blake v. Graves*, 18–313 (explaining *Karney v. Paisley*, 13–89.)

Same.
R. § 3984.
C. '51, § 2392.

SEC. 3642. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communcation made while the marriage subsisted.

Professional confidence.
R. §§ 3985–6.
C. '51, §§ 2393–4.

SEC. 3643. No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred.

A party to a suit, who is also a witness, cannot be called on to state a confidential communication made to his attorney: *Barker v. Kuhn*, 38–392.

A communication to one supposed to be an attorney, but who was not such at the time, but was studying and was soon after admitted, *held*, not privileged: *Sample v. Frost*, 10–266.

Previous threats against the life of a party, for whose murder defendant was on trial, made to an attorney whom defendant was consulting in regard to a civil suit against such party, *held*, not to be a privileged communication: *The State v. Mecherter*, 46–88.

That a person to whom communications were made was an acting magistrate and usually did the business of defendant, and frequently gave him advice and counsel, *held*, not sufficient to make a communication to such person privileged: *Pierson v. Steortz*, Mor. 136.

Public officers.
R. § 3987.
C. '51, § 2395.

SEC. 3644. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

Judge competent.
R. § 4005.
C. '51, § 2408.

SEC. 3645. The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such case it is in his discretion to order the trial to be postponed or suspended and to take place before another judge.

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Civil liability. R. § 3988. C. '51, § 2396.

SEC. 3646. No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.

Criminal. R. § 3989. C. '51, § 2397.

SEC. 3647. But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer except as provided in the next section.

It is not alone left to the witness to determine whether the answer would tend to criminate him. While he is not required to explain how the answer would criminate him, the court may determine whether the answer can directly or indirectly have that effect: *The State v. Duffy*, 15–425; and where it is apparent to the court that the answer to the question could not criminate the witness, he may be compelled to answer: *Richman v. The State*, 2 Gr., 532.

In an action for seduction plaintiff, as a witness, may refuse to answer as to whether she had previous illicit intercourse with other men, as the matter sought to be elicited would subject her to public ignominy: *Brown v. Kingsley*, 38–220.

Under the facts of a particular case, *held*, that the witness could not be required to answer: *Printz v. Cheeney*, 11–469.

Previous conviction. R. § 3990. C. '51, § 2398.

SEC. 3648. A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof.

Moral character. R. § 3991.

SEC. 3649. The general moral character of a witness may be proved for the purpose of testing his credibility.

Proof of a specific vice, as want of chastity, is not competent for the purpose of discrediting the competency of a witness: *Kilburn v. Mullen*, 22–498.

The doubt thrown upon the credibility of a witness by proof of bad moral character, may be removed by corroborating evidence: *Snediker v. Poorbaugh*, 29–488.

The credibility of a witness may be impeached by showing an abnormal condition of the mind, caused by disease or habits which impair the memory: *Alleman v. Stepp*, 52–626.

Under § 4556, this section is applicable equally in criminal cases, and where one of two co-defendants is called to testify for the other, he may be impeached as any other witness: *The State v. Hardin*, 46–623.

Whole of a writing or conversation. R. § 3992. C. '51, § 2399.

SEC. 3650. When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing, is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood or to explain the same, may also be given in evidence.

The other act or declaration contemplated by this section must be something which is necessary to make the previous or subsequent act or declaration fully understood, or to explain it. It is not all that a party may have said at other times in regard to the matter in controversy which may be thus introduced: *Dougherty v. Posegate*, 3–88.

When part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other: *Gaddis v. Lord*, 10–141.

Where a subject is introduced in the examination of a witness, and a part of the facts shown, the opposite party may inquire as to all the facts on the same subject: *Jones v. Hopkins*, 32–503.

Parol evidence of the contents of a lost letter necessary to make another letter "fully understood," is admissible: *Collins v. Bane*, 34–385–389.

If part of an account, in an account book, is relied on, the whole must be received: *Veiths v. Hagge*, 8–163, 189.

A witness may be allowed to testify as to a part of a conversation which

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he heard, although there was a part which he did not hear or understand: *The State v. Elliott*, 15–72; and that defendant's witness has been allowed to state a portion of a conversation addressed to defendant, will not warrant testimony on the part of defendant as to what he said in reply: *Ibid.*

Detached conversations, *held*, not sufficiently connected to allow the introduction of the second as necessary to explain the first: *Williams v. Donaldson*, 8–108.

Where, on the trial of a criminal action, one declaration of defendant was admitted, but subsequent declarations were offered, but refused, such action will not be held erroneous, unless it affirmatively appear that such subsequent declarations were necessary to explain the first, or make it fully understood: *The State v. Vance*, 17–138.

Writing and printing. R. § 3993. C. '51, § 2400.

SEC. 3651. When an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent.

Understanding of parties. R. § 3994. C. '51, § 2401.

SEC. 3652. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

This section only applies to instruments which arise out of and are the expression of the agreement of two minds: *Pierson v. Armstrong*, 1–282, 287.

Section applied: *Snow v. Flannery*, 10–318; *Stout v. Fire Ins. Co.*, 12–371, 380; *Wilkinson v. Conn., etc., Ins. Co.*, 30–119, 127.

Historical and Scientific works. R. § 3995. C. '51, § 2402.

SEC. 3653. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.

To render a map or plat admissible under this section, it must be public, and must be shown to be the work of a disinterested person: *Pfotzer v. Mullaney*, 30–197.

The section does not render inadmissible in evidence that which was before admissible. Standard medical authorities are not therefore the best evidence of what they teach or whether they differ. The testimony of experts is admissible on such points, and also as to what are standard authorities, etc.: *Brodhead v. Wiltse*, 35–429.

Subscribing witness. R. § 3996. C. '51, § 2403

SEC. 3654. When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence.

Handwriting. R. § 3997. C. '51, § 2404.

SEC. 3655. Evidence respecting handwriting may be given by comparison made by experts, or by the jury, with writings of the same person which are proved to be genuine.

The writing with which comparison is made, must be proved to be genuine by testimony of witnesses who saw the party write it, or by the party's admission, when not offered by him, or in some such a positive manner. The genuineness of the standard cannot be proved by a witness who has seen the party write generally. The standard, however, need not be a writing connected with the case: *Hyde v. Woolfolk*, 1–159.

The opinion of an ordinary witness, formed upon comparison of the writings alone, is not admissible. No one but an expert can be allowed to give an opinion formed upon such comparison; but to be an expert in regard to hand-writing the witness need not be a man of any particular calling. The competency of two witnesses in a particular case, *held*, to be sufficiently shown: *Ibid.*

Evidence of experts is of the most unsatisfactory character, and the court may so instruct the jury: *Whitaker v. Parker*, 42–585.

On appeal in an equitable action, triable *de novo*, the supreme court will make a comparison of the writings: *Morris v. Sargent*, 18–90; and see *Baker v. Mygatt*, 14–131; but in an action by ordinary proceeding the determination of the court upon

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the genuineness of a signature is, upon appeal, entitled to the same consideration as the verdict of a jury: *Lay v. Wissman*, 36–305.

Private writing. R. § 4000. C. '51, 2407.

SEC. 3656. Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without farther proof.

Entries by deceased person. R. § 3998. C. '51, § 2405.

SEC. 3657. The entries and other writings of a person deceased, made at or near the time of the transaction and in a position to know the facts therein stated, are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law.

Where entries are offered as being against the interest of the party making them, such interest should be made clearly to appear: *The State v. Wooderd*, 20–541.

The jury may be told that testimony of this kind, though competent, yet as the right of cross-examination does not exist, is not highly favored by the law: *Ibid.*

BOOKS OF ACCOUNT.

When and how admitted in evidence. R. § 3999. C. '51, § 2406.

SEC. 3658. Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. The books must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

2. It must be shown by the party's oath or otherwise that they are his books of original entries;

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof;

4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made.

The preliminary proof being made, the question of the admissibility of books in evidence is for the court; the degree of credit given them and the question of whether the charges are in the ordinary course of business are to be determined by the jury. In general, a charge for "money paid" or "money lent" is not a charge in the usual course of business, and cannot be proved by a party's books of account. But if the payment or loan of money constitutes, in any just sense, the ordinary business of the party, and the charges are made in the ordinary course of business, they may be proved by the books of account. The business of keeping a retail store, however, is not generally such business as to justify the introduction of the books of such business to prove charges for money loaned. Proof of a course of business *between the parties*, of lending and charging in a book of account, will not be sufficient to make such book admissible in evidence: *Veiths v. Hagge*, 8–163; *Young v. Jones*, 8–219; *Sloan v. Ault*, 8–229; *Snell v. Eckerson*, 8–284; *Cummins v. Hull's Adm'r*, 35–253; and in a particular case, *held*, that in the absence of any explanation as to what the ordinary course of dealing of the parties was, certain entries did not appear to be made in the usual course of business: *Kurr v. Stivers*, 34–123. However, when a defendant avails himself of credits shown by such book in his favor, he cannot object to the account being used to show charges against

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him. The whole account must be taken together: *Veiths v. Hagge*, 8–163.

Where the books show that a receipt was given for the money, it is the best evidence and must be produced or accounted for: *Sl an v. Ault*, 8–229.

When a book of account is thus admitted, it becomes written evidence and speaks for itself: *Cummins v. Hull's Adm'r*, 35–253; and it is not permissible to introduce evidence as to the *contents* of the books: *Churchill v. Fulliam*, 8–45; *Peck v. Parchen*, 52–46.

The entry of a contract or agreement made by the party in his own book, is not receivable in evidence. So, *held*, in case of a memorandum or stock book in which purchases of stock, etc., were noted: *Hart v. Livingston*, 29–217; *Whisler v. Drake*, 35–103.

In general, no party other than the one making the entries is competent to make the supplementary oath necessary for the admission of the book: *Karr v. Stivers*, 34–123.

When the proper preliminary proof is made, the books should be received in evidence, and any objection on account of discrepancies, etc., affecting their credibility only, should be left to the jury: *Eyre v. Cook*, 9–185.

When a witness refers to books of account, in aid of his statements, the books are competent to show a mistake in his testimony; and in such case the formal proof is not necessary: *Davenport v. Cummings*, 15–219.

The fact that an account, as shown by the books, appears to be barred, is not ground for excluding the books when offered in evidence: *Thorn v. Moore*, 21–285.

Where charges for stone purchased from plaintiff were not made at the time the stone was taken, but were made as soon as defendant notified him how many had been taken, *held*, that a satisfactory reason was thus shown for not making the entries at the time of the transaction: *Anderson v. Ames*, 6–487.

INSTRUMENTS AFFECTING REAL PROPERTY.

Evidence.
R. § 4001.
C. '51, § 1227.

SEC. 3659. Every instrument in writing affecting real estate, which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence without farther proof.

This section does not prevent a deed which is not properly acknowledged from being received in evidence: *Gould v. Woodward*, 4 Gr. 82.

An instrument, such as here described, is not evidence of the handwriting of the person by whom it purports to be signed: *Hyde v. Woolfolk*, 1–159.

The recitals in an instrument admissible under this section are *prima facie* evidence of the facts recited: *Beal v. Blair*, 33–318.

The certificate of acknowledgment is *prima facie* evidence of the fact of acknowledgment, but not conclusive, and may be overcome by other evidence, the burden of proof being upon the party seeking to rebut the effect of the certificate: *Morris v. Sargent*, 18–90; and see § 3662 and notes.

The deed, such as here contemplated, being in the custody of the grantee, will be presumed to have been delivered, and being in writing will import a consideration, and these facts need not be proved before offering the instrument in evidence: *Wolverton v. Collins*, 34–238.

For the provisions as to acknowledgments, etc., see § § 1955 to 1969.

Record or certified copy.
R. § 4002.
C. '51, § 1228.

SEC. 3660. The record of such instrument, or a duly authenticated copy thereof, is competent evidence whenever by the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. And in such case it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment that the same is made under his hand and seal of office, and the records show by a scroll or otherwise that there was such a seal, which will be presumptive evi-

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dence that the official seal was attached to the original certificate.

The record of a deed is not admissible unless it is shown that the original is lost, or does not belong to the party wishing to use the same, or is not within his control: *Williams v. Heath*, 22–519; *Ackley v. Sexton*, 24–320.

Where it is not shown that the instrument is lost, the party desiring to introduce a copy thereof should show, both that it does not belong to him and that it is not under his control; but it will not be considered to be within his control merely from the fact that he may compel its production by a subpœna *duces tecum*: *McNichols v. Wilson*, 42–385, 393.

Where it appeared that the original was part of the files of a case in the supreme court and could have been readily procured, *held*, that a copy was not admissible in evidence: *Byington v. Oaks*, 32–488; but where a deed had been introduced in evidence in a case in another county and was in the hands of the court there, *held*, that it was sufficiently shown not to be in the possession or under the control of the party: *Ingle v. Jones*, 43–286.

Section applied: *Courtright v. Deeds*, 37–503; *Olleman v. Kelgore*, 52–38.

The provisions of this section do not dispense with the necessity of proof of the delivery of the original, in cases where such proof would be necessary if the original itself were introduced: *Foley v. Howard*, 8–56; nor does the section apply to a record copy of a patent of lands from the United States, and such copy is not admissible: *Curtis v. Hunting*, 6–536. (But now see 16th G. A., ch. 10, inserted following § 3662.)

SEC. 3661. The provisions of the preceding section are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded. Retrospective. R. § 4003. C. '51, § 1229.

SEC. 3662. Neither the certificate, nor the record, nor the transcript thereof, is conclusive evidence of the facts therein stated. Not conclusive. R. § 4004. C. '51, § 1230.

The right to contradict the certificate exists, for instance, when fraud is supposed in obtaining the acknowledgment, or when the certificate is alleged to be false, and it is proposed to show that the deed was never acknowledged: *Tatum v. Goforth*, 9–247; but it is not contemplated that a defective certificate is to be supplied or made good by other evidence: *O'Farrell v. Simplot*, 4–381; and see notes to § 3659.

UNITED STATES AND STATE PATENTS.

[Sixteenth General Assembly, Chapter 10.]

United States and state patents for lands in this state, that have been or hereafter may be recorded in the recorder's office of the county in which the lands are situated, shall be deemed matters of record, and certified copies thereof, under the hand of the recorder, may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office. In order to entitle said patents to be recorded, no acknowledgment, as required by chapter six of the code, shall be necessary.

When deemed matters of record.

Certified copies as evidence.

No acknowledgments necessary.

STATUTE OF FRAUDS.

SEC. 3663. Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent. Written evidence only admissible. R. § 4006. C. '51, § 2409.

Although the English statute of frauds provides "that no action shall be brought," while ours provides that "no evidence, etc., is competent," the

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effect is the same in both cases; and English and American authorities upon the construction of the former are applicable to the latter: *Westheimer v. Peacock*, 2–528.

The contract itself is not void, but may be subsequently revived so as to become binding: *Berryhill v. Jones*, 35–335.

A resolution of a board of supervisors is sufficient written evidence of a contract by them to convey real estate, to enable the vendee to enforce the same: *Grimes v. Hamilton Co.*, 37–290.

The written evidence need not be contained in one paper, nor need the papers be contemporaneous; and parol evidence may be received to connect or explain them. In case of a sale of land at auction, the notice of sale containing the terms, etc., the plat upon which the name of defendant as purchaser, with price, etc., was entered by the clerk of the sale, and a letter signed by defendant declining to have anything further to do with the property, were held sufficient, with parol evidence, to comply with the requirements of the statute: *Lee v. Mahoney*, 9–344.

A writing signed by a defendant and kept in his possession without delivery, is not available to take a case out of the statute: *Steel v. Fife*, 48–99.

Contracts. R. § 4067. C. 51, § 410.

SEC. 3664. Such contracts embrace:

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid;

2. Those made in consideration of marriage;

3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate;

4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;

5. Those that are not to be performed within one year from the making thereof.

PAR. 1: What will constitute sufficient delivery, discussed. Whether an agreement that a pre existing debt should be applied as part of the purchase money, would constitute part payment, *quære: Brown v. Wade*, 42–647.

It would seem that a contract creating a lien upon, as well as one for the sale of, personal property, would come within this clause: *Brown v. Allen*, 35–306.

PAR. 2: Where it is attempted, by letters, to prove a contract to convey real estate, in consideration of marriage, the letters should show a distinct proposition that, in consideration of the marriage, the one party would convey such real estate, and an acceptance of the proposition by the other party in as broad and distinct terms as it was made: *Elwell v. Walker*, 52–256.

PAR 3: Where the main purpose of the promisor is not to answer for another, but to subserve some purpose of his own, the promise is not within the statute of frauds: *Mills v. Brown*, 11–314.

Where property was delivered upon the faith of a promise by the surety to sign the note therefor, *held*, that such promise was not within the statute: *Van Riper v. Baker*, 44–150; also, *held*, that if a loan was made to three, one only receiving the money, the others would be bound, although their promise was not in writing: *Dee v. Downs*, 50-310. *S. C.* 11 N.W. Rep. 2.

Where the promise to answer for the debt, etc., of another is made upon a new and original consideration, it is not within the statute: *Johnson v. Knapp*, 36–616.

PAR. 4: An agreement to procure a conveyance of land is not within the statute: *Bannon v. Bean*, 9–395; *Cooley v. Osborne*, 50–526.

A resulting trust arising from the furnishing of funds by one party, with which real estate is purchased by another in his own name, is not within the statute of frauds, but may be established by parol: *Nelson v. Worrell*, 20–469; but such implied trust cannot be established by parol, where the party claiming it did not actually advance the purchase money: *Burden v. Sheridan*, 36–125.

Parol evidence is admissible to establish a resulting trust in an entry of government lands by one for another: *Sullivan v. McLenans*, 2–437; and it is not necessary, in such case, to show that the money was advanced at the time: *Bryant v. Hendricks*, 5–276; so also, where the owner of land was prevented from making re-

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demption from a tax sale, upon promise of the tax purchaser to convey after a tax deed was executed, *held*, that the agreement, though in parol, was not within the statute of frauds: *Judd v. Mosley*, 30–423.

A parol agreement relinquishing an interest in real estate, in consideration of the discharge of an indebtedness already existing, *held*, valid: *Hotchkiss v. Cox*, 47–655.

In the exception as to leases, it is the *term* of the lease that is referred to, and not the time from the making thereof within which it is to be performed. Verbal leases for a year are good, although made to commence *in futuro*: *Sobey v. Brisbee*, 20–105; *Jones v. Marcy*. 49–188.

The taking and holding possession under a verbal assignment of a lease *held*, not to take the contract of assignment out of the statute of frauds: *Hunt v. Coe*, 15–197.

PAR 5: To be within this clause of the statute, the contract itself must show, from the nature of its subject matter, by its express terms, or by necessary implication, that its performance within a year is forbidden. It is not sufficient to bring it within the statute, that the parties manifestly intended to occupy more than a year in its performance: *Blair Town Lot & Land Co. v. Walker*, 39–406.

A contract for labor to be paid for after the death of the debtor, *held*, not to be within the statute: *Riddle v. Backus*, 38–81.

The contracts here referred to are such as are not to be performed within a year *on either side*: *Smalley v. Greene*, 52–241.

This paragraph does not apply to contracts for the creation or transfer of an interest in lands: *Sobey v. Brisbee*, 20–105.

SEC. 3665. The provision of the first subdivision of the preceding section, does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery; but labor, skill, or money, are necessarily to be expended in producing or procuring the same; nor do those of the fourth subdivision of said section apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance, which, by the law heretofore in force, would have taken a case out of the statute of frauds.

Exceptions. R. § 4008. C. '51, § 2411.

A sale or gift of real estate is, under our statute, just as complete and perfect when made by parole and followed by possession under it, with the consent of the vendor, as if it were made in writing: *Hughes v. Lindsey*, 31–329.

A sale of real estate in parol, accompanied with possession, is valid: *Chamberlin v. Robertson*, 31–408; *Tuttle v. Becker*, 47–486. But it must appear that the possession was taken under the contract and with the knowledge of the other party: *Carrolls v. Cox*, 15–455.

The mere continuance in possession by a tenant, is not sufficient to render valid a verbal contract: *Makin v. Blunt*, 20–142.

To take a case out of the operation of the statute of frauds on the ground of part performance, it is indispensable that the acts done should be referable exclusively to the contract; but a preponderance of evidence alone is sufficient to show that fact: *Sweeney v. O'Hora;* 43–34.

A license to mine is valid, though resting wholly in parol, if possession is taken and held thereunder with actual consent of the licensor: *Anderson v. Simpson*, 21–399.

The term "purchase money" as here used, means the consideration. Where such consideration was the conveyance to the vendor by the vendee of another piece of property, *held*, that proof that such conveyance was executed would take the case out of the statute of frauds: *Devin v. Himer*, 29–297.

The facts taking a contract out of the statute of frauds may exist and be proved outside the contract itself. In a contract for a sale of hogs, *held*, that proof that at the time it was made the hogs were not owned by the vendor, but that labor, skill, or money would be necessary to procure them, would be sufficient: *Bennett v. Nye*, 4 Gr. 410.

A contract creating a lien upon personal property, equally with one for the sale of such property, is

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within the exception made by the first clause of this section: *Brown v. Allen*, 35–306.

In case of a sale of personal property, the fact that the goods are to be shipped by express from one place to another at an expense, does not bring the case within the exception; such is not a case where "labor, skill or money are necessary to be expended, etc.": *Partridge v. Wilsey*, 8–459.

When not denied in the pleadings. R. § 4009. C. '51, § 2412.

SEC. 3666. The above regulations relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it.

If the contract is not denied in the answer of defendant, it is to be enforced against him, although in such answer he may expressly insist upon the benefit of the statute: *Auter v. Miller*, 18–405.

Party made witness. R. § 4010. C. '51, § 2413.

SEC. 3667. Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence.

Where a party seeking to enforce a contract which should be in writing intends to rely upon the evidence of the party making it, he should so state in his petition, otherwise it will be subject to demurrer under § 2648: *Babcock v. Meek*, 45–137.

If plaintiff relies on the testimony of defendant to establish the contract, he cannot contradict or supplement such testimony by that of other witnesses. The testimony of defendant is conclusive: *Auter v. Miller*, 18–405; *Thorn v. Moore*, 21–285; nor can plaintiff introduce other evidence to impeach defendant's credibility: *Hunt v. Coe*, 15–197.

The provision allowing the opposite party to be called to establish a contract which should be in writing, does not apply to the testimony of the *agent* of such party. His testimony cannot be received for that purpose: *Burnside v. Rawson*, 37–559.

Where there is any proper evidence tending to establish the contract, the question as to whether it has been sufficiently made out is for the jury, and it is erroneous in such cases to take such question from them by an instruction: *Byerlee v. Mendel*, 39–382.

Section applied: *Smith v. Phelps*, 32–537.

Notary public: certificate of. R. §§ 199, 4011. C. '51, § 2414.

SEC. 3668. The usual protest of a notary public without proof of his signature or notarial seal, is prima facie evidence of what it recites concerning the dishonor and notice of a bill of exchange or promissory note, and a copy from his record, properly certified to by him, shall receive such faith and credit as it is entitled to by the law and custom of merchants.

The certificate of protest is only evidence of notice when it recites that notice was given: *Sather v. Rogers*, 10–231; *Thorp v. Craig*, 10–461.

It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place, it will not be presumed that such place was the residence of such indorser: *Bradshaw v. Hedge*, 10–402.

If the certificate states that notices of protest properly addressed were deposited in the post-office, it will be presumed that the postage was prepaid: *Brooks v. Day*, 11–46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice: *Wamsley v. Rivers*, 34–463.

The fact that the certificate is dated at a time subsequent to that of the dishonor and protest, will not render it incompetent: *Chatham v. Allison*, 15–357.

The evidence contemplated in this section is not receivable in criminal cases, where a defendant has the

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right to be confronted with the witnesses against him (Const. art. 1, § 10): *The State v. Reidel*, 26–490.

Inferior tribunals: presumption. R. § 4120. C. '51, § 2512.

SEC. 3669. The future proceedings of all officers, and of all courts of limited and inferior jurisdiction within this state shall, like those of a general and superior jurisdiction, be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared.

Where several acts appear to have been done on the same day, they will be presumed to have been in the proper order to render all of them valid. Courts and officers are presumed to act rightly: *Hodge v. Ruggles*, 36–42.

Where it appears that there was notice and return of personal service, a defect therein, which is held immaterial by the tribunal, cannot be taken advantage of collaterally: *Pursley v. Hayes*, 22–11.

Section applied: *The State v. Lane*, 26–223; *Church v. Crossman*, 49–444.

Records of court in same county. 12 G. A. ch. 86, § 9.

SEC. 3670. The records and papers properly filed in a cause in either the district or circuit court of a county, are equally evidence in the other court. Depositions taken for either court may be used in the other with the same effect, subject to like objection, as if taken in such court.

HOW TESTIMONY IS TO BE PROCURED.

Clerks to issue subpœnas. R. § 4012.

SEC. 3671. The clerks of the several courts shall, on application of any person having a cause or any matter pending in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When a subpœna is not served by the sheriff, coroner, or constable, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed.

To whom directed: duces tecum. R. § 4013. C. '51, § 2415.

SEC. 3672. The subpœna shall be directed to the person therein named, requiring him to attend at a particular time or place to testify as a witness, and it may contain a clause directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

How far witnesses in civil cases can be compelled to attend. R. § 4014. C. '51, § 2416.

SEC. 3673. Witnesses in civil cases cannot be compelled to attend the district or circuit court out of the state where they are served, nor at a distance of more than seventy miles from the place of their residence, or from that where they are served with a subpœna, unless within the same county. No other subpœna but that from the district or circuit court can compel his attendance at a greater distance than thirty miles from his place of residence, or of service, if not in the same county.

This limitation as to distance does not apply to garnishees, who may be compelled to attend from any distance within the state: *Westphal v. Clark*, 42–371.

May demand payment in advance. R. § 4015. C. '51, § 2417.

SEC. 3674. Witnesses are entitled to receive in advance, if demanded, their traveling fees to and from the court, together with their fees for one day's attendance. At the commencement of each day after the first, they are further entitled, on demand, to receive the legal fees for that day in advance. If not thus paid they are not compelled to attend or remain as witnesses.

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Penalty for failure to obey. R. § 4016. C. '51, § 2418.

SEC. 3675. For a failure to obey a valid subpœna, without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of contempt of court. He is also liable to the party by whom he was subpœnaed for all consequences of such delinquency, together with fifty dollars additional damages.

Same. R. § 4017. C. '51, § 2419.

SEC. 3676. Before a witness is thus liable for a contempt for not appearing, he must be served personally with the process, by reading it to him, and by leaving a copy thereof with him, if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him, if required; or it must appear that a copy of the subpœna, if left at his usual place of residence, came into his hands, together with the said fees and traveling expenses above mentioned.

When witness conceals himself: power of officer. R. § 4018. C. '51, § 2420.

SEC. 3677. If a witness conceal himself, or in any other manner attempt to avoid being personally served with a subpœna, any sheriff or constable having the subpœna, may use all necessary and proper means to serve the same, and for that purpose may break into any building or other place where the witness is to be found, having first made known his business and demanded admission.

Prisoner. R. § 4019.

SEC. 3678. A person confined in any prison in this state, may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the state; but in all other cases his examination must be by a deposition.

A defendant in a criminal action possesses no absolute right to demand the personal attendance of a convict in the penitentiary or county prison under an order of court, but the exercise of the power here given to the court is discretionary with it: *The State v. Kennedy*, 20–372.

Deposition of. R. § 4020.

SEC. 3679. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the depositions.

Persons authorized by laws of other states: power of. R. § 4021. C. '51, § 2477.

SEC. 3680. When by the laws of any other state or country, testimony may be taken in this state to be used in the courts of such state or country, and also in all cases herein provided for taking depositions, the persons authorized to take such depositions have power to issue subpœnas and compel obedience thereto, to administer oaths, and to do any other act of a court which is necessary for the accomplishment of the purpose for which they are acting.

Same. R. § 4022. C. '51, § 2478.

SEC. 3681. Subpœnas issued by them are valid to the same extent as those emanating from a justice's court, and may be served and returned in the same manner.

Officers to serve. R. § 4023. C. '51, § 2479.

SEC. 3682. Any sheriff or constable, when called upon for that purpose, shall serve such subpœnas and make return thereof.

When party fails to obey subpœna. R. § 4024. C. '51, § 2480.

SEC. 3683. In addition to the above remedies, if a party to a suit in his own right, on being duly subpœnaed, fail to appear and give testimony, the other party may, at his option, have a continuance of the cause as in cases of other witnesses, and at the cost of the delinquent.

Same. R. § 4025. C. '51, § 2481.

SEC. 3684. Or if he shows by his own testimony or otherwise, that he could not have a full personal knowledge of the trans-

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action, the court may order his pleading to be taken as true; such order, however, is subject to be reconsidered during the term of the court, upon satisfactory reasons being shown for such delinquency.

The pleading is not to be taken as true, unless the court upon application make an order to that effect: *Hay v. Frazier*, 49–454.

PRODUCTION OF BOOKS AND PAPERS.

SEC. 3685. The district or circuit court may, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them. When and how done. R. § 4026. C. '51, § 2423.

The granting of the rule requiring the party to produce papers, lies in the discretion of the court: *Allison v. Vaughan*, 40–421.

SEC. 3686. The petition for that purpose must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deems such rule expedient and proper. Petition. R. § 4027. C. '51, § 2424.

SEC. 3687. On failure to obey the rule, or show sufficient cause for such failure, the same consequences shall ensue as if the party had failed to appear and testify when subpœnaed by the party now calling for the books and papers. Consequences of failure to obey. R. § 4028. C. '51, § 2425.

SEC. 3688. Though a writing called for by one party is by the other produced, the party thus calling for it is not obliged to use it as evidence in the case. Writing called for by one party. R. § 4029. C. '51, § 2426.

DOCUMENTARY EVIDENCE.

SEC. 3689. An affidavit is a written declaration under oath, made without notice to the adverse party. Affidavit. R. 4030.

SEC. 3690. An affidavit may be made within or without this state before any person authorized to administer oaths. Before whom made. R. § 4035.

[The word "oaths," in the last line, is "them" in the original, but is here retained as in the printed code, as probably inserted by the editor by way of correction.]

SEC. 3691. Affidavits taken out of the state before any judge or clerk of a court of record, or before a notary public, or a commissioner appointed by the governor of this state to take acknowledgment of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state. Out of the state. R. § 4036. C. '51, § 2475.

The fact that the officer before whom an affidavit is made, out of the state, is authorized to administer oaths may be established *aliunde*: *Levy v. Wilson*, 43–605.

SEC. 3692. When a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition, stating the object for which he desires the affidavit. How compelled. R. § 4038. C. '51, § 2480.

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Same. R. § 4039. C. '51, § 2481.

SEC. 3693. If such officer is satisfied that the object is legal and proper, he shall issue his subpœna to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used instead of an ordinary affidavit.

The party subpœnaed cannot be excused from making the affidavit or answering the questions, on the ground that the affidavit desired would not be legally admissible in the proceeding for which it is sought. Neither the officer before whom he is brought, nor the witness, is allowed to determine that fact in advance. A failure to respond to the subpœna, or to answer when brought before the officer, may be punished as a contempt: *Robb v. McDonald*, 29–330.

Notice. R. § 4040. C. '51, § 2482.

SEC. 3694. The officer thus applied to may, in his discretion, require notice of the taking of such affidavit or deposition to be given to any other person interested in the subject matter, and allow him to be present and cross-examine such witness.

Cross interrogatories. R. § 4041. C. '51, § 2483.

SEC. 3695. The court or officer to whom any affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may, if deemed proper, require the witness to be brought before some proper officer and subjected to cross-interrogatories by the opposite party.

Similar provision; see § 2913.

Signature and seal: presumption. R. § 4037. C. '51, § 2476.

SEC. 3696. The signature and seal of such of the officers herein authorized to take depositions or affidavits as have a seal, and the simple signature of such as have no seal, are presumptive evidence of the genuineness of such signature as well as of the official capacity of the officer, except as herein otherwise declared.

Publications: how proved. R. § 4042. C. '51, § 2427.

SEC. 3697. Publications required by law to be made in a newspaper, may be proved by the affidavit of any person having knowledge of the fact, specifying the times when, and the paper in which, the publication was made. But such affidavit must, for the purposes now contemplated, be made within six months after the last day of publication.

As to proof of publication of original notice, see § 2620, and note.

Posting up papers. R. § 4043. C. '51, § 2428.

SEC. 3698. The posting up or service of any notice or other paper required by law, may be proved by the affidavit of any competent witness attached to a copy of said notice or paper, and made within six months of the time of such posting up.

Other facts. R. § 4044. C. '51, § 2429.

SEC. 3699. Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated, as nearly as the circumstances of the case will admit.

How perpetuated. R. § 4045. C. '51, § 2430.

SEC. 3700. Such proof so made may be perpetuated and preserved for future use, by filing the papers above mentioned in the office of the clerk of the circuit court. And the original affidavit appended to the notice or paper, if there be one, and if not, the affidavit by itself, is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient.

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MAPS, PLATS, RECORDS, ENTRIES.

Field notes and plats. R. § 4046. C. '51, § 2431.

SEC. 3701. A copy of the field-notes of any surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation.

Copies of record and entries. R. § 4047. C. '51, § 2432.

SEC. 3702. Duly certified copies of all records and entries, or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record or papers so filed.

A certified copy of a paper in the auditor's office, but which is not authorized by law to be kept there, is not receivable in evidence: *Morrison v. Coad*, 49–571. Section applied: *Bellows v. Todd*, 34–18, 26.

Books of original entries. R. § 4048.

SEC. 3703. The recorder in each of the several counties in this state, shall cause to be procured a book, entitled "copies of original entries," to be kept as a record in his office, in which shall be copied a list of the original entries of land within his county, with name of the person or persons entering the same and the date of such entry, for which he shall receive a reasonable compensation, to be audited and allowed by the board of supervisors of his county.

Copies of. R. § 4049.

SEC. 3704. Said book, containing a copy of such entries, when compared with the originals, and certified to as true copies by the register of the land office at which such original entries were made, shall be deemed a matter of record, and certified copies thereof under the hand of said recorder may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office.

Same. R. § 4050.

SEC. 3705. Said recorder shall, from time to time, as he may deem it necessary, procure in the same manner copies of any additional entries, under the same restrictions and with like effect until all the lands in his county shall have been entered, and certified copies of the entries thereof procured.

Officer to give copies. R. § 4051. C. '51, § 2433.

SEC. 3706. Every officer having the custody of a public record or writing is bound to give any person, on demand, a certified copy thereof on payment of the legal fees therefor.

Copies, maps, etc., in office of surveyor general. R. § 4052.

SEC. 3707. Copies of all maps, officia letters, and other documents in the office of the surveyor-general of the United States, when certified to by that officer according to law, shall be received by the courts of this state as presumptive evidence of the existence of the originals and that said copies are copies of the original, notwithstanding such maps, official letters, or other papers, may themselves be copied.

Certificate as to loss of paper. R. § 4053. C. '51, § 2434.

SEC. 3708. The certificate of a public officer that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts.

Duplicate receipt of receiver of land office. R. § 4054. C. '51, § 2435.

SEC. 3709. The usual duplicate receipt of the receiver of any land office, or if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is

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proof of title equivalent to a patent against all but the holder of an actual patent.

This section *held* applicable to the certificate of the receiver of the Des Moines River Land Office: *Stone v. McMahan*, 4 Gr. 72.

Certificate of register. R. § 4055.

SEC. 3710. The certificate of the register or receiver of any land office of the United States as to the entry of land within his district, shall be presumptive evidence of title in the person entering to the real estate therein named.

This section relates to the remedy, and applies to all actions in the courts of this state, whether the land is situated in this state or not: *Pierson v. Reed*, 36–257.

Signature presumed genuine. R. § 4056. C. '51, § 2436.

SEC. 3711. In the cases contemplated in the last seven sections, the signature of the officer shall be presumed to be genuine, until the contrary is shown.

JUDICIAL RECORDS.

Of this state or federal courts. R. § 4057. C. '51, § 2437.

SEC. 3712. A judicial record of this state, or of any of the federal courts of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.

It is not necessary to account for the original before introducing a copy: *Dupont v. Downing*, 6–173.

Of another state. R. § 4058. C. '51, § 2438.

SEC. 3713. That of another state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law.

The method prescribed by act of congress for authenticating a judicial record is not exclusive of that which a state may adopt with reference to such an authentication in its own courts: *Lattourett v. Cook*, 1–1.

The certificate of *a* judge, whether the presiding officer of the court or not, is sufficient: *Simons v. Cook*, 29–324.

Of a justice of the peace. R. § 4059. C. '51, § 2439.

SEC. 3714. The official certificate of a justice of the peace of any of the United States to any judgment and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment.

The certificate of the clerk should show that the justice was a justice within the same county, and also that he was an acting justice at the time of signing the certificate: *Guesdorf v. Gleason*, 10–495.

The certificate of a retired justice of the peace in relation to his former official proceedings, has no more weight than that of a mere stranger: *Brown v. Scott*, 2 Gr. 454; his successor in office is the proper person to make the certificate here contemplated, as to any of the official proceedings of his predecessor shown by the records in his office, and the certificate of a clerk of a court that the justice is an acting justice and his signature genuine, is sufficient: *Railroad Bank v. Evans*, 32–202.

Of a foreign country. R. § 4060. C. '51, § 2440.

SEC. 3715. Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows:

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1. By the official attestation of the clerk or officer in whose custody such records are legally kept; and,

2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally entrusted with the custody of such records, and that the signature to his attestation is genuine; and,

3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court.

Parol evidence may be received to show the practice and usage in the courts of another state, and whether a record conforms thereto, and its effect: *Greasons v. Davis*, 9–219.

The certificate of the judge is conclusive that the attestation of the record is in due form, and if it appears to be made by a deputy in the name of the principal, it is conclusive as to the authority of the deputy to make such certificate: *Ibid.*; *Young v. Thayer*, 1 Gr. 196.

EXECUTIVE AND LEGISLATIVE RECORD.

Of the executive of U. S. or any state or foreign government. R. § 4061. C. '51, § 2441.

SEC. 3716. Acts of the executive of the United States, or of this or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislatures of those governments respectively, or by either branch thereof.

Of the legislature of this or other state or foreign government. R. § 4062. C. '51, § 2442.

SEC. 3717. The proceedings of the legislature of this or any other state of the Union, or the United States, or of any foreign government, are proved by the journals of those bodies respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which proceeding was had, or by a copy purporting to have been printed by their order.

Printed copies of the statutes. R. § 4063. C. '51, § 2443.

SEC. 3718. Printed copies of the statute laws of this or any other of the United States, or of congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws.

The method of proof here provided would not exclude other methods, such as producing copies duly authenticated under the seal of the state; but the testimony of witnesses would not be admissible to prove the statutes of another state: *Lattourett v. Cook*, 1-1.

Parol evidence of a person familiar with the practice in other states may be received to show that certain books are commonly received by the courts of that state as evidence of the statute laws thereof: *Greasons v. Davis*, 9-219.

Section applied: *Webster v. Rees*, 23–269.

Written law: unwritten law. R. § 4064. C. '51, § 2444.

SEC. 3719. The public seal of the state or county affixed to a copy of the written law or other public writing, is also admissible as evidence of such law or writing respectively. The unwritten laws of any other state or government may be proved as facts by parol evidence, and also by the books of reports of cases adjudged in their courts.

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Printed copies of ordinances of any city or town. R. § 1076.

SEC. 3720. The printed copies of the ordinances of any municipal corporation published by its authority, and transcripts of any ordinances or of any act or proceeding of a municipal corporation recorded in any book, or entries on any minutes or journals kept under the direction of such municipal corporation, and certified by its clerk, shall be received in evidence for any purpose for which the original ordinances, books, minutes, or journals would be received and with as much effect. The clerk shall furnish such transcripts, and he shall be entitled to charge therefor at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court.

A court cannot take judicial notice of the ordinances of a city: *Garvin v. Wells*, 8–286; *Wolf v. City of Keokuk*, 48–129.

DEPOSITIONS.

When taken and by whom. R. § 4065. C. '51, § 2445.

SEC. 3721. After the commencement of a civil action or other civil proceeding, if a witness resides within this state but in a different county from the place of trial, or is about to go beyond the reach of a subpœna, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony, may, whenever he deems it expedient, take his deposition in writing before any person having authority to administer oaths; and if the action is by equitable proceedings and to be tried on written evidence, then, without any other reason therefor, either party may so take the deposition of any witness.

A deposition need not be introduced by the party taking it, but the other party may introduce it if he so desire: *Hall v. Gibbs*, 43–380; *Wheeler v. Smith*, 13–564; *Pelamourges v. Clark*, 9–1, 16; *Crick v. McClintic*, 4 Gr. 290.

Notice. R. § 4066. C. '51, § 2446. 13 G. A. ch. 167, § 34.

SEC. 3722. Reasonable notice of the name of a witness and the time and place when and where the same will be taken, must be given to the opposite party; but if notices are given in the same case by the same party, and of the taking of depositions at different places upon the same day, they shall be invalid; and no party shall be required to take depositions on the day of the general election, or on the fourth day of July.

Objection to the sufficiency of the notice is waived by appearing and cross-examining the witness: *Nevan v. Roup*, 8–207.

Where the notice stated the place for taking the deposition as the office of "Squire Moore," and the certificate showed that it was taken at the office of "Enos Moore," *held*, that the notice was insufficient in that respect, and the deposition was properly suppressed: *McClintock v. Crick*, 4–453.

Of witness out of county. R. § 4067. C. '51, § 2447.

SEC. 3723. The deposition of a witness residing out of the county, may be taken before one or more commissioners on written interrogatories.

If the witness resides out of the county, but within the state, his deposition may be taken either on commission or on notice; if he resides out of the state, it can only be on commission; if within the county, it must be by notice: *Fabian v. Davis*, 5–456.

If the witness resides out of the state, but his deposition can be taken within the county where suit is pending, it may be taken on notice, and need not be by commission: *Anderson v. Easton*, 16–56.

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SEC. 3724. The party wishing to take such deposition may select any of the officers mentioned in the next section as such commissioners, or the parties may agree upon, or the court appoint in the commission, any other individual for that purpose. Who commissioners. R. § 4068. C. '51, § 2448.

[The word "party" in the first line, as it stands in the original, is "officer" in the printed code.]

SEC. 3725. The clerk, or any judge of any court of record, or any commissioners appointed by the governor of this state to take acknowledgment of deeds in another state, or any notary public, or any consul or consular agent of the United States, may be selected and appointed by the party such commissioner, either by the name of office of such officer, or by his individual name and official style, and the name of the court of which such constituted commissioner is clerk or judge, and the name of the state and county; or, if without the United States and Canada, the name of the state and town or city in which such commissioner of deeds, notary, or consul or consular agent resides, must be stated in the notice and in the commission issued. Same. R. § 4069. C. '51, § 2449.

A commission directed to "any notary public within and for" any certain county and state is sufficient to comply with the requirements of this section: *Sheriff v. Hull*, 37–174

In a commission to take a deposition in the United States or Canada, it is sufficient to name the county and state in which the commissioner resides. It is not necessary to name the city or town: *Lyon v. Barrows*, 13–428.

A mistake in the title of the court of which the commissioner was clerk, and in the name of such clerk, *held*, fatal: *Jones v. Smith*, 6–229.

Where the commission was directed to the "clerk of the district court of Morgan county," etc., and the deposition was taken and certified by the "clerk of the court of common pleas" of that county, *held*, that the deposition should have been suppressed: *Plummer v. Roads*, 4–587.

It is not proper to select and direct a commission to several of the officers here specified, in the alternative: *Levalley v. Harmon's Adm'r*, 20–533.

If a notary, before whom depositions are taken, is such an officer *de facto*, they cannot be suppressed on the ground that he had not properly qualified, and was not such officer *de jure*: *Keeney v. Leas*, 14–464.

SEC. 3726. None of the above named officers are permitted to take the depositions aforesaid, by virtue of a commission directed to him merely as such officer, unless within the limits to which his official jurisdiction extends. Qualification. R. § 4070. C. '51, § 2450.

SEC. 3727. Reasonable notice must be given the adverse party of a time when a commission will be sued out of the office of the clerk of the court in which the action is pending; if such action is in an inferior court, then from the office of the clerk of the circuit court, for taking the deposition of the witness, naming him, which notice must be accompanied with a copy of the interrogatories to be asked such witness. Notice: action before a justice. R. §§ 4071, 4072. C. '51, §§ 2464, 2465.

The *name* of the witness whose testimony is proposed to be taken, should be stated in the notice: *Pilmer v. Branch, etc., Bank*, 16–321.

SEC. 3728. At or before the time thus fixed, the opposite party may file cross-interrogatories. If cross-interrogatories are not filed, the clerk shall file the following: Cross interrogatories. R. § 4072. C. '71, § 2452.

1. Are you directly or indirectly interested in this action? and if interested, explain the interest you have;

2. Are all your statements in the foregoing answers made from your personal knowledge? and if not, do your answers show what

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are made from your personal knowledge, and what are from information, and the source of that information? if not, now show what is from information, and give its source;

3. State everything you know concerning the subject of this action, favorable to either party.

Rules. R. § 4077. C. '51, § 2454.

SEC. 3729. Subject to the regulations herein contained, the court may establish farther rules for taking depositions and all other acts connected therewith.

NOTICE—SERVICE OF.

Reasonable notice: what deemed. R. § 4073. C. '51, § 2453.

SEC. 3730. The notice hereinbefore mentioned, is at least, when served on the attorney, ten days, and when served on the party within the county, five days; if served on the party anywhere else, the notice shall be that required under other similar circumstances in the service of an original notice; and when depositions are to be taken in pursuance of the first of the above methods, one day in addition must be allowed for every thirty miles travel from the place where the notice is served, to that where the depositions are to be taken. No party shall be required to take depositions when the court is in actual session.

When service is on a party, the additional days for the distance of travel are to be added to the five days; and, in all cases, in computing the time, the first day is to be excluded, and the last included: *Richardson v. B. & M. R. Co.*, 8–260.

How served. R. § 4074.

SEC. 3731. The notice, or notice and copy of interrogatories, may be served by the same persons on the same persons, in the same manner, and may be returned, and the return shall be authenticated in the same way, as should be an original notice in the same cause when served other than by publication.

On attorney. R. § 4075.

SEC. 3732. It may also be served personally on any attorney of the adverse party of record in the cause.

By filing in clerk's office. R. § 4076.

SEC. 3733. Whenever the adverse party has been notified by publication only, and has not appeared, he shall be deemed served with the notice, or the notice and interrogatories, by the filing of the same with the clerk in the cause.

Depositions taken upon such notice as here provided, are admissible on a re-trial of the cause after default is set aside, as provided in § 2877. The fact that such depositions were taken without any cross-examination by defendant, will not exclude them: *Watson v. Russell*, 18–79.

MANNER OF TAKING DEPOSITIONS.

Commission: form of. R. § 4078. C. '51, § 2455.

SEC. 3734. The commission issues in the name of the court and under its seal. It must be signed by the clerk, and need contain nothing but the authority conferred upon the commissioner, instructions to guide him, and a statement of the cause and court in which the testimony is to be used, and a copy of the interrogatories on each side appended.

See notes to § 3725.

How taken. R. § 4079.

SEC. 3735. The person before whom any of the depositions above contemplated are taken, must cause the interrogatories propounded, whether written or oral, to be written out, and the

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answers thereto to be inserted immediately underneath the respective questions. The answers must be in the language, as nearly as practicable, of the witness, if either party requires it. The whole being read over by or to the witness, must be by him subscribed and sworn to in the usual manner.

A deposition in which the questions and answers were written out by the attorney of one of the parties was held to have been been properly suppressed, where it appeared that the opposite party was not present and did not consent thereto: *Hurst v. Larpin*, 21–484.

Exhibits appended. R. § 4080. C. '51, § 2457.

SEC. 3736. All exhibits produced before the person taking the deposition or proved or referred to by any witness, or correct copies thereof, must be appended to the depositions and returned with them, unless sufficient reasons be shown for not so doing.

Certificate. R. § 4081. C. '51, § 2458.

SEC. 3737. The person taking the deposition shall attach his certificate thereto, stating that it was subscribed and sworn to by the deponent at the time and place therein mentioned. The whole, including the commission and interrogatories, when any such were issued, must then be sealed up and returned to the clerk of the proper county by mail, unless some other mode be agreed upon between the parties.

The certificate, when defective, may be amended by the officer to conform to the facts: *McKinley v. C. & N. W. R. Co.*, 44–314.

Neither party to be present. R. § 4082.

SEC. 3738. Where a deposition is taken upon interrogatories, neither party, nor his agent or attorney, shall be present at the examination of a witness, unless both parties are present or represented by an agent or attorney, and the certificate shall state such fact if party or agent is present.

Where the provisions of this section have been violated, prejudice will be presumed to result therefrom, at least in the absence of a showing to the contrary: *Sheriff v. Hull*, 37–174.

Opened: not to be taken from clerk's office. R. § 4083. C. '51, § 2459.

SEC. 3739. The depositions when thus returned, must be opened by the clerk and placed on file in his office, after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees, but must not allow them to be taken from his office previous to the next term of the court, unless by the mutual written consent of the parties.

A deposition taken by one party, may be introduced in evidence by the other: See notes to § 3721.

Where depositions were allowed to be taken out in violation of this section, but for an honest purpose, and the violation of these provisions was merely technical, and without prejudice, *held*, that the subsequent admission of such depositions in evidence was not sufficient error to warrant a reversal: *Wolverton v. Ellis*, 18–413.

Returned by mail. R. § 4084. C. '51, § 2460.

SEC. 3740. The depositions when thus returned by mail, must be directed to the clerk of the court. They shall state on the outside of the envelope the title of the cause in which they are to be used.

Unimportant deviations. R. § 4085. C. '51, § 2461.

SEC. 3741. Unimportant deviations from any of the above directions, shall not cause the depositions to be excluded where no substantial prejudice could be wrought to the opposite party by such deviation.

A mistake merely clerical in the date named in the caption, *held*, not sufficient to exclude the deposition; but a mistake in the commission as to the title of the court of which the commissioner was clerk and in the name of the clerk, *held*, fatal: *Jones v. Smith*, 6–229.

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Authentication of. R. § 4086. C. '51, § 2462.

SEC. 3742. Where depositions are directed to be taken before a judge or justice of the peace, merely by his name of office, the return must contain an authentication by the clerk of the proper court, under his seal of office, verifying the fact that the person who took the deposition is really such officer.

Deposition to show reason for taking. R. § 4087. C. '51, § 2463.

SEC. 3743. The deposition in each of the above cases must show that the witness is a non-resident of the county, or such other fact as renders the taking of the deposition legal, and no such deposition shall be read on the trial, if, at the time, the witness himself is produced in court.

Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50–128. If the deposition shows that the witness is a non-resident, that is sufficient, although the witness states that he expects to be present at the trial; and unless he is actually present the deposition should not be excluded: *Nevan v. Roup*, 8–207.

In justice's court. R. § 4088. C. '51, § 2466.

SEC. 3744. Depositions taken to be used in a justice's court, shall be transferred to the court to which the cause is appealed, and used on the trial of such appeal in the same manner as if regularly taken therein.

Objections to depositions other than for incompetency or irrelevancy, should be made in the justice's court, and should not be sustained, if made for the first time on appeal: *Alverson v. Bell*, 13–308.

PERPETUATING TESTIMONY.

Testimony. R. § 4094.

SEC. 3745. The testimony of a witness may be perpetuated in the following manner.

Petition: statements. R. § 4095.

SEC. 3746. The applicant shall file in the office of the clerk of the district or circuit court, a petition, to be verified, in which shall be set forth specially, the subject matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be the plaintiff.

Order of court or judge. R. § 4096.

SEC. 3747. The court, or the judge thereof, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination; how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

Notice: if cannot be done: proceedings. R. § 4097.

SEC. 3748. When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross-interrogatories where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not re-

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sponsive to some of them. The attorney filing the cross interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

Before whom taken. R. § 4098.

SEC. 3749. Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court in which the petition is filed.

Court or judge to approve. R. § 4099.

SEC. 3750. The court or judge, if satisfied that the depositions have been properly taken and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required; but such depositions shall be subjected to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.

[The word "taken" in the last line, as it stands in the original, is "therein" in the printed code.]

EXCEPTIONS TO DEPOSITIONS.

Notice of filing.

SEC. 3751. The clerk shall, forthwith, after filing depositions in his office, issue a notice of the filing of such depositions, reciting therein the title of the cause, names of witnesses, and the date of filing such depositions, and serve the same upon the attorneys of the parties in the action therein recited. Said notice shall be deemed duly served, when the clerk shall have deposited copies of the same in the post-office at the place where such cause is pending for trial, duly directed to the post-office address of the respective attorneys for the parties in such action, which notice shall be so mailed by the clerk on the day he files such deposition; and if the post-office address of any of the attorneys of the parties is unknown to the clerk, he shall then deposit said notice, addressed to such attorney or attorneys, at the post-office where such cause is then pending for trial. No exceptions to depositions other than for incompetency or irrelevancy shall be regarded, unless made by motion filed by the morning of the second day of the first term held after the depositions have been filed by the clerk; *provided*, such depositions have been filed three days prior thereto. If the depositions are afterwards received during such term, such motion shall be filed by the morning of the third day after such depositions are filed. All motions to suppress depositions must be filed before the cause is reached for trial.

Exceptions.

Proviso:

Time of filing motion to suppress.

[A substitute for the original section; 17th G. A., ch. 26. The portion of the section following the words "pending for trial," in the fourteenth line, except the proviso and the word "third," in the twenty-first line, constitute, substantially, the section as it originally stood.]

The exception here contemplated must be by motion and by the time fixed. The section, *held* applicable to the objection that certain questions were not proper cross-examination: *Johnson v. C. R. I. & P. R. Co.*, 51–25.

Section, *held* applicable to an objection that the statutory cross-interrogatories were not answered: *Harris M'f'g Co. v. Marsh*, 49–11; so,

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also, to the objection, that copies of notes referred to in the answers were not attached: *Ibid.*

An objection to a deposition for a defect in the notice, first interposed when it is offered in evidence on the trial, will not be regarded, although exception was taken to the notice before the commission issued: *Pilmer v. Branch, etc., Bank*, 16–321.

Under the section as amended, *held*, that where the cause was reached for trial when the motion to suppress a deposition was filed, the motion was properly overruled: *Bays v. Herring*, 51–286.

Section applied: *Nelson v. C. R. I. & P. R. Co.*, 38–564, 566.

Hearing.
R. § 4090.
10 G. A. ch. 85, § 4.

SEC. 3752. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions before the commencement of the trial.

Errors waived.
R. § 4091.

SEC. 3753. Errors of the court in its decision upon exception to depositions are waived, unless excepted to.

Costs.
R. § 4100.
C. '51, § 2474.

SEC. 3754. In all cases of taking depositions as hereinbefore provided, the costs thereof must be paid in the first place by the party at whose instance they are taken, subject like other costs to be taxed against the failing party in the suit.

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TITLE XXIII.

OF COMPENSATION OF OFFICERS.

CHAPTER 1.

OF STATE AND DISTRICT OFFICERS.

Governor and secretary. R. § 41. C. '51, § 37. 10 G. A. ch. 85, § 95. 13 G. A. ch. 112, § 1.

SECTION 3755. The salary of the governor shall be three thousand dollars per annum; and the salary of the private secretary of the governor twelve hundred dollars per annum.

Secretary of state and deputy. R. §§ 58, 4133. C. '51, §§ 42, 2524. Ex. S. 9 G. A. ch. 19, § 4. 13 G. A. ch. 44, § 13; ch. 112, §§ 2, 3. Joint resolution, 12 G. A., No. 21.

SEC. 3756. The salary of the secretary of state shall be twenty-two hundred dollars per annum; and the salary of the deputy secretary of state shall be twelve hundred dollars per annum. The secretary of state shall collect the following fees:

For each commission to commissioners in other states, three dollars.

For each commission to notaries public, one dollar and twenty-five cents.

For certificate, with seal attached, one dollar.

For a copy of any law or record, upon the request of any private person or corporation, for every hundred words, ten cents.

For recording articles of incorporation other than those of a public character, for every hundred words, ten cents.

Auditor and deputy. R. § 70. C. '51, § 49. Ex. S. 9 G. A. ch. 19, § 4. 13 G. A. ch. 112, §§ 2, 3.

SEC. 3757. The salary of the auditor of state shall be twenty-two hundred dollars per annum; and the salary of the deputy auditor of state shall be twelve hundred dollars per annum; and the auditor shall collect fees as provided in chapters on insurance.

Treasurer and deputy. R. § 82. C. '51, § 61. Same. 12 G. A. ch. 108.

SEC. 3758. The salary of the treasurer of state shall be twenty-two hundred dollars per annum; and the salary of the deputy treasurer of state twelve hundred dollars per annum.

Register state land office and deputy. Ex. S. 9 G. A. ch. 19, § 4. 12 G. A. ch. 139

SEC. 3759. The salary of the register of the state land office shall be twenty-two hundred dollars per annum; and the salary of the deputy register of the state land office twelve hundred dollars per annum. Such register shall also collect such fees as is provided in chapter five, title two of part one of this code.

[This section is amended by the act following.]

[Seventeenth General Assembly, Chapter 73.]

Salaries changed.

SEC. 1. The salary of the register of the state land office shall be two thousand dollars per annum, and the salary of his deputy shall be one thousand dollars per annum, and said salaries shall be compensation in full for all services required by law of said reg-

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No clerk hire.

ister and his deputy; and no additional allowance for clerk hire, contingencies, or for any other purpose connected with the business of said office, except the necessary stationery, shall be made.

Repealing clause.

SEC. 2. All acts and parts of acts inconsistent herewith are hereby repealed.

Superintendent public instruction and deputy. Ex. S. 9 G. A. ch. 19, § 4. 10 G. A. ch. 52, § 12.

SEC. 3760. The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum; and the salary of the deputy superintendent of public instruction, twelve hundred dollars per annum.

Adjutant general. 10 G. A. ch. 17.

SEC. 3761. The salary of the adjutant-general shall be two thousand dollars per annum.

[This is modified by 18th G. A., ch. 74, § 11, inserted on page 261.]

State librarian. 14 G. A. ch. 92, § 8.

SEC. 3762. The salary of the state librarian shall be one thousand dollars per annum, nor shall any extra amount be paid for any assistant librarian.

[As amended by 17th G. A., ch. 75, substituting "one thousand" for "twelve hundred" dollars.]

Superintendent of weights and measures. 9 G. A. ch. 82, § 15.

SEC. 3763. The salary of the state superintendent of weights and measures shall be fifty dollars per annum.

STATE PRINTER.

State printer. R. §§ 148-153.

SEC. 3764. The state printer shall be paid ninety per cent. of the following prices for all work done for the state, and no more:

For composition on the laws, journals, reports, circulars, and all other printed matter, except blanks, sixty cents per thousand ems, and ninety cents per thousand ems for figure work, where the figures are arranged in columns, and one dollar and twenty cents per thousand ems for rule and figure work.

For press work, the compensation shall be fifty cents per token for each eight-page form, octavo size, or for each four-page form, quarto size; provided that two hundred and forty impressions shall constitute a token, except when the work ordered shall not amount to that many impressions, when any less quantity shall be counted as a token; for pressing books and pamphlets in the sheet, said printer shall receive eight cents per hundred sheets.

For printing blanks, where the blanks require one side of a sheet of folio-post or any larger sized paper, there shall be allowed for the first quire one dollar and seventy-five cents; for the balance of the first ream sixty cents per quire, and twenty-five cents per quire for any number exceeding one ream.

For printing blanks on letter, cap, or any larger paper less than folio post, there shall be allowed for the first quire, one dollar and twenty cents; if the blank occupy one side of a sheet, for the balance of the first ream, thirty cents per quire, and for any number exceeding one ream, twenty cents per quire; provided that twenty-four blanks shall constitute a quire, except when two blanks are printed on one side of a sheet, when twenty-four sheets of paper shall constitute a quire.

For printing blanks upon any paper mentioned in the preceding section, or any smaller paper, and when two or more blanks are printed upon a half sheet, seventy-five cents shall be allowed for the first quire, and fifteen cents per quire for any number exceed-

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ing one ream; provided that for this kind of blanks twelve sheets of paper shall constitute a quire.

For printing heading to assessments or census blanks, one dollar and thirty cents shall be allowed for the first quire, and forty cents per quire for the balance of the first ream, and twenty-five cents per quire for any number exceeding one ream; provided that when a sheet is printed on both sides, twelve sheets shall constitute a quire, and when on one side, twenty-four sheets shall constitute a quire.

[As amended by 15th G. A., ch. 58, § 1, which changed the first two lines so as to allow only ninety per cent. of the fees formerly authorized.]

No constructive charges allowed. R. § 155.

SEC. 3765. No constructive charges of any kind shall be allowed the state printer, and he shall be allowed only for composition, press work, and type actually set up and imposed, or for paper actually printed, and he shall file with the secretary of state a copy of each job of work on which each item of charge is made at the time of rendering his account, before the secretary can issue him the receipt contemplated by law. The actual number of ems and tokens of press work in each job shall be specified, with a statement that the law has been strictly complied with and that no constructive charges are embraced in his account as rendered, which statement shall be verified by the affidavit of the state printer.

To receive half pay as work progresses. R. § 146.

SEC. 3766. At any time during the progress of printing the laws or journals of either house of the general assembly, the secretary of state may issue his certificate for one-half of the value of the work done, such value to be determined by the secretary, upon the production of which, the auditor of state shall audit the same and draw a warrant therefor on the state treasury.

STATE BINDER.

State binder. 12 G. A. ch. 96.

SEC. 3767. The state binder shall be paid eighty-five per cent. of the following prices for all work for the state:

For folding and trimming all documents not stitched, fifteen cents per hundred copies;

For folding, stitching, and binding in paper covers, all messages, reports, and documents not exceeding one sheet, allowing eight pages for a sheet, one dollar and twenty-five cents per hundred copies, and for each additional sheet of eight pages, twenty-five cents per hundred copies, the cover of each copy to be counted as four pages;

For folding, sewing and binding the journals of the two houses of the general assembly in paper covers, twenty-five cents per copy;

For folding, sewing, and binding in muslin or cases, with gilt letters for title, same style as agricultural reports for eighteen hundred and sixty-six, thirty-five cents per copy for a volume of four hundred pages or less, and for each additional hundred pages, or fraction thereof over fifty pages, five cents;

For folding, sewing, and binding in "half sheep," with gilt letters for title, same style as the legislative documents of eighteen hundred and sixty-six, sixty cents per copy for each volume of

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four hundred pages or less, and five cents for each additional hundred pages, or fraction thereof over fifty pages;

For folding, stitching, and binding the laws of each general assembly in boards, with muslin backs and paper sides, same as the laws of eighteen hundred and sixty-six, eighteen cents per copy; and for all styles of work not named in this chapter, he shall be paid as nearly as possible in accordance with the rates above specified;

For folding, sewing, and binding in "law sheep," same style as Iowa reports, eighty cents per copy for each volume of four hundred pages or less, and five cents for each additional hundred pages, or fraction thereof over fifty.

[As amended by 15th G. A., ch. 58, § 2, which inserted the words "eighty five per cent. of" in the first line.]

To receive half pay during progress of work. R. § 175.

SEC. 3768. At any time during the progress of the binding of the laws or journals of the general assembly, the secretary of state may issue his certificate for one half of the value of the work done and performed, to be ascertained by said secretary, and the amount so certified shall be audited by the auditor of state, and a warrant drawn therefor by him on the state treasury.

SUPREME JUDGES—ATTORNEY GENERAL—CLERK.

Judges of supreme court. Ex. S. 9 G. A. ch. 19 § 3. 11 G. A. ch. 57, § 2. 13 G. A. ch. 112, § 4; 12 G. A. ch. 27, § 5; 14 G. A. ch. 37, § 5.

SEC. 3769. The salary of each judge of the supreme court shall be four thousand dollars per annum.

[The original section was repealed by 18th G. A., ch. 27, and the foregoing substituted, which is the same as the original except that it omits provisions as to mileage.]

Attorney general. 11 G. A. ch. 67. 12 G. A. ch. 53, § 1.

SEC. 3770. The salary of the attorney-general shall be fifteen hundred dollars per annum, and whenever he is required by the duties of his office, or by direction of the governor or general assembly, to attend any of the courts of this state, or any of the federal courts of this or any other state, other than the supreme court when held at the capital, he shall receive five dollars for each day he actually attends the sessions of such courts, in addition to his salary, and shall also in addition to his salary be entitled to charge and receive such fees as are allowed him by the chapters on insurance.

Clerk of supreme court. R. §§ 2949, 4134-5. C. '51, § 2525-6. 12 G. A. ch. 27, § 5. 14 G. A. ch. 37, § 5.

SEC. 3771. The salary of the clerk of the supreme court shall be twenty-two hundred dollars per annum; and there is allowed him the sum of twelve hundred dollars per annum, or so much thereof as may be necessary, for clerk hire, to be paid upon affidavit of the clerk that the services for which such clerk hire is allowed are necessary to the proper discharge of the duties of his office.

Fees to be collected and paid into state treasury.

The clerk shall collect the following fees, and account for them as provided in section three thousand seven hundred and seventy eight of the code, and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars;

Upon entering judgment when the cause has been tried on its merits, two dollars;

Upon each continuance, one dollar;

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Upon issuing each execution, one dollar and twenty-five cents;
Upon entering satisfaction of each judgment, fifty cents;
Upon each writ, rule or order to be served upon any person not in court, twenty-five cents;
For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion, or any record made at the request of any person, for each one hundred words, ten cents.

[A substitute for the original section; 17th G. A., ch. 74, § 1. The original allowed the clerk fees by way of compensation.]

[Sec. 3772, as to fees of clerk of supreme court in criminal cases, repealed; 17th G. A., ch. 74, § 2.]

Execution for fees of clerk.

SEC. 3773. If any of the foregoing fees of the clerk are not paid in advance, execution may issue therefor, except where the fees are payable by a county or the state.

DISTRICT OFFICERS.

District and circuit judges. Ex. S. 9 G. A. ch. 19, § 2. 11 G. A. ch. 87, § 1. 12 G. A. ch. 86, § 13. 13 G. A. ch. 112, § 5. 14 G. A. ch. 22, § 3.

SEC. 3774. The salary of each judge of the district, and of the circuit court shall be twenty-two hundred dollars per annum.

[The words "per annum" in the last line, as given in the printed code, are not in the original. They are here retained, however, as being probably inserted by the editor.]

District attorney. R. § 381. Ex. 9 G. A. ch. 19, § 5. 10 G. A. ch. 38, § 1.

SEC. 3775. The salary of each district attorney shall be six hundred dollars per annum, and they shall receive in addition thereto the following fees, to be audited and paid like other claims against the counties:
For each conviction on a plea of guilty, five dollars;
For each jury trial in cases of misdemeanor, ten dollars;
For each jury trial in cases of felony, twenty dollars;
For each judgment for costs only, five dollars;
For prosecuting an information before a justice of the peace for a violation of the laws in relation to the sale of intoxicating liquors, five dollars;
For all fines and forfeitures actually collected by him, ten per cent. upon all sums less than two hundred dollars, and upon all sums exceeding that amount, one per cent.

Where two or more defendants are indicted jointly and plead guilty, the district attorney is entitled to the fee provided in such cases for each, as a separate judgment must be rendered against each one: *The State v. Hunter*, 33-361.

In case of conviction. 10 G. A. ch. 38, § 2.

SEC. 3776. In cases of conviction, the fees contemplated in the preceding section shall be taxed against the defendant, and when collected paid into the county treasury.

Short hand reporters. 14 G. A. ch. 99, §§ 2, 3.

SEC. 3777. Short-hand reporters shall receive compensation as follows:
For each day actually in attendance in court under the order of the judge, such sum as may be fixed by the judge not exceeding six dollars per day, to be audited and paid by the county upon the certificate of the judge of the court, but the judge shall not order the attendance of said reporter, except during that part of the term when in his judgment the reporting of testimony will be

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required, and he shall discharge said reporter from further attendance at each term as soon as in his judgment the reporting of testimony will not be further required for such term; and for making transcript of his original notes, for each one hundred words, six cents; but where such transcripts are desired in any civil case, the fees therefor shall be paid by the party desiring the same, and the amount allowed such reporter for reporting testimony in any case shall, in all instances, except where the defendant in a criminal case is acquitted, be taxed as a part of the costs in the case; *provided*, that when the defendant in any criminal cause, who shall have perfected an appeal from a judgment against him, presents to the judge satisfactory proof by affidavit or otherwise, that he is unable to pay for such transcript, the court, if in the opinion of the judge justice will be thereby promoted, may order said transcript to be made at the expense of the county; and the original *notice* [notes] of any testimony taken in any case shall be filed in the office of the clerk of the court and become a part of the record in said case, and said notes or any transcript thereof duly certified by the reporter of said court, shall be admissible in any case in which the same are material and competent to the issue therein, with same force and effect as depositions, and subject to the same objections, so far as applicable; and said original notes, or the transcript thereof or any part thereof, may be referred to in any bill of exceptions, and when duly transcribed and certified, shall be inserted therein on appeal; and upon demand of any person for a duly certified transcript of any designated portion of the original notes of testimony in any case, it shall be the duty of said reporter to transcribe the portion so designated, and duly certify the same upon payment of fees therefor; *provided*, that when the reporter taking the notes in any case in court has ceased to be the official shorthand reporter of that court, any transcript by him made therefrom and duly certified by him under oath, as a full, true and complete transcript of said notes, shall have the same force and effect as though certified in the same manner by the official shorthand reporter of said court.

[As amended by 18th G. A., ch. 195, § 2, substantially changing the entire section. The first section of the act amends § 181, which see.]

Certain state officers to pay fees to state treasurer. 13 G. A. ch. 112, § 8.

SEC. 3778. The secretary of state, auditor of state, and register of the state land office, shall keep an accurate and particular account of all fees received by them, which shall be verified by affidavit, and rendered monthly to the treasurer of state, and they shall pay the amounts thus received to such treasurer at the end of each month.

Judge's salary not increased. Same, § 6.

SEC. 3779. During the term for which any judge may have been elected or appointed, his salary shall not be increased by this chapter, except that any judge elected to fill a vacancy shall receive the salary herein provided.

Salaries paid monthly. Same, § 7.

SEC. 3780. The salaries of all officers mentioned in this chapter shall be paid in monthly installments at the end of each month, and shall be in full compensation for all services, except as otherwise expressly provided in this chapter.

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CHAPTER 2.

OF COUNTY AND TOWNSHIP OFFICERS.

Clerk of district and circuit court. R. §§ 430, 1852, 4136.

SECTION 3781. The clerk of the district or circuit court shall be entitled to charge and receive the following fees:

For filing any petition, appeal, or writ of error, and docketing the same, one dollar and fifty cents;

For every attachment, fifty cents;

For every cause tried by jury, one dollar and fifty cents;

For every cause tried by the court, seventy-five cents;

For every equity cause, one dollar and fifty cents;

For each injunction, or other extraordinary process or order, one dollar;

For all causes continued on application of a party by affidavit, fifty cents;

For all other continuances, fifteen cents;

For entering any final judgment or decree, seventy-five cents;

For taxing costs, fifty cents;

For issuing execution or other process after judgment or decree, fifty cents;

For filing and properly entering and endorsing each mechanic's lien, the same to be taxed as other costs in case a suit is brought thereon, one dollar;

For certificate and seal, fifty cents;

For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents.

For entering any rule or order, twenty-five cents;

For issuing writ or order, not including subpœnas, fifty cents;

For issuing commission to take depositions, fifty cents;

For entering sheriff's sale of real estate, fifty cents;

For entering judgment by confession, one dollar;

For entering satisfaction of any judgment, twenty-five cents;

For all copies of record or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;

For taking and approving a bond and sureties thereon, fifty cents;

For declaration of intentions by an alien to become a citizen, twenty-five cents;

For all services on naturalization of aliens, including oaths and certificate, fifty cents;

In criminal cases. R. §§ 4140-1. C. '51, §§ 2531-2. 13 G. A. ch. 68.

In criminal cases, and in all causes in which a state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county;

For making out transcripts in criminal cases appealed to the supreme court, when the defendant is unable to pay, for each one hundred words, ten cents, to be paid by the county.

"For entering any rule or order" comprehends the entering of an order for change of venue from one court to another, and the fee therefor must

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be paid before such change takes place: *Stryker v. Rivers*, 47–108.

The clerk cannot charge a fee for services required to be performed by him, but for which no specific fee is allowed: *Sprout v. Kelly*, 37–44.

The clerk is entitled to receive the fees here provided, no matter when collected: *Peet v. White*, 43–400.

Pensions and bounties. 10 G. A. ch. 88.

SEC. 3782. The clerks of the district court shall certify under the seal of such court, to all applications and other papers requiring the certificate and seal of a court of record to procure pensions, bounties, and back pay for soldiers or other persons entitled thereto, whenever requested by the applicant, his agent, or attorney, and such clerk shall be entitled to the sum of ten cents only for such service.

In probate matters. 12 G. A. ch. 134, § 1.

SEC. 3783. There shall be such compensation paid such clerk for his services in probate matters out of the fees collected by him for probate business, as the board of supervisors may allow.

Limit of compensation. R. § 4327. 10 G. A. ch. 68.

SEC. 3784. The total amount of compensation of such clerk for all official services shall not exceed the sum of eleven hundred dollars per annum, in counties having a population not exceeding ten thousand; the sum of thirteen hundred dollars per annum in counties having a population in excess of ten thousand, but not exceeding twenty thousand; nor the sum of fifteen hundred dollars per annum in counties having a population in excess of twenty thousand, but not exceeding thirty thousand.

If the fees collected by the clerk in any county in any one year shall exceed the sums aforestated, the excess shall be paid into the county treasury for the use of the county fund. In case the aggregate amount of fees so received by the clerk in any one year is less than the limit of his compensation as herein fixed, and such amount is deemed inadequate compensation by the board of supervisors, they may allow such additional amount as they may deem just and proper, within the limits herein prescribed.

When in the judgment of the board of supervisors it is necessary to the proper discharge of the duties of the office, said board may, upon application of the clerk, authorize said clerk to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed.

Provided, that in counties having a population in excess of thirty thousand, but not to exceed forty thousand, the board of supervisors may allow such compensation to the clerk, deputy and clerks as they may deem just and proper, but that the sum total of such compensation allowed shall not exceed twenty-five hundred dollars; and *provided further*, that in counties having a population in excess of forty thousand, the board of supervisors may allow such compensation to the said clerk, deputy and clerks, as they may deem just and proper, but that the total compensation shall not exceed thirty-five hundred dollars; *provided further*, that in any county having a population of over thirty thousand and under forty thousand, and which is within a judicial district in which the circuit has been divided, the board of supervisors may, if they find it necessary, employ an additional deputy or clerk for duties in connection with the probate records, at a compensation not exceeding six hundred dollars per annum. *Provided further*, that in each county having two county seats, the compensation of clerk of courts, including the amount paid his

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deputies and clerks, shall not exceed three thousand dollars, in any one year, any excess of fees collected to be paid into the county treasury as above provided.

[A substitute for the original section; 18th G. A., ch. 184, § 1. Other sections of the act, applicable to clerk as well as other officers, are inserted following § 3798.]

This is to be in full of all official services, and includes any sum allowed for probate business under the preceding section. The clerk is to be allowed in addition, however, such reasonable deputy hire as the pressure of the business of his office demands. (See § 771). *Washington Co. v. Jones*, 45–260, 264.

Previous statutes as to compensation construed, and, *held*, that all fees of every kind in excess of the fixed salary and any additional amount allowed by the board, was to be paid over to the county: *Boone Co. v. Wilson*, 38–372.

SEC. 3785. The clerk of the district court, as such, and as clerk of the circuit court, shall report to the board of supervisors of his county at each regular session, a full and complete statement of the amount of fees received by him, which shall be verified by the affidavit of such clerk. Report to supervisors: fees collected. R. § 431.

SEC. 3786. The clerk of the district and circuit courts shall pay into the county treasury all money received for witness fees remaining unclaimed in his hands for six months after the receipt of the same, and at the time of so doing shall deliver to the treasurer a written statement, giving the title of the cause and style of the court in which the same was pending, with the name of the witnesses and the amount each one is entitled to receive, and the treasurer shall keep an account of the money thus received separate from other funds, and shall pay the same to the persons entitled thereto as shown by such statement, taking proper receipts therefor. Pay money received for witnesses that is uncalled for to county treasurer. R. §§ 353–6.

SEC. 3787. There shall be paid the clerk of the circuit court the following fees: For marriage licenses and fees in probate matters. R. § 436.

For issuing marriage licenses, one dollar;

For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; 9 G. A. ch. 71, § 4; ch. 137. 12 G. A. ch. 85, § 15.

Where such value is between three and five thousand dollars, five dollars;

Where such value is between five and seven thousand dollars, eight dollars;

Where the value exceeds eight thousand dollars, ten dollars;

And in addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents;

All of which fees shall be paid into the county treasury.

See note to § 3784.

SHERIFF.

SEC. 3788. The sheriff is entitled to charge and receive the following fees: Schedule of fees. R. §§ 2623, 4145. C. 51, § 2536.

For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of such court, two dollars per day. Attending supreme court.

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Serving order, notice or warrant. For serving an order or notice and making return thereof, for the first person served, fifty cents; for each additional person, twenty-five cents; for each warrant served, two dollars and mileage, and repayment of any amounts actually paid by him as necessary expenses for assistance and conveyance in executing such warrant, as sworn to by the sheriff. In case service of the warrant cannot be made, such reasonable compensation may be allowed as the board of supervisors may deem just and equitable.

Copy of order or notice. For each copy of such order or notice, when required, for each hundred words, ten cents;

Commitment: discharge. Each commitment to jail, twenty-five cents; discharge from same, twenty-five cents;

Copy of paper. Copy of a paper required by law, when made by him, for each hundred words, ten cents;

Serving subpœna: calling jury. For serving and returning a subpœna, for each person, twenty cents; for calling a jury, each case, ten cents;

Summoning jury. Summoning a grand or trial jury, for each panel, including mileage to be paid out of the county treasury, six dollars;

Traveling fees. Traveling fees in other cases required by law, going and returning, per mile, five cents;

Executing deed. Making and executing a deed for land sold on execution, one dollar;

Summoning jury in forcible entry and detainer. Summoning a jury in case of forcible entry and detainer, fifty cents;

Partition: assignment of dower. Serving an execution or order for the partition of real estate or assignment of dower, one dollar;

Taking bond. For taking each bond required by law, twenty-five cents;

Summoning jury to assess damages. For summoning a jury to assess the damages to the owner of lands taken for any work of internal improvements and attending upon them, including mileage, five dollars; if such case occupies more than one day, for each additional day or fraction thereof, one dollar and fifty cents. There shall be nothing in this section so construed that will allow any sheriff to make separate charges for different assessments, provided they can be done by the same set of appraisers, and completed in one day of ten hours.

Serving attachment. For serving each attachment and making return thereof, one dollar;

Inventory of property. For the time necessarily employed in making an inventory of personal property attached or levied upon, per day, one dollar;

Collecting money. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent.; and on all excess over five hundred dollars, one per cent.;

Same. But where the property is purchased by the plaintiff in execution, or where the money is collected without sale of property, one-third of the above rates;

Return of paper not served. For returning any order, warrant, or notice not served, five cents;

Receiving prisoner surrendered. For receiving a prisoner on surrender by bail, twenty-five cents; for taking new bail or bond, twenty-five cents;

Boarding prisoner. For boarding a prisoner, a compensation to be fixed by the board of supervisors, not to exceed for each day, fifty cents.

Washing for prisoner. For washing for prisoner, the sheriff shall have such compensation as shall be allowed by the board of supervisors.

Conveying prisoners to penitentiary, asylum or reform school. The sheriff, for conveying one or more convicts to either of the penitentiaries of this state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane per-

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son or persons to any insane asylum in the state, or person or persons to the reform school in the state, shall be allowed as full compensation therefor, his necessary traveling expenses actually paid by him, including board and railroad fare for himself and such convicts, insane or other prisoners, or any other necessary expenses, and, in addition thereto, thirty cents per hour for the time necessarily employed in going to and returning from said prisons, asylums, or reform schools, to be certified by the oath or affidavit of such sheriff, accompanied by the proper vouchers, to the board of supervisors of the county where the convictions took place. Should the sheriff need any assistance in taking prisoners to the penitentiary, or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors.

[A substitute for the original section; 18th G. A., ch 115; the last section of which repealed all acts and parts of acts inconsistent therewith. The paragraphs, as given in the foregoing, are separate sections in the act, but the matter is inserted here in the same form as in the section for which this is a substitute.]

The compensation of the sheriff is fees, and he cannot claim a *quantum meruit* for his services: *Wapello Co. v. Monroe Co.*, 39–349.

These fees, together with the salary provided by the next section, are in full of all services and the sheriff cannot make extra charge for guarding and waiting on prisoners: *Grubb v. Louisa Co.*, 40–314.

The provisions as to various items of charge considered: *Bringolf v. Polk Co.*, 41–554.

The sheriff is allowed but one fee for summoning a jury to assess the damages to owners of land taken for works of internal improvement. He may not claim a separate fee for each tract when only one jury is summoned: *Robb v. A. K. & D. M. R. Co.*, 44–440.

Where two or more defendants are jointly indicted, they may be arrested on a joint warrant or several warrants, and the sheriff's fee will be for serving one warrant or several, as the case may be: *The State v. Hunter*, 33–361

Where a person not an officer serves notices, etc., his charges cannot be taxed as costs: *Conway v. McG. & M. R. R. Co.*, 43–32.

As to sheriff's fee in case of purchase of property by plaintiff in execution, see *Gilman v. D. V. R. Co.*, 42–495.

The "route of travel" referred to in the original section, as fixing the amount of mileage to be allowed as therein provided, for conveying prisoners, etc., is the route traveled by persons pursuing a journey between the given points; and *held* that where the usual and speediest route was by rail, the sheriff might convey the prisoner in that way and charge mileage for the distance traveled, although there was a shorter route by highway: *Maynard v. Cedar Co.*, 51–430.

Salary. 10 G. A. ch. 46, § 2. 13 G. A. ch. 152.

SEC. 3789. The sheriff is also entitled for attending district and circuit courts, and for other services for which no compensation is allowed by law, [to] such annual salary as may be fixed by the board of supervisors, but in no case to exceed two hundred dollars.

[A substitute for the original section; 18th G. A., ch. 115; the last section of which act repealed all acts and parts of acts inconsistent therewith.]

The sheriff has charge of the county jail and is required to perform the duties of jailor. He may appoint a deputy to act in such capacity; but such jailor cannot recover compensation from the county: *McDonald v. Woodbury Co.*, 48–404; nor can the sheriff recove extra compensation for guarding and waiting on prisoners: *Grubb v. Louisa Co.*, 40–314.

In criminal causes. R. § 4146. C. '51, § 2587.

SEC. 3790. In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as

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their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor, and paid out of the county treasury.

COUNTY SUPERVISORS.

Members of board of supervisors. 12 G. A. ch. 105. 13 G. A. ch. 148, § 4.

SEC. 3791. The members of the board of supervisors shall each receive four dollars for each day actually in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session but employed on committee service, and six cents per mile for every mile traveled in going to and from said session of the board; *provided*, that in counties having a population as shown by the last preceding census of less than ten thousand, they shall not receive compensation for more than twenty days in one year; and in counties having a population of more than ten thousand, but less than thirty thousand, for more than thirty days in the year; and in counties having a population of thirty thousand or over, not more than forty days in one year.

RECORDER—TREASURER.

Recorder. R. § 4143. C. '51, § 2584.

SEC. 3792. The recorder shall be entitled to charge and receive the following fees:

For recording each instrument containing four hundred words, fifty cents;

For every additional hundred words, or fraction thereof, ten cents.

Treasurer. R. § 777. 10 G. A. ch. 129, § 6. 11 G. A. ch. 75. 13 G. A. ch. 166.

SEC. 3793. Each county treasurer shall receive for his services the following compensation: Three-fourths of one per cent. of all money collected by him as taxes due any incorporated city or town, to be paid out of the same;

2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;

3. For each certificate of purchase issued for land sold for non-payment of taxes, twenty cents;

4. For paying money into the state treasury when required by law, or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent. on the amount so paid, which allowance shall be paid by the county.

5. When the aggregate amount of compensation allowed by this and the next section exceeds twelve hundred dollars in any one year in counties where taxes are collected by township collectors, or fifteen hundred dollars in counties having no township collectors, the excess shall be paid into the county treasury, but when, in the judgment of the board of supervisors, it is necessary for the proper discharge of the duties of the office, said board may, upon application of the treasurer, authorize said treasurer to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum for the time actually employed; *provided*, that in counties where population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars in any case, and the board shall not allow to exceed three hundred dollars clerk

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hire in such counties; *and provided*, that in counties having more [than] thirty thousand population, the board of supervisors may grant such additional compensation for treasurer, deputy or clerk hire as they may deem just and proper.

[The original section, together with the amendment therein made by 17th G. A., ch. 122, § 3, was repealed by 18th G. A., ch. 184, § 2, and the foregoing enacted as a substitute. Other provisions of the same act, applicable to county treasurer as well as other officers, are inserted following § 3798.]

To give information of amount of taxes due from any person. 9 G. A. ch. 168, § 1.

SEC. 3794. The county treasurer shall, if applied to by letter, enclosing thirty cents value in postage stamps, asking for information of the amount of taxes upon any specified parcel or parcels of land in his county, answer the same correctly by mail, giving direct answers to all the inquiries in such letter respecting the amount and interest of the unpaid taxes as the same appears from the tax books in his office. If the total of such land specified in any one letter exceeds three hundred and twenty acres, then such treasurer is not bound to answer such letter unless it contains, besides the thirty cents above provided, ten cents in addition for every one hundred and sixty acres when the total acres specified in such letter exceed the said three hundred and twenty acres; but the aggregate fees thus charged shall in no case exceed the sum of fifty cents; and upon the return to such treasurer of the letter or a copy thereof so sent by him, with the amount due as shown by such letter, such treasurer shall pay such taxes and return a receipt therefor by mail.

Penalty for failure. Same, § 2.

SEC. 3795. Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money enclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned in the preceding section than is therein provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action in any court having jurisdiction.

Render account of money received as compensation to supervisors. 10 G. A. ch. 129, § 9.

SEC. 3796. The county treasurer shall enter in a book kept for that purpose, all moneys received by him for services rendered, designating for what the same was received, and shall render an account verified by affidavit to the board of supervisors at each session thereof, stating fully all money so received and from what source derived, and any excess to which he would be entitled under the preceding section over and above the sum therein limited shall be paid into the county treasury.

AUDITOR.

County auditor. R. § 777. 9 G. A. ch. 25, § 8.

SEC. 3797. The county auditor shall be entitled to charge and receive the following fees:

For recording each bond required to be by him recorded, fifty cents;

For transfers made in the transfer books, for each deed, twenty-five cents;

For issuing certificate of redemption of land sold for taxes, twenty-five cents;

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For each certificate issued by the treasurer for lands sold for non-payment of taxes, fifteen cents.

Limit of compensation. 12 G. A. ch. 160, § 6. 9 G. A. ch. 5. §§ 4, 5.

SEC. 3798. The total compensation of the auditor, in any one year, shall not exceed the sum of twelve hundred dollars, inclusive of fees, but when, in the judgment of the board of supervisors, it is necessary for the proper discharge of the duties of the office, said board may, upon application of the auditor, authorize said auditor to employ a deputy or clerk, at a salary not exceeding the rate of six hundred dollars per annum; *provided*, that in counties of more than twenty-five thousand population, the board of supervisors may grant such additional compensation to the auditor, deputy, or clerks, as they deem it just and proper.

Deputy.

Additional compensation.

[A substitute for the original section; 18th G. A., ch. 184, § 3. Other sections of the same act are inserted below.]

The county is under no legal obligation to reimburse the auditor an amount paid out by him for services of a deputy: *Benton v. Decatur Co.*, 36–504.

[Eighteenth General Assembly, Chapter 184.]

[Sections 1, 2, and 3 provide substitutes, respectively, for sections 3784, 3793, and 3798, which see.]

Census to be guide as to population.

SEC. 4. It shall be the duty of the board of supervisors, in fixing the compensation of the officers as provided in this act, to take the latest state or national official census as their guide in so doing.

Officers to keep account of fees and report same.

SEC. 5. It is hereby made the duty of the county auditor, the county treasurer, and the clerk of the district and circuit courts, in each county of the state, to keep a complete and accurate account of all the fees charged and collected by them as now provided by law; which account shall be made and kept as a permanent record of the office; and it is hereby made the further duty of each of the officers therein specified, to make a report of such fees to the board of supervisors at each regular session of said board, verified by oath or affirmation, a summary of which shall be spread upon the minutes of said board and made a part of the record. If any officers shall neglect or refuse to make such report, as required by this section, it shall be the duty of the board to employ an expert to examine the books, papers and accounts of such officer and to make such report, the expenses therefor being charged to the delinquent officer and collectible upon his official bond.

Board of supervisors may make examination of books.

CORONER—SURVEYOR.

Coroner. R. § 4148. C. 51, § 2539.

SEC. 3799. The coroner is entitled to charge and receive the following fees:

For a view of each body and taking and returning an inquest on same, five dollars;

For a view of each body and examination without inquest, three dollars;

For issuing subpœna, warrant, or order for a jury, twenty-five cents;

For each mile traveled to and returning from an examination or inquest, ten cents;

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Which fees shall be paid out of the county treasury when they cannot be obtained from the estate of the deceased;

For all other services, the same fees as are allowed sheriffs in similar cases, to be paid in like manner.

Surveyor. R. § 4155. C. '51, § 2546. 11 G. A. ch. 109.

SEC. 3800. The county surveyor is entitled to charge and receive the following fees:

For each day's service actually performed in traveling to and from the place where any survey is to be made, and for making the same and return thereof, four dollars;

For certified copy of the plat or field-notes, fifty cents.

[A substitute for the original section, changing the rate of compensation; 16th G. A., ch. 25.]

NOTARIES PUBLIC.

Notaries public. R. § 4151. C. '51, § 2542.

SEC. 3801. Notaries public shall be entitled to charge and receive the following fees:

For every protest of a bill or note, seventy-five cents;

For registering any protest, fifty cents;

For being present at a demand, tender, or deposit, and noting the same, fifty cents;

For administering an oath, five cents;

For certifying to the same under his official seal, twenty-five cents;

For certificate under seal, twenty-five cents;

For other services, the same fees as are allowed justices of the peace for similar services.

SEALER.

Sealer of weights and measures. 9 G. A. ch. 82, § 23.

SEC. 3802. Each sealer of weights and measures shall receive the following fees:

For sealing and marking every beam, ten cents;

For sealing and marking measures of extension at the rate of ten cents per yard, not to exceed fifty cents for any one measure;

For sealing and marking every weight, five cents;

For sealing and marking liquid and dry measures, five cents for each measure.

He shall also be entitled to a reasonable compensation for making weights and measures conform to the standards in his possession.

Inspector of lumber and shingles. R. § 1913.

SEC. 3803. The inspector of lumber and shingles shall receive:

For inspecting and measuring lumber, for each thousand feet, board measure, fifteen cents;

For inspecting shingles, for each thousand, fifteen cents.

JUSTICES OF THE PEACE.

Justices of the peace. 14 G. A. ch. 134.

SEC. 3804. Justices of the peace shall be entitled to charge and receive the following fees:

For docketing each case in any action, except in garnishment proceedings, fifty cents;

For issuing each original notice, fifty cents;

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For issuing attachment or order for the delivery of property, twenty-five cents;

For drawing and approving bond when required in any case, fifty cents;

For entering judgment by confession after the suit brought, fifty cents;

For entering judgment by confession not on suit brought, one dollar;

For entering judgment by default, or on a plea of guilty, fifty cents;

For entering judgment when contested, fifty cents;

For additional when a jury is called, one dollar;

For issuing venire for jury, twenty-five cents;

For each subpœna in civil cause, when demanded, twenty-five cents;

For each oath or affirmation, except in proceedings connected with suits before him, five cents;

For each continuance at the request of either party, fifty cents;

For setting aside each judgment by default, fifty cents;

For each information and affidavit, fifty cents;

For each execution, renewal of execution, or warrant of any kind, fifty cents;

For each bond or recognition, fifty cents;

For each mittimus or order of discharge, fifty cents;

For each official certificate or acknowledgment, twenty-five cents;

For making and certifying transcript, fifty cents;

For trial of all causes, civil or criminal, for each six hours or fraction thereof, one dollar;

For all money collected and paid over without suit, five per cent; and for all money collected and paid over after suit brought without judgment, two per cent., which shall be added to the costs.

The justice is not entitled to the fee "for drawing and approving a bond when required in any case," when the bond is prepared by an attorney and handed to the justice merely to be approved and filed: *McKay v. Maloy*, 53–33.

The justice cannot collect from the debtor the fees provided in the last clause of the section for collection of money without suit. Such compensation is not costs, but fees to be recovered from the party demanding the service (§ 3837): *Pennington v. Beedy*, 50–85.

CONSTABLES.

Constables. 14 G. A. ch. 134.

SEC. 3805. Constables shall be entitled to charge and receive the following fees:

For serving any notice or civil process on each person named therein, fifty cents;

For copy thereof when required; ten cents;

For serving attachment or order for the delivery of property, fifty cents;

For traveling fees, going and returning, per mile, five cents;

For summoning a jury, including mileage, one dollar;

For attending the same on trial, for each calendar day, one dollar;

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For serving execution, besides mileage, fifty cents;
For advertising and selling property, seventy-five cents;
For advertising without selling, twenty-five cents;
For return of execution when no levy is made, ten cents;
For serving each subpœna, besides mileage, fifteen cents;
For posting up each notice required by law, fifteen cents;
For serving each warrant of any kind, seventy-five cents;
For attending each trial in a criminal case, for each calendar day, one dollar;
For serving each mittimus or order of release, besides mileage, thirty cents;
For all money collected on execution and paid over except costs, five per cent, which shall constitute part of the costs.

Constables' fees for serving an original notice of suit in a court of record may be taxed up as costs: *Du Boise v. Babcock*, 42–233.

SEC. 3806. The fees contemplated in the two preceding sections, in criminal cases, shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same, the facts being certified by the justice and verified by affidavit. In criminal cases. 14 G. A. ch. 131.

There is no provision for the compensation of the mayor of a city exercising the powers of a justice under § 506, and he cannot recover from the county any fees in criminal cases tried by him: *Upton v. County of Clinton*, 52–311.

SEC. 3807. A constable or other officer who serves any warrant for the seizure of intoxicating liquors shall be allowed: Officers seizing intoxicating liquors. R. § 1570.
For such service, one dollar;
For the removal and custody of such liquor, his reasonable expenses;
For the destruction of such liquor under the order of the court, his reasonable expenses and one dollar;
For posting and leaving notices in such cases, one dollar.

TOWNSHIP TRUSTEES.

SEC. 3808. The township trustees shall receive:
For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, to each trustee, two dollars; Township trustees. R. § 4156. C. '51, § 2548.
For each day engaged in assessing damages done by trespassing animals, one dollar per day each, to be paid as are other costs in such cases;
But when acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury.
When acting as fence viewers, or in locating any ditch or drain, or in any other case where provision is not made for their payment out of the county treasury, their fees shall be two dollars per day each, and in the first instance be paid by the party requiring their services, and they shall append to the report of their proceedings a statement thereof and therein shall direct who shall Acting as fence viewers, etc.

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By whom fees shall be paid.

pay said fees and in what sums respectively, and the party having so advanced any such fees may have his action therefor against the party so awarded to pay the same, unless, within ten days after demand by the party entitled, the same shall be reimbursed to him.

[As amended by the addition of the last paragraph; 16th G. A. ch. 35.]

TOWNSHIP CLERK—ASSESSOR.

Township clerk. R. §§ 909, 911. 9 G. A. ch. 90.

SEC. 3809. The township clerk shall receive:

For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars;

For all money coming into his hands by virtue of his office, aside from money received from his predecessor in office, five per cent.;

For filing each application for a drain or ditch, fifty cents;

For recording each person's mark or brand for animals, twenty-five cents;

For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation in such cases as the board of supervisors may deem reasonable and allow.

[As amended by inserting the words in the sixth line commencing with "aside" and ending with "office;" 16th G. A., ch. 61.]

Assessors. R. § 730. 9 G. A. ch. 173, § 3.

SEC. 3810. Each township assessor shall receive for each day of eight hours necessarily engaged in the discharge of his official duties, to be paid out of the county treasury, two dollars.

CHAPTER 3.

OF WITNESSES, JURORS, AND SPECIAL CASES.

Jurors. R. § 4154. C. '51, § 2545. 9 G. A. ch. 15, §§ 2, 3. 10 G. A. ch. 92.

SECTION 3811. Jurors shall receive the following fees:

For each day's service or attendance in courts of record, two dollars, and for each mile traveled from his residence to the place of trial; the sum of ten cents;

For each day's service before a justice of the peace, one dollar.

No mileage shall be allowed jurors before justices, nor talesmen.

Jurors' fees in justice's courts shall be taxed as part of the costs.

Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days' attendance and mileage to which each one is entitled.

Where a case before a justice of the peace is commenced in one week and extends into the next, Sunday should not be computed in the number of days of service: *Anson v. Dwight*, 18-241.

Fees taxed as part of costs. 9 G. A. ch. 15, § 4.

SEC. 3812. For every case tried in a court of record by jury, there shall be taxed as a part of the costs as a jury fee the sum of

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six dollars, which shall be collected as other costs and paid into the county treasury by the clerk, who shall report the same to the board of supervisors at each regular session thereof, who shall cause the same to be charged to the treasurer.

[This section was amended by 15th G. A., ch. 32, so as to require the entire *per diem* of the jury to be taxed as costs, to be collected and paid into the county treasury, but this amendment was, by 16th G. A., ch. 39, repealed, and the original section as given above, re-enacted.]

The provision requiring a party to pay a jury fee, or increasing the jury fee, is not in conflict with Const, art. 1, § 9; *Adae v. Zangs*, 41–536, 542; *Little v. McGuire*, 43–447; *Steele v. C. R. of Iowa*, 43–109; *The State v. Verwayne*, 44–621.

Although a trial occupy but part of a day, if there is no other jury trial on the same day, a full day's jury fee should be charged up. What should be the rule when there is more than one jury trial on the same day, *quære: The State v. Verwayne*, 44–621.

Commissioners to appraise property taken for public use. R. § 4158. C. '51, § 2550.

SEC. 3813. Every appraiser or commissioner appointed or selected to appraise the damages caused by taking private property for public use, shall receive the same compensation as jurors in courts of record, but when called to appraise property taken on judicial process, they shall receive twenty-five cents per hour.

Witnesses. R. § 4153. C. '51, § 2544.

SEC. 3814. Witnesses in any court of record, except in the police courts, shall receive for each day's attendance, one dollar and twenty-five cents; in the police courts, witnesses shall receive for each day's attendance, the same fees and mileage as are allowed before justices of the peace;

Before a justice of the peace, fifty cents for each day;

Mileage for actual travel per mile each way, five cents.

An attorney, juror, or officer, who is in habitual attendance on the court for the term at which he is examined as a witness, shall be entitled to but one day's attendance.

Experts.

Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; *provided*, that such additional compensation so fixed shall not exceed four dollars per day while so employed.

Criminal cases.

For attending before the grand or trial jury, or court, in criminal cases, where the defendant is adjudged not guilty, the fees above provided for attending the district or justice's court shall be paid by the county, upon a certificate of the clerk or justice showing the amount of the services to which they are entitled.

[As amended by 16th G. A., ch. 62, which inserted the provisions in the first paragraph as to police courts, and also the proviso in the paragraph as to experts.]

A witness subpœnaed to attend court upon the same day in several different cases, is only entitled to fees and mileage for each day's attendance on the court, and cannot claim full fees in each case: *Hardin v. Polk Co.*, 39–661.

A witness is entitled to fees from the county for attendance in a criminal case on a preliminary examination before a justice: *Johnson Co. v. Porter*, 4 Gr. 79.

To entitle a party to fees as an expert, it must be shown that he was called as such, and to testify to an opinion founded on his special study and experience: *Snyder v. Iowa City*, 40–646.

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Justices of the peace to pay money received for witness fees into county treasury. R. § 351.

SEC. 3815. Any witness fees which may be received by justices of the peace for witnesses appearing before them, which shall not have been called for within one year after the date of collection, shall be paid into the county treasury for the use of the county, accompanied with a statement of the amount due each witness, but the witness entitled to such fees shall receive the same from the county treasury, upon a certificate from the justice of the peace before whom he may have appeared as such witness, or his successor in office, that he is entitled to such fees and the amount of the same; and any person or officer paying any sum of money into the county treasury under the provisions of this section, shall take duplicate receipts from the treasurer therefor, one of which he shall file with the county auditor who shall charge the amount thereof to the treasurer as so much county revenue.

[The printed code has the word "stating" between "office" and "that" in the ninth line, which is not in the original.]

Penalty for failure. R. § 352.

SEC. 3816. Any failure to pay over to the county treasurer witness fees as contemplated by this title, is a misdemeanor, and shall be prosecuted as provided by law.

When witness fees are paid by a party or county. 9 G. A. ch. 165.

SEC. 3817. When the county or any party has paid the fees of any witness, and the same is afterward collected from the adverse party, the person or county so paying the same shall, upon the production of the receipt of such witness or other satisfactory evidence, be entitled to such fee, whether it be in the hands of the justice or clerk, or has been paid into the county treasury.

Fees in criminal cases. 12 G. A. ch. 141.

SEC. 3818. In no criminal case shall witnesses for the defense be subpœnaed at the expense of the county, except upon order of the court or judge before whom the case is pending, then only upon a satisfactory showing that the witnesses are material and necessary for the defense; and the board of supervisors shall in no case audit or allow any claims for witness fees for the defendant in criminal cases except upon order or judgment of court or judge thereof, and such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require.

[By 18th G. A., ch. 207, the foregoing was substituted for the original section, which was as follows: "In all criminal cases the fees of witnesses for the defense shall be paid by the county."]

Where no other fees are fixed. R. § 4132. C. '51, § 2523.

SEC. 3819. Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents;

For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents;

For making out a transcript of any public papers or records under his control, for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents.

For committing persons to jail: carriage hire. 13 G. A. ch. 175. 14 G. A. ch. 97.

SEC. 3820. Every officer or person who shall arrest any person with a warrant or order issued by any court or officer, or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be

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allowed to charge as fees, which shall be collectible the same as other fees in criminal cases, besides the fees allowed by law, whatever sums such officer or person shall actually and necessarily pay for carriage hire in so conveying such person to jail.

For taking up estrays. 9 G. A. ch. 102, §§ 22, 23.

SEC. 3821. Any person taking up any estray horse, mule, jack or jenny, fifty cents;

For every head of neat cattle, twenty-five cents;

For all other kinds of animals, fifteen cents.

For appointing the appraisers, making the necessary entry, certificate, and return, the justice shall receive fifty cents.

Trespassing animals. R. § 1520. 14 G. A. ch. 20, § 4.

SEC. 3822. In all cases where services shall be performed by any officer or other person in respect to estrays or trespassing animals, the following fees or compensation shall be allowed: To the justice of the peace for administering the oath to the taker-up or finder, making an entry thereof, with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the district court, fifty cents; to the clerk for taking proof of the ownership of the property and granting certificate of the same, twenty-five cents; for registering each certificate transmitted to him by the justice as aforesaid, ten cents; for advertisements, including the newspaper publication, fifty cents; to the sheriff on account of sales made by him in pursuance of chapter three, of title eleven, four per cent. on the amount; to the constable, for each warrant served on appraisers, twenty-five cents; to each appraiser, twenty-five cents; all which said costs and charges, with the exception of the justice's for granting a certificate of ownership, and the sheriff's commission, shall be paid by the taker-up to the person entitled thereto, whenever the service shall be performed; the printer of the county paper for publishing the notice shall receive the price of his published or ordinary advertising rates; in all cases where it shall be necessary to make publication in a newspaper, the taker-up or finder, as the case may be, shall be required to deposit with the clerk of the district court, a sum of money sufficient to pay the same, previous to the publication thereof; all which costs and charges shall be reimbursed to the taker-up or finder in all cases where restitution of the property shall be made to the owner, or the same shall be delivered to the sheriff to be sold, or where money or bank notes shall be paid into the county treasury, in addition to the reward to which such person may be entitled for such taking up or finding as aforesaid.

Public printer for publishing estray notices. 9 G. A. ch. 102, §§ 9, 10, 14.

SEC. 3823. The public printer shall receive for each estray notice published, a sum agreed upon by the secretary of state, not, however, exceeding thirty cents for each insertion; and when the appraised value of the estray exceeds fifteen dollars, the finder shall pay the justice a sum sufficient to pay the clerk's fee, postage, and the cost of publishing such notice. If more than one animal is taken up at the same time, they shall be included in one entry and advertisement, and no additional fees shall be required or allowed in such case, and said clerk shall subscribe for one copy of such paper, to be paid for out of the county treasury, which paper shall be filed and preserved in the office of said clerk.

For laying out public highways. R. §§ 872, 877.

SEC. 3824. The following fees shall be paid persons engaged in laying out and changing highways:

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Commissioners for each day, two dollars;
Surveyor for each day, four dollars;
Chain carriers, markers, and other assistants, for each day, one dollar and fifty cents.

If the highway extends into more than one county, such expenses when so adjudged shall be paid by the several counties in proportion to the length of time occupied on the highway in each county.

Commissioners of insanity. 12 G. A. ch. 179, §§ 14, 15. 13 G. A. ch. 109, § 48.

SEC. 3825. The commissioners of insanity shall be allowed at the rate of three dollars per day each, for all the time actually employed in the duties of their office. They shall also be allowed their necessary and actual expenses, not including charges for board. The clerk, in addition to what he is entitled to as commissioner, shall be allowed one-half as much more for making the required record entries in all cases of inquest and of meetings of the board for any purpose, and for the filing of any papers required to be filed. He shall also be allowed twenty-five cents for each notice or process given or issued under seal as herein required. The examining physician shall be entitled to the same compensation as a commissioner, and to mileage at the rate of five cents per mile each way.

Sheriff.

The sheriff shall be allowed for his personal services in conveying a patient to the hospital and returning therefrom, at the rate of three dollars per day for the time necessary and actually employed, and mileage the same as is allowed him in other cases, and for other services the same fees as for like services in other cases.

Witnesses.

Witnesses shall be entitled to the same fees as witnesses in the circuit court. The compensation and expenses provided for above, shall be allowed and paid out of the county treasury in the usual manner. Whenever the commissioners issue their warrant for the admission of a person to the hospital, and funds to pay the expenses thereof are needed in advance, they shall estimate, the probable expense of conveying such person to the hospital, including the necessary assistance, and not including the compensation allowed the sheriff, and on such estimate, certified by the clerk, the auditor of the county shall issue an order on the county treasurer for the amount as estimated in favor of the sheriff or other person entrusted with the execution of such warrant; the sheriff or other person executing such warrant, shall accompany his return with a statement of the expenses incurred, and the excess or deficiency may be deducted from or added to his compensation, as the case may be. If funds are not so advanced, such expenses shall be certified and paid in the manner above prescribed on the return of the warrant. When the commissioners order the return of a patient, compensation and expenses shall be in like manner allowed.

When paid out of county treasury.

Visiting committee to hospital for the insane. 14 G. A. ch. 91, § 9.

SEC. 3826. The visiting committee shall be allowed five dollars per day for the time taken in visiting the hospital for the insane, and mileage at the rate of five cents per mile each way. The disbursing officer of each hospital for the insane shall pay the per diem and mileage allowed such visiting committee, and each member of such visiting committee shall certify under oath to such disbursing officer, the number of days he has served and the number of miles traveled.

[This section is modified by the provisions of the act inserted following.]

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[Seventeenth General Assembly, Chapter 92.]

Trustees: visiting committees: regents.

SEC. 1. The trustees of state institutions, members of visiting committee to hospitals for insane, and regents of the state university shall receive, as their compensation, four dollars per day for each and every day actually employed in the discharge of their duties, and five cents per mile for each mile necessarily traveled in such business, and no more.

Length of time.

SEC. 2. This act shall not be construed to allow trustees to receive compensation for a longer time than is now permitted by law.

Repealing clause.

SEC. 3. All acts and parts of acts inconsistent with this act are hereby repealed.

Messengers sent for election returns. R. § 529. C. '51, § 296.

SEC. 3827. Messengers sent for the returns of elections, shall be paid ten cents a mile going and returning, to be audited and paid from the state or county treasury, as the case may be.

Marriages: solemnization. R. § 4159. C. '51, § 2551.

SEC. 3828. Any person authorized to solemnize marriage, is entitled to charge two dollars for officiating in each case, and making return thereof.

Attorney appointed to defend criminals. R. §§ 1578, 4168. C. '51, § 2561.

SEC. 3829. An attorney appointed by a court to defend a person indicted for any offense, is entitled to receive from the county treasury the following fees:

For a case of murder, twenty-five dollars;

For felony, ten dollars;

For misdemeanor, five dollars;

Any attorney selected by a peace officer, for appearing and prosecuting before a justice of the peace a prosecution for selling intoxicating liquors, five dollars.

[As amended by 17th, G. A., ch. 91, which inserted the specific amounts in the fourth and also in the fifth line, instead of the words "such fees as the court may fix."]

The provisions of this section limiting the amount which an attorney shall receive in such cases, are not unconstitutional: *Samuels v. County of Dubuque*, 13–536.

To entitle an attorney to the fee here provided in case of a prosecution for the sale of intoxicating liquors, he must be selected by the peace officer who is informant in the case (see § 1551). The peace officers here contemplated are those designated as such in § 4109, and the term does not include a special constable appointed under § 3630, by a justice of the peace to assist in seizing liquors: *Foster v. Clinton Co.*, 51–541.

Same. R. § 4169. C. '51, § 2562.

SEC. 3830. An attorney cannot in such case be compelled to follow a case to another county or into the supreme court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices above allowed.

Only one attorney allowed. R. § 4170. C. '51, § 2563.

SEC. 3831. Only one attorney in any one case shall receive the compensation above contemplated, nor is he entitled to this compensation until he files his affidavit that he has not, directly or indirectly, received any compensation for such services from any source.

For publication of legal notices. 10 G. A. ch. 115, § 1.

SEC. 3832. In all cases where publication of legal notices of any kind are required or allowed by law, the person or officer desiring such publication shall not be required to pay more than one dollar per square of ten lines of brevier type, or its equivalent, for the first insertion, and fifty cents per square for each subsequent insertion; and any person desiring such publication, who shall have tendered such notice to the editor, proprietor, or person

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conducting some newspaper, published weekly or oftener in such county, having the largest circulation, and has offered to pay for the publication of the same at the rate herein named, and in case the publication of such notice is refused at the price above fixed, then the officer or person desiring such publication shall procure the insertion of such notice in the newspaper nearest the county seat of such county having a general circulation that will publish such notice at the rate herein provided; which publication shall in all respects have the same effect in law and equity as if such notice had been published in the county where such action was commenced or sale is to take place. And in all cases of publication of notices in connection with commencement of actions in court, or sales upon execution, the plaintiff may designate the newspaper published within the county in which such notice shall be published.

Plaintiff may designate paper.

The plaintiff has the right to designate the newspaper in which publication of original notices or notices of execution sales shall be made; § 306 is not applicable to such cases: *Herriman v. Moore*, 49–171.

SEC. 3833. The compensation for printing the delinquent tax list, shall be at a rate not exceeding twenty cents for each tract of real property advertised for sale; and in case there is no newspaper published in the county where such lands lie then the treasurer shall cause the publication to be made in the nearest newspaper having a circulation in such county, provided that no newspaper shall be considered as one of general circulation unless it has two hundred regular weekly subscribers.

For printing delinquent tax list. Same, § 2.

SEC. 3834. The compensation of arbitrators shall be, for each day actually and necessarily spent in the discharge of their duty, two dollars, or such other sum as may be agreed upon by the parties in interest. The fees of referees acting under a submission made by or agreed to by the parties in a case pending in a court of record, shall be fixed by the court or judge and taxed as a part of the costs in the case.

Arbitrators and referees. R. § 3691. C. '51, § 2114.

[The words following "judge" at the end of the section are not in the original. They are retained as in the printed code, as having probably been inserted by the editor.]

SEC. 3835. Any officer or person taking depositions is authorized to charge therefor at the rate of ten cents per hundred words, exclusive of the certificate.

Depositions. R. § 4160. C. '51, § 2552.

SEC. 3836. Every person charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items and the date of each.

Receipt for fees paid. R. § 4157. C. '51, § 2549.

SEC. 3837. When no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented if required.

Bill of particulars. R. § 4164. C. '51, § 2557.

Where an attorney in a case requires services, his client, and not the attorney, is liable therefor: *Doughty v. Paige*, 48–483.

If a justice of the peace has prepared and certified a transcript on appeal, he cannot be required to deposit it with the clerk until his fees therefor are paid: *McKay v. Maloy*, 53–33. To the same effect as to clerk of court of record: see *Dickerson v. Shelby*, 2 Gr. 460.

SEC. 3838. In all cases where an officer in the discharge of his duty is required to set up an advertisement, he shall, when not otherwise provided, be allowed twenty-five cents, and if an adver-

Setting up advertisements. R. § 4165. C. '51, § 2558.

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tisement is required to be published in a newspaper, the money therefor shall be paid by the party and may be taxed in the bill of costs.

Officers to keep list of fees posted up. R. § 4166 C. '51, § 2559.

SEC. 3839. Every officer entitled to fees, shall keep posted up in his office a fair table thereof on pain of forfeiture of two dollars per day, for the benefit of the county, for each day he fails to keep such tables of fees thus posted up.

Penalty for taking more than allowed. R. § 4167. C. '51, § 2560.

SEC. 3840. Any officer who wilfully takes higher or other fees than are allowed by law, is guilty of a misdemeanor, and may be fined therefor a sum not less than ten nor more than fifty dollars.

Any contract for higher fees than those provided, or for an amount which might prove to be higher, would be void: *Gilman v. D. V. R. Co.*, 40–200.

When paid by a county. 9 G. A. ch. 66, § 2.

SEC. 3841. Where costs are paid by a county other than the one where the offense was committed, the amount of such costs shall be deemed a charge in favor of such county, and against the one in which the offense was committed, and may be recovered by action in any court having jurisdiction.

This section applies in case of change of venue, and probably in case of preliminary examination, but is not applicable where one county (under § 4160) takes jurisdiction of a crime committed in an adjoining county, but within five hundred yards of the boundary between them: *Floyd Co. v. Cerro Gordo Co.*, 47–186.

When fees must be paid in advance. Same, § 1.

SEC. 3842. No officer or other person mentioned in this title, is entitled to any of the fees mentioned herein in advance, where the same grows out of any criminal prosecution. But in all other cases, except where the fees or compensation is payable by the state or county, or when the orders, judgments, or decrees of courts or justices of the peace are to be entered or performed, or their writs executed, the officer performing any of the services named in this chapter, is entitled to his fees in advance if he demand them. After the expiration of sixty days from the rendition of a final judgment not appealed, removed, or reversed, the clerk of the court or a justice of the peace in whose office the judgment is entered, may, and on demand of any party entitled to any part thereof, shall issue a fee bill for all costs of such judgment, which shall have the same force and effect as an execution issued by such officer, and shall be served and executed in the same manner.

Fee bill issued to have same force as execution.

When fees are payable by state or county.

SEC. 3843. In all cases where fees or compensation as distinguished from a certain and fixed salary, are, by the provisions of this title to be paid any officer or other person out of the county or state treasury, no part of the same shall be audited or paid, until a particular account has been filed in the auditor's office of the county or state, verified by affidavit, and showing clearly for what services such fees or compensation are claimed, and when the same was rendered.

Supervisors to furnish officers with office, fuel, and stationery.

SEC. 3844. The board of supervisors shall furnish the clerk of the district and circuit court, sheriff, recorder, treasurer, auditor, and county superintendent, with offices at the county seat, together with fuel, lights, blanks, books, and stationery necessary and proper to enable them to discharge the duties of their respective offices; but in no case shall any of such officers be permitted to occupy an office also occupied by a practicing attorney.

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PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 1.

OF OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

Treason. R. § 4188. C. '51, § 2565. 14 G. A. ch. 136.

SECTION 3845. Whoever is guilty of treason, by levying war against the state, or adhering to its enemies, giving them aid and comfort, shall be punished by imprisonment for life at hard labor in the state penitentiary. Treason is not a bailable offense.

Misprision of treason. R. § 4189. C. '51, § 2566.

SEC. 3846. If any person have knowledge of the commission of the crime of treason against the state and conceal the same, and not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprision of treason, and shall be fined not exceeding one thousand dollars, or be imprisoned in the penitentiary not exceeding three years nor less than one year.

Evidence. R. § 4190. C. '51, § 2567.

SEC. 3847. No person can be convicted of the crime of treason, unless on the evidence of two witnesses to the same overt act, or on confession in open court.

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CHAPTER 2.

OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

Murder.
R. § 4191.
C. '51, § 2568.

SECTION 3848. Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

In an indictment for murder under our statute, it is necessary to charge that the homicide was done with malice aforethought: *The State v. Newberry*, 26–467.

Words used in the indictment in a particular case, *held*, to be equivalent to the expression "malice aforethought:" *The State v. Neeley*, 20–108.

In murder of either degree there must be malice aforethought, express or implied: *The State v. Johnson*, 8–525; *Fouts v. The State*, 4 Gr. 500.

To constitute the crime of murder, malice is necessary, but need not have existed for any considerable length of time: *The State v. Decklotts*, 19–447.

Homicide committed in sudden passion, without deliberation, and without malice, is manslaughter and not murder: *The State v. Spangler*, 40–365.

What would be murder at common law is murder under our statute. Malice may, as at common law, be implied in cases of homicide from any act, unlawful and dangerous in its nature, unjustifiably committed. Therefore, *held*, that independently of § 3864, one who, in an attempt to procure an abortion, causes the death of a woman, is guilty of murder in the second degree: *The State v. Moore*, 25–128.

It is not necessary that an indictment for murder should specifically charge, as at common law, that the defendant murdered the deceased. The use of other words of the same import will be sufficient: *The State v. O'Niel*, 23–272.

It is not necessary that an indictment for murder should allege that the deceased was a human being: *The State v. Stanley*, 33–526, 531.

An infant in the womb is not a human being within the meaning of this section; certainly not before it is quick: *Abrams v. Foshee*, 3–274. It is not a subject of murder until an independent circulation has been established: *The State v. Winthrop*, 43–519.

Instructions as to when the causing of death in the prosecution of a conspiracy will amount to murder, considered: *The State v. Shelledy*, 8–477.

As to when killing is excusable in self-defense, see *The State v. Benham*, 23–154; *The State v. Sullivan*, 51–142.

First degree.
R. § 4192.
C. '51, § 2569.
14 G. A. ch. 136.

SEC. 3849. All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree, and shall be punished with death or imprisonment for life, at hard labor, in the state penitentiary, as determined by the jury, or by the court if the defendant pleads guilty.

[A substitute for the original section: 17th G. A., ch. 165, § 1, as amended by 18th G. A., ch. 2, § 1, which added the words at the end of the section, following "jury" in next to the last line. The other sections of 17th G. A., ch. 165, are inserted following § 3851. The original section was as follows: "All murder which is perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder of the first degree, and shall be punished by imprisonment for life at hard labor in the state penitentiary."]

To constitute murder in the first degree, committed otherwise than by means of poison or lying in wait, or in the perpetration or attempt to perpetrate some one of the crimes specified, there must be willfulness, deliberation and premeditation (commenting upon *Fouts v. The State*, 4 Gr. 500): *The State v. Johnson*, 8–525. That the indictment charges the kill-

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ing as willful and premeditated only, will not be sufficient: *The State v. Boyle*, 28–522.

The indictment must charge that the *killing* was willful, deliberate and premeditated. The allegation that the assault was so, will not suffice: *The State v. Knouse*, 29–118; *The State v. Thompson*, 31–393. So, an indictment charging that the assault was willful, deliberate, and premeditated, and that the blow from which deceased died was willful, deliberate and premeditated, but not charging that it was dealt for the purpose of killing, or that the killing itself was willful, does not charge murder in the first degree: *The State v. McCormick*, 27–402; *The State v. Watkins*, 27–415.

To constitute the first degree of the offense, there must be a specific intent to take life, and the facts to bring the case within that degree must be set out; naming the offense in the introductory and concluding portion of the indictment as murder in the first degree, will not cure the defect. Since at common law an indictment for murder is good without averring that the killing was premeditated, an indictment for murder which would be sufficient at common law is not necessarily so for murder in the first degree under the statute: *Ibid.* (both cases), and *Fouts v. The State*, 4 Gr. 500.

The proof of killing, without more, does not raise the presumption that such killing was willful, deliberate, and premeditated: *The State v. McCormick*, *supra*.

Whether in case the killing was committed in the perpetration or attempt to perpetrate some of the felonies specified in this section, it should be charged as willful, etc., *quære: Id.*

Where the indictment charged that the assault was made willfully, etc., and by lying in wait with intent to kill, and that death resulted therefrom, *held*, that it was sufficient to charge murder in the first degree, although the charge was not specifically made that the *killing* was done willfully, etc., and by lying in wait, or that it was committed at all: *The State v. Stanley*, 33–526.

Facts from which malice and premeditation may be inferred, considered: *The State v. Gillick*, 7–287.

It is prejudicial error to put a party on trial for murder in the first degree under an indictment charging only murder in the second degree, although the party is only convicted of the lesser offense: *The State v. Boyle*, 28–522; *The State v. Knouse*, 29–118.

Where on an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *The State v. McCormick*, 27–402; but where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *The State v. Watkins*, 27–415.

The crime of manslaughter is necessarily included in that of murder, and upon the trial for murder in the first degree, all the degrees of criminal homicide should be explained and submitted to the jury: *The State v. Clemons*, 51–274; *The State v. Glyndon*, 51–463; and see notes to §§ 3848, 3850, 3851, and 3856.

Second degree. R. § 4193. C. '51, § 2570.

SEC. 3850. Whoever commits murder otherwise than is set forth in the preceding section, is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term not less than ten years.

A specific intention to kill is not essential to constitute murder at common law, nor is it essential, under our statute, to constitute murder in the second degree: *The State v. Decklotts*, 19–447; *The State v. Morphy*, 33–270.

See notes to two preceding sections.

Degree: how determined. R. § 4194. C. '51, § 2571.

SEC. 3851. Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and by their verdict ascertain, whether he be guilty of murder of the first or second degree; but if such defendant be convicted upon his own confession in open court, the court must proceed by the examination of witnesses to determine the degree of murder, and award sentence accordingly.

Where the jury, upon trial of an indictment for murder in the first degree, found defendant "guilty as charged in the indictment," *held*,

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that such verdict was fatally defective as not sufficiently ascertaining the degree of the offense: *The State v. Moran*, 7-236.

The jury, if they do not find defendant guilty of murder in either degree, may, under § 4466, convict him of manslaughter: *Gordon v. The State*, 3-410; and see notes to § 3849.

[Seventeenth General Assembly, Chapter 165.]

[Sec. 1 amends § 3849, which see.]

Jury to fix punishment.

SEC. 2. Upon trial of an indictment for murder, the jury, if they find the defendant guilty of murder in the first degree, must designate in their verdict whether he shall be punished by death, or imprisonment for life at hard labor in the penitentiary. But if such defendant be convicted upon a plea of "guilty," the court shall designate whether he shall be punished by death or imprisonment for life at hard labor in the penitentiary.

[As amended by 18th G. A., ch. 2, § 2, which inserted the words "of murder in the first degree," in the second line, and added the last sentence of the section.]

Judgment and execution.

SEC. 3. Whenever the court or jury shall designate that a defendant shall be punished by death, the court pronouncing judgment shall fix the day of the execution thereof, which shall not be less than one year after the day on which the judgment is rendered, and not longer than fifteen months, during which time the defendant, against whom judgment of death has been pronounced, shall be imprisoned in the penitentiary of the state.

[As amended by 18th G. A., ch. 2, § 3, which substituted the words at the beginning of the section, preceding "the court" in the second line, for the corresponding portion of the original section.]

Copy of papers to be sent the governor.

SEC. 4. Immediately after the entry of the judgment of death, the court rendering such judgment must transmit by mail to the governor of the state, a copy of the indictment, plea, verdict, judgment, and of the testimony in the case.

Warrant of execution.

SEC. 5. When a judgment of death is pronounced, a certified copy of the entry thereof in the record book must be furnished to the officer whose duty it is to execute the same, who shall proceed and execute accordingly, and no other warrant or authority is necessary to require or justify the execution.

Reprieve: who may.

SEC. 6. The only officer [s] who shall have power to reprieve or suspend the execution of a judgment of death, are the governor and the sheriff, as provided in the next section, unless in case of an appeal to the supreme court, as provided in section eighteen of this act.

Insanity or pregnancy: sentence suspended.

SEC. 7. When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, to be drawn by the clerk, who shall be sworn by the sheriff well and truly to inquire into the insanity *of* [or] pregnancy of the defendant and a true inquisition return, and they shall examine the defendant and hear any evidence that may be presented, and by written inquisition, signed by each of them, find as to the insanity or pregnancy, and unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution. But if the inquisition find the defendant insane or pregnant, he shall suspend the execution and immediately transmit the inquisition to the governor.

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Subsequent warrant for execution.

SEC. 8. Whenever a judgment of death has not been executed on the day appointed by the court therefor, from any cause whatever, the governor, by a warrant under his hand and the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

Time and manner of execution.

SEC. 9. A judgment of death must be executed by the sheriff on the day fixed in the judgment, between sunrise and sunset, by hanging the defendant by the neck until he is dead.

Place of execution.

SEC. 10. A judgment of death must be executed within the walls of the jail of the county in which the judgment was rendered, or within a yard or enclosure adjoining thereto, unless as provided in the next two sections.

Same.

SEC. 11. If there be no jail in the county in which the judgment was rendered, or if it becomes unfit or unsafe for the confinement of prisoners, or be destroyed by fire or otherwise, and the jail of any other county has been legally designated for the imprisonment of the defendant until the day fixed for his execution, the judgment must be executed within the walls of the jail of the county so designated, or within a yard or enclosure adjoining the same, and by the sheriff of such county.

Same.

SEC. 12. If there be two or more jails or prisons in the same county, a judgment of death shall be executed within the walls of either of such jails or prisons, or within an enclosure adjoining thereto, as the court rendering such judgment shall therein direct.

Witnesses at execution.

SEC. 13. The sheriff executing a judgment of death, must, at least three clear days before inflicting the punishment of death, notify the judge of the district court of his county, the district attorney, the clerk of the district court, together with two physicians and twelve respectable citizens of his county, to be selected by him and the sheriff of the county in which the trial was had and the offense committed (if it be in a different county,) to be present as witnesses of such execution. He must also at the request of the defendant permit one or more ministers of the gospel, whom the defendant shall name, and any of his relations to attend the execution, and also such magistrates, peace officers, and guards as the sheriff shall deem proper, but no person other than those mentioned in this section can be present at the execution, nor shall any person under age be permitted to witness the same.

Certificate of sheriff and judges.

SEC. 14. The sheriff or his deputy executing the judgment of death, and the judges attending the execution must prepare and sign with their name of office, a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant according to the foregoing provisions, and must cause the certificate to be signed by the public officers, and at least twelve persons not relations of the defendant who witnessed the execution.

Must be filed and published.

SEC. 15. The sheriff or his deputy executing such judgment of death, must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and a copy thereof to be published in a newspaper printed at the capital of the state, and in one, if any, published in his county.

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Appeal shall stay execution.

SEC. 16. An appeal by the defendant to the supreme court from a judgment of death shall stay the infliction of that punishment, but the defendant is to be retained in custody to abide the judgment on the appeal.

Appeal: proceedings in case of.

SEC. 17. When an appeal is taken from a judgment of death it shall be the duty of the clerk of the district court in which the judgment was rendered to give forthwith to the defendant, his agent, or attorney, a certificate under his hand and the seal of the county, stating that an appeal has been taken in the case, and the sheriff or other officer having the custody of the defendant, must upon the delivery of such certificate to him refrain from the infliction of the punishment of death upon the defendant, and retain him in custody to abide the judgment of the appeal.

Appeal: proceedings in case judgment is affirmed by supreme court.

SEC. 18. When a judgment of death has been affirmed, the supreme court must cause a copy of the entry of judgment to be remitted to the governor, to the end that a warrant of the execution may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that fixed by the judgment of the district court. The officer receiving the same shall execute the warrant of the governor as therein directed and shall report his action both to the governor and the district court which rendered the original judgment. If for any cause the execution does not take place on the day appointed by the governor, the governor may from time to time appoint another day for the execution until the judgment is carried into effect.

Indictments pending shall be prosecuted to judgment under Code, § 3849.

SEC. 19. All indictments pending in any court of this state for any crime committed in violation of said section three thousand eight hundred and forty-nine of the code shall be prosecuted to final judgment, and all crimes that have been committed in violation of said section shall be subject to indictment, trial and punishment in the same manner as they would have been had said section not been repealed.

Repealing clause.

SEC. 20. All acts and parts of acts inconsistent with this act are hereby repealed.

Dueling.
R. § 4195.
C. '51, § 2572.

SEC. 3852. Whoever fights a duel with deadly weapons, and inflicts a mortal wound on his antagonist, whereof death ensues, is guilty of murder of the first degree, and shall be punished accordingly.

Same: aiding and abetting.
R. § 4196.
C. '51, § 2573.

SEC. 3853. Any person who fights a duel with deadly weapons, or is present at the fighting of such duel as aid, second, or surgeon, or advises, encourages, or promotes such duel, although no homicide ensue; and any person who challenges another to fight a duel, or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand dollars nor less than four hundred dollars, and imprisoned in the penitentiary not more than three years nor less than one year.

Accepting challenge.
R. § 4197.
C. '51, § 2574.

SEC. 3854. Any person who accepts such challenge, or who consents to act as a second, aid, or surgeon on such acceptance, or who advises, encourages, or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section.

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Posting for not accepting challenge. R. § 4198. C. '51, § 2575.

SEC. 3855. If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another for not fighting a duel, or for not sending or accepting a challenge, he shall be fined not exceeding three hundred dollars nor less than one hundred dollars, and shall be imprisoned in the county jail not more than six months nor less than two months.

Manslaughter. R. § 4199. C. '51, § 2576.

SEC. 3856. Any person guilty of the crime of manslaughter, shall be punished by imprisonment in the penitentiary not exceeding eight years, and by fine not exceeding one thousand dollars.

Manslaughter is not a degree of murder, but a distinct offense, included, however, in the crime of murder: *The State v. White*, 45–325, 327; and under an indictment for murder, a defendant may be convicted of manslaughter: See notes to § 3849.

The common law definition of manslaughter has not been changed by our statute: *The State v. Shelledy*, 8–477; *The State v. Moore*, 25–128.

The offense defined: *The State v. Aborr*, 39–185; *The State v. Spangler*, 40–365.

The careless use of a dangerous and deadly weapon, whereby a person is killed, constitutes manslaughter, although no harm is intended: *The State v. Hardie*, 47–647, and as to when acciden al killing will be excusable, see *The State v. Benham*, 23–154.

Maiming or disfiguring. R. § 4200. C. '51, § 2577.

SEC. 3857. If any person, with intent to maim or disfigure, cut or maim the tongue; cut out or destroy an eye; cut, slit, or tear off an ear; cut, bite, slit, or mutilate the nose or lip; cut off or disable a limb or any member of another person, he shall be punished by imprisonment in the penitentiary not more than five years, and by fine not exceeding one thousand dollars nor less than one hundred dollars.

The offense of maiming and disfiguring necessarily includes an assault and battery, within the meaning of § 4466: *Benham v. The State*, 1–542.

Robbery. R. § 4201. C. '51, § 2578.

SEC. 3858. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense as is provided in the following two sections.

To constitute robbery, there must be *animus furandi*; compelling the payment of money which is due, by threats of violence, is not robbery, but is an offense under § 3871: *The State v. Hollyway*, 41–200.

The means used to put in fear need not be such as would put in fear one used to the ways of the world: *The State v. Carr*, 43–418.

A sudden snatching from the hand of another is sufficient force and violence to constitute robbery: *Ibid.*

Same. R. § 4202. C. '51, § 2579.

SEC. 3859. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery present and so armed, he shall be punished by imprisonment in the penitentiary for a term not exceeding twenty years nor less than ten years.

Same. R. § 4203. C. '51, § 2580.

SEC. 3860. If such offender commit the robbery otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two years.

Rape. R. § 4204. C. '51, § 2581.

SEC. 3861. If any person ravish and carnally know any female of the age of ten years or more, by force and against her will, or

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carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the penitentiary for life or any term of years.

The force necessary on the one hand, and the resistance required on the other, to constitute the crime, depend upon the relative mental and physical strength of the parties, and the circumstances surrounding them; and where a female was imbecile, and the prisoner, knowing such fact (which might be inferred from his having had some conversation with her), used some force, and there was nothing to indicate consent on her part, *held*, that the act would be considered to have been against her will, and that in such case, actual opposition or dissent need not be shown: *The State v. Tarr*, 28–397; and it seems that a defendant might be convicted under this section of the crime of rape committed upon a woman so destitute of mind that she was incapable of consent, without proof of any resistance on her part, notwithstanding the provisions of § 3863: *The State v. Atherton*, 50–189.

It is not necessary to establish the non-consent or force, by proof of outcries or of a struggle, nor need actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all the circumstances, the requisite facts are shown: *The State v. Tarr*, 28–397.

The absence of any marks of violence, or of outcries, etc., at the time, may be considered as against the evidence of prosecutrix: *The State v. Tomlinson*, 11–401. Absence of such outcries and complaints tends strongly to rebut the hypothesis of guilt, but is not conclusive, and the age, etc., of prosecutrix is to be considered: *The State v. Cross*, 12–66. The better rule is to admonish the jury as to the difficulty of disproving the charge, and call their attention to the fact whether outcry was made at the time: *The State v. Hagerman*, 47–151.

The fact of prosecutrix making complaint is proper evidence, but the particulars of such complaint are not: *The State v. Richards*, 33–420.

Two or more may be jointly indicted for the crime, one being the principal and the others accessories: *The State v. Comstock*, 46–265.

The crime of rape necessarily includes both a simple assault, and an assault with intent to commit the crime, within the meaning of § 4466: *The State v. Vinsant*, 49–241.

On a trial for rape, defendant may be convicted of an assault with intent to commit the crime, and even though consent is shown at the time of the commission of the act, it may be shown to have been absent at the time of the commission of the assault: *The State v. Cross*, 12–66; *The State v. Atherton*, 50–189.

Carnal knowledge of a female child under ten years of age, constitutes rape: *The State v. Newton*, 44–45.

Evidence considered and, *held*, insufficient to justify conviction for the crime: *The State v. Tomlinson*, 11–401.

As to the evidence necessary to convict, see § 4560.

Compelling to marry. R. § 4205.

SEC. 3862. If any person take any woman unlawfully and against her will, and by force, menace, or duress, compel her to marry him or any other person, or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years.

No particular amount of force is necessary to constitute the offense of defilement under this section, and it was probably intended to cover cases in which there is no force, excepting that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will; but it contemplates at least an act against the will. The defendant is not required to show an affirmative act of consent to make out a defense: *Pollard v. The State*, 2–567.

Carnal knowledge. R. § 4206. C. '51, § 2583.

SEC. 3863. If any person unlawfully have carnal knowledge of any female by administering to her any substance, or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, or have such carnal knowledge of an idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual

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resistance, he shall, upon conviction, be punished as provided in the section relating to ravishment.

See notes to § 3861.

SEC. 3864. If any person, with intent to produce the miscarriage of any pregnant woman, wilfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the state prison for a term not exceeding one year, and be fined in a sum not exceeding one thousand dollars.

Producing miscarriage of pregnant woman. R. § 4221.

It is not necessary to constitute the crime that the woman should be quick with child, nor, providing there is criminal intent, is it necessary that the substance administered should be such as would produce a miscarriage: *The State v. Fitzgerald*, 49–267.

The crime is committed in the county where the drug or other substance is administered, and not where the miscarriage actually takes place; § 4159 does not apply: *The State v. Hollenbeck*, 36–112.

It is not a crime under this section for a woman to procure an abortion on herself: *Hatfield v. Gano*, 15–177.

SEC. 3865. If any person take or entice away any unmarried female, under the age of fifteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, he shall, upon conviction, be punished by imprisonment in the penitentiary for not more than three years, or by fine of not more than one thousand dollars and imprisonment in the county jail not more than one year.

Enticing female child under fifteen years. R. § 4207. C. '51, § 2584.

The fact that defendant believed and had good reason to believe, that the female was over the age of fifteen years, constitutes no defense, if she was in fact under that age: *The State v. Ruhl*, 8–447. (And as to similar point, see *The State v. Newton*, 44–45.)

If the parents are dead, and no guardian has been appointed, the persons with whom the female resides as a member of the family, and who have her wholly under their care and protection, would have "the legal charge of her person" within the meaning of the section: *Ibid.*

It is not sufficient to constitute an offense under this section that the accused entice away the female for his own carnal enjoyment, and such enjoyment would not constitute prostitution: *Ibid.*

As to the evidence necessary to convict of this offense, see § 4560.

SEC. 3866. If any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of twelve years, with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Enticing away child under twelve years. R. § 4208. C. '51, § 2585.

SEC. 3867. If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Seduction. R. § 4209. C. '51, § 2586.

To "debauch" implies to "have carnal knowledge of." *(Arguendo): Wood v. Mathews*, 47–409, 410.

The kind and extent of seductive arts necessary to constitute the crime, will depend upon the condition in life, advantages, age, and intelligence of the parties: *The State v. Higdon*, 32–262.

An indictment charging that defendant seduced and debauched, etc., etc., is sufficient, without charging

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the facts as to the means made use of to accomplish such end: *The State v. Curran*, 51–112.

The fact of courtship is admissible in testimony, as a circumstance showing an opportunity and means for committing the act: *Ibid*; *The State v. Wells*, 48–671; and see *Stevenson v. Belknap*, 6–97, 103.

The word "character" is here used in its true sense, as distinguished from reputation, but a female may be of unchaste character without being guilty of any act of sexual intercourse. Obscenity of language, indecency of conduct and undue familiarity with men may serve to indicate the true character. It is for the jury to decide, under all the circumstances, as to the character of the prosecutrix: *Andre v. The State*, 5–389; *Boak v. The State*, 5–430.

A female who has been unchaste may reform and acquire a chaste character, such as is here referred to: *The State v. Carron*, 18–372.

Evidence that prosecutrix has a bad reputation for chastity is not admissible, but evidence that her reputation in that respect is good may be received in rebuttal of evidence tending to prove acts of lewdness: *The State v. Prizer*, 49–531; *The State v. Shean*, 32–88.

The previously chaste character of the injured party is presumed, and the *onus* is upon defendant to show the contrary: *Andre v. The State*, 5–389; *The State v. Higdon*, 32–262; *The State v. Wells*, 48–671; and such presumption may be rebutted by proven or admitted facts or circumstances in the case: *The State v. Bowman*, 45–418.

It is only the "previously chaste character" which can be put in issue, and all evidence of improper conduct after the time of the alleged seduction should be excluded: *The State v. Wells*, 48–671.

Questions as to chastity must clearly refer to a time previous to the seduction: *The State v. Deitrick*, 51–467.

Where the woman is examined as a witness to prove the seduction, she may, on cross-examination, be asked as to matters which would show a want of chastity previous to such seduction. The question of chastity is directly in issue: *The State v. Sutherland*, 30–570.

Previously chaste character is not essential in a civil action, by an unmarried female, for seduction: See § 2555, and notes.

Where, in a prosecution for seduction, prosecutrix testified that she resisted, and defendant overcame such resistance by force, *held* that the court should have instructed the jury, that if they found such to be the fact, defendant was entitled to an acquittal, the crime, under such facts, being rape, and not seduction: *The State v. Lewis*, 48–578.

As to evidence in such cases, see § 4560.

Marriage a bar. R. § 4210. C. '51, § 2587.

SEC. 3868. If, before judgment upon an indictment, the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense.

Such a marriage is encouraged by the law, and contracts entered into in contemplation thereof are not invalid as being made under *duress*, and will be upheld: *Armstrong v. Lester*, 43–159.

Kidnapping. R. § 4211. C. '51, § 2588.

SEC. 3869. If any person wilfully and without lawful authority, forcibly or secretly confine or imprison any other person within this state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in this state against his will, or to cause such person to be sent out of this state against his will, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine and imprisonment at the discretion of the court.

Exposing child. R. § 4212. C. '51, § 2589.

SEC. 3870. If the father and mother of any child under the age of six years, or any person to whom such child has been entrusted or confided, expose such child in any highway, street, field, house, or outhouse, or in any other place with intent wholly to abandon it, he or she, upon conviction thereof, shall be pun-

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ished by imprisonment in the penitentiary not exceeding five years.

"Father *and* mother" construed to mean "father *or* mother." Either parent alone may commit the crime: *The State v. Smith*, 46–670, 672.

SEC. 3871. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent thereby to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the penitentiary not more than two years or by a fine not exceeding five hundred dollars.

Malicious threats to extort. R. § 4213. C. '51, § 2590.

Extortion and pecuniary advantage are not necessary ingredients of this offense. An indictment charging defendant with maliciously threatening, etc., with intent "to compel the person, etc., to do an act against his will" is sufficient: *The State v. Young*, 26–122.

An indictment charging defendant with verbally threatening to kill and murder two certain persons with intent, etc., *held* sufficient without setting out the threatening words used; also, *held* that a threat to kill *two* persons constituted but one offense: *The State v. O'Mally*, 48–501.

In the absence of a felonious intent, it is not robbery to compel, by means of threats of personal violence, the payment of money; but such an act is an offense under this section: *The State v. Hollyway*, 41–200.

SEC. 3872. If any person assault another with intent to commit murder, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

Assault with intent to murder. R. § 4214. C. '51, § 2591.

In an indictment for an assault with intent to commit an offense, it is not necessary to make all the averments required in an indictment for the offense itself. Therefore, *held* not necessary in charging an assault with intent to murder to charge that the assault was made with malice aforethought: *The State v. Newberry*, 26–467.

An assault with intent to commit murder does not admit of different degrees, since the intent is the gist of the offense, but it necessarily includes a simple assault: *The State v. Jarvis*, 21–44. And a defendant indicted under this section may be convicted of that offense: *The State v. Shepard*, 10–126.

An assault with intent to commit manslaughter is included in an assault with intent to commit murder, and a party may be convicted of the former offense under an indictment charging the latter, as provided by § 4466: *The State v. White*, 42–325 (overruling S. C. 41–316): *The State v. Schele*, 52–608.

SEC. 3873. If any person assault a female with intent to commit a rape, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

With intent to commit rape. R. § 4215. C. '51, § 2592.

It must appear that the intent of defendant was to gratify his passions, notwithstanding any possible resistance prosecutrix should make: *The State v. Cross*, 12–66; *The State v. Hagerman*, 47–151; and defendant may be found guilty of an assault, with intent to commit, etc., although at the time of accomplishing the act there was such consent as to deprive the act of the character of rape: *The State v. Cross, supra; The State v. Atherton*, 50–189.

Assault with intent to carnally know a child under ten years, etc., (§ 3861) is an assault with intent to commit rape, and in such case it is not necessary to prove that defendant knew the fact as to the age of the child. Proof of that fact itself is sufficient: *The State v. Newton*, 44–45. And upon a similar point, see *The State v. Ruhl*, 8–447.

SEC. 3874. If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by

With intent to maim, rob, steal, etc. R. § 4216. C. '51, § 2593.

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fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court.

Great bodily injury. R. § 4217. C. '51, § 2594.

SEC. 3875. If any person assault another with intent to inflict a great bodily injury, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars.

An information accusing defendant of assault and battery, charging the offense of assault with intent, etc., sufficiently charges the offense here specified: *The State v. Carpenter*, 23–506.

An indictment charging assault and battery with intent to inflict, etc., does not charge more than one offense. The battery is simply an aggravation of the offense: *Cokely v. The State*, 4–477.

When the felonious intent is shown, that which would be an assault, if unaccompanied with such intent, will be such when thus accompanied: *The State v. Malcolm*, 8–413.

Under an indictment for this offense, defendant may be convicted of an assault, as provided in § 4466: *Orton v. The State*, 4 Gr. 140.

With intent to commit any felony. R. § 4218. C. '51, § 2595.

SEC. 3876. If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

Under this section, an assault with intent to commit manslaughter may be punished: *The State v. White*, 45–325.

Mingle poison with food, etc. R. § 4219. C. '51, § 2596.

SEC. 3877. If any person mingle any poison with any food, drink, or medicine, with intent to kill or injure any human being, or wilfully poison any spring, well, cistern, or reservoir of water, he shall be punished by imprisonment in the penitentiary not exceeding ten years and by fine not exceeding one thousand dollars.

Assault and battery. R. § 4220. C. '51, § 2597.

SEC. 3878. Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

The statute merely prescribes a punishment for these offenses, and leaves them to be defined by the common law: *The State v. Twogood*, 7–252.

An indictment charging an assault and also a battery, does not charge two offenses. Every battery necessarily includes an assault: *Ibid.*; and the offense of maiming and disfiguring necessarily includes an assault and battery, under the provisions of § 4466: *Benham v. The State*, 1–542; so, also, the offense of an assault with intent to do great bodily injury necessarily includes a simple assault: *Orton v. The State*, 4 Gr. 140.

It is an assault to present a gun or pistol at a person, though it be not loaded, if the person assaulted has no reason to believe that it is not loaded: *The State v. Shepard*, 10–126.

Information charging defendant with inhumanly beating his own child, sufficiently charges the offense of assault and battery; but the name of the person on whom the offense was committed should be given: *The State v. Bitman*, 13–485.

Carrying concealed weapons.

SEC. 3879. If any person carry upon his person any concealed weapon, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days; *provided*, that this section shall not apply to police officers and other persons whose duty it is to execute process or warrants, or make arrests.

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CHAPTER 3.

OFFENSES AGAINST PROPERTY.

Burning inhabited dwelling in night time. R. § 4222. C. '51, § 2598.

SECTION 3880. If any person wilfully or maliciously burn in the night time, the inhabited building, boat, or vessel of another, or wilfully and maliciously set fire to any other building, boat, or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for life or any term of years.

In day time. R. § 4223. C. '51, § 2598.

SEC. 3881. If any person wilfully or maliciously burn in the day time the inhabited building, boat, or vessel of another, or any building, boat, or vessel adjoining thereto; or wilfully and maliciously set fire to any building, boat, or vessel owned by himself or another, by the burning whereof such inhabited building, boat, or vessel is burnt in the day time; or in the day time wilfully and maliciously set fire to any building, boat, or vessel owned by himself or another, by the burning of which any such inhabited building, boat, or vessel is burnt in the night time, he shall be punished by imprisonment in the penitentiary for a term not exceeding thirty years.

[The last word of this section, in the original rolls, is "days" instead of "years", but as the Rev. and the code commissioners' report each have the section as here given, the word "years" is retained as in the printed code, the substitution of "days" in the original being evidently a mistake corrected by the editor. It admits, however, of serious doubt whether the strict language of the original would not govern in such case.]

Burning uninhabited dwelling, etc., in night time. R. § 4224. C. '51, § 2600.

SEC. 3882. If any person wilfully and maliciously burn in the night time, any uninhabited dwelling house, boat, or vessel belonging to another, or any court house, jail, college, church or any building erected for public use, or any other building, boat or vessel, by the burning whereof any building, boat, or vessel mentioned in this section is burnt in the night time, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

In the day time. R. § 4225. C. '51, § 2601.

SEC. 3883. If any person wilfully and maliciously burn in the day time any building, boat, or vessel mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

Burning mills, locks, dams, depots, etc. R. § 4226. C. '51, § 2602.

SEC. 3884. If any person wilfully and maliciously burn, either in the night or day time, any warehouse, store, manufactory, mill; railroad depot, barn, stable, shop, office, out-house, or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam, or flume, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

An indictment charging defendant with burning a certain "building, etc., *called a barn*," *held*, sufficient, though in fact the building was not a barn but only a shed: *The State v. Smith*, 28–565.

Setting fire with intent to burn. R. § 4227. C. '51, § 2603.

SEC. 3885. If any person set fire to any building, boat, or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat, or vessel

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to be burnt, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

Where defendant set a lighted candle in hay and other combustible material, with intent to burn a barn, but neither the barn nor the material was ignited or burned, *held*, that nevertheless he was guilty under this section. The lighting of the candle was "setting fire, etc., to any material:" *The State v. Johnson*, 19–230.

Burning or destroying lumber, fences, grain, etc.
R. § 4228.
C. '51, § 2604.

SEC. 3886. If any person wilfully and maliciously burn, or otherwise destroy or injure any pile or parcel of wood, boards, timber, or lumber, or any fence, bars, or gate, or any grain, hay, or other vegetable product severed from the soil, or any standing tree, grain, grass, or other standing product of the soil, the property of another, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

Married woman: liability of.
R. § 4229.
C. '51, § 2605.

SEC. 3887. The preceding sections of this chapter, severally, extend to a married woman who commits either of these offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband.

Burning to injure insurers.
R. § 4230.
C. '51, § 2606.

SEC. 3888. If any person wilfully burn any building, goods wares, merchandize, or other chattels which are insured against loss or damage by fire, or wilfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of such property or not, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

Setting out fire.
R. § 4231.
C. '51, § 2607.

SEC. 3889. If any person wilfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any enclosed or cultivated field, or any highway, by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment, in the discretion of the court.

[A substitute for the original section; 17th G. A., ch. 55. The change consists in the insertion of the words "or any enclosed or cultivated field, or any highway," in the section as it previously stood.]

Under this section, *held*, that a party was liable for damages resulting to others, only where he set the fire out wilfully or without using the proper caution: *Conn v. May*, 36–241, and cases cited; and see notes to following section.

Same.
9 G. A. ch. 53.

SEC. 3890. If any person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, between the first day of September in any year and the first day of May following, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Setting out fire in a cultivated field is not within the scope of this section: *Brunell v. Hopkins*, 42–429. (But see, now, the amendment to the previous section.)

Under this section a party is absolutely liable for all damages resulting from the act prohibited, without regard to the question of negligence: *Conn v. May*, 36–241. See note to preceding section.

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Burglary. R. § 4232. C. '51, § 2608.

SEC. 3891. If any person break and enter any dwelling house in the night time, with intent to commit any public offense; or, after having entered with such intent, break any such dwelling house in the night time, he shall be deemed guilty of burglary, and shall be punished according to the aggravation of the offense as is provided in the next two sections.

The intent being made a necessary element in the crime here defined, intoxication may be weighed by the jury in considering whether such intent existed: *The State v. Bell*, 29–316.

An indictment, charging a breaking and entering with intent to commit larceny, is sufficient without averring that the intention was to steal, etc., property of a greater value than twenty dollars: *The State v. Jones*, 10–206.

Being armed or assaulting a person. R. § 4233. C. '51, § 2609.

SEC. 3892. If such offender, at the time of committing such burglary, is armed with a dangerous weapon, or so armed himself after having entered such dwelling house, or actually assault any person being lawfully therein, or has any confederate present aiding and abetting in such burglary, he shall be punished by imprisonment in the penitentiary for life or any term of years.

When not armed. R. § 4234. C. '51, § 2610.

SEC. 3893. If such offender commit such burglary otherwise than is mentioned in the preceding section, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

[Fifteenth General Assembly, Chapter 13.]

Possession of burglar's tools deemed misdemeanor.

SEC. 1. If any person shall be found, having in his possession at any time any burglar tools or implements, with intent to commit the crime of burglary, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, and it shall be the duty of the court before whom such conviction is had to retain possession of such burglar tools or implements, to be used in evidence in any court in which said person is tried.

Breaking and entering with intent to commit offense. R. § 4235. C. '51, § 2611. 13 G. A. ch. 185.

SEC. 3894. If any person with intent to commit any public offense, in the day-time break and enter, or in the night-time enter without breaking, any dwelling house; or at any time break and enter any office, shop, store, warehouse, railroad-car, boat, or vessel, or any buildings in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one hundred dollars and imprisonment in the county jail not more than one year.

One who receives the stolen goods is not an accomplice in the crime of burglary: *The State v. Hayden*, 45–11.

The crime of entering a dwelling house in the night time with intent to commit a public offense, is included in that of burglary, under the provisions of § 4466, so that under an indictment for the latter offense a defendant may be convicted of the former: *The State v. Maxwell*, 42–208.

The offense is against the owner of the building, and his name, and not that of the owner of goods, etc., therein, which the accused intended to steal, should be given in the indictment. If the name of such owner is not known, it should be so stated: *The State v. Morrisey*, 22–158.

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[Eighteenth General Assembly, Chapter 11.]

Attempting to break and enter with intent to commit public offense.

SEC. 1. If any person, with intent to commit any public offense, shall attempt to break and enter any dwelling house, at any time, or to enter any dwelling house in the night time without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale or deposit, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not more than one year.

Selling or concealing mortgaged property. R. § 4236.

SEC. 3895. If any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell or in any manner dispose of the property covered by such mortgage without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and be punished accordingly.

An indictment under this section should aver that the mortgage remains unsatisfied: *The State v. Gustafson*, 50–194.

The consent of the mortgagee here contemplated, while it prevents the act from being a crime, does not act as a waiver of his lien on the property: *Oswald v. Hayes*, 42–104, 106.

Where a mortgage of personal property provided that, if the mortgagor removed it from the county, the mortgagee might take possession of and sell it, *held*, that a mere removal from the county would constitute no offense under this section, and a *subsequent* concealment or sale would not be an offense in the county where the mortgage was executed; but it seems the offense would be committed in the county from which the property was thus subsequently taken for the purpose of concealment and sale: *The State v. Julien*, 43–445.

Driving stock from home or pasture. 9 G. A. ch. 34, §§ 1, 2. 12 G. A. ch. 108. 14 G. A. ch. 88.

SEC. 3896. If any person knowingly or wilfully drive off, or suffer or permit to be driven off, any horned or other stock of another to a distance exceeding three miles from the residence of the owner, or of his agent having charge of such stock, or the range in which such stock is usually in the habit of running, without the consent of such owner or agent, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and any justice of the peace in any county through which the stock thus driven off should pass, or in which it may be found, shall have jurisdiction of the offense.

To authorize a recovery under this section for damages suffered, it is necessary to allege and prove that defendant had knowledge of the fact that the animal had entered his drove and was being taken away: *Chamberlain v. Gage*, 20–303.

Stealing, or knocking off fruit: in day time. 9 G. A. ch. 120. 12 G. A. ch. 74, § 1.

SEC. 3897. If any person maliciously or mischievously enter the enclosure of another, with intent to knock off, pick, destroy or carry away; or having lawfully entered, do afterwards wrongfully knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or any other fruit or flower of any tree, shrub, bush, or vine, he shall be punished, for the first offense, by a fine not less than five dollars nor exceeding one hundred dollars, with the costs of conviction, or by imprisonment in the county jail not exceeding thirty days; and should any person be found guilty of a second violation hereof, he shall be fined not less than ten dollars and costs of conviction, or imprisonment as above provided.

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Same in night time. 12 G. A. ch. 74, § 2.

SEC. 3898. If any person maliciously or mischievously enter the enclosure of another in the night time and knock off, pick, destroy, or carry away any apples, peaches, pears, plums, grapes, or other fruit or flower of any tree, shrub, bush, or vine; or, if any person having entered the enclosure of another in the night time, with the intent to knock off, pick, destroy, or carry away any fruit or flower as aforesaid be actually found therein, he shall on conviction thereof, be punished by a fine not less than twenty-five nor to exceed one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days.

A party has no right to prevent a trespass of this kind by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring gun: *Hooker v. Miller*, 37-613.

Destroying or injuring fruit trees. Same, § 4.

SEC. 3899. If any person maliciously or mischievously bruise, break, pull up, cut down, carry away, destroy, or in anywise injure any fruit or ornamental tree, shrub, or vine, growing or standing on the land of another, he shall be punished by a fine not less than ten nor exceeding one hundred dollars and costs of conviction, or by imprisonment in the county jail not exceeding thirty days.

Discharging firearms near where stock is being fed. 14 G. A. ch. 14, § 1.

SEC. 3900. Any person who knowingly discharges fire arms of any description within, or in the immediate vicinity of, any enclosure where cattle, hogs, or sheep are being fed for the purpose of fattening the same; or any person who enters such enclosure with fire arms, or dog, unless such person shall be the owner of said stock, or have the control of the same, or shall have permission from such owner or the person having control thereof to enter said premises, shall be guilty of a misdemeanor.

Mixing for sale illuminating oils at a less fire test than one hundred and ten degrees. 14 G. A. ch. 47.

SEC. 3901. If any person mixes for sale naptha and illuminating oils, or shall keep or offer for sale or sell such mixture, or shall keep or offer for sale or sell oil made from petroleum for illuminating purposes, or any other product of petroleum inflammable at a less temperature or fire test than one hundred and ten degrees Fahrenheit, he shall be deemed guilty of a misdemeanor, and punished for the first offense by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days; and for the second and every succeeding offense, by fine not less than one hundred and not more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than twelve months, or by both such fine and imprisonment.

INTERFERENCE WITH RAILWAYS.

[Sixteenth General Assembly, Chapter 148.]

Discharging fire-arms, etc., at railroad train.

SECTION 1. If any person shall throw any stone, or other substance of any nature whatever, or shall present or discharge any gun, pistol, or other fire arm at any railroad train, car, or locomotive engine he shall be deemed guilty of a misdemeanor and be punished accordingly.

Jumping off cars while in motion.

SEC. 2. If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, shall get upon, or off, any locomotive engine, or car of any railroad company while said engine

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or car is in motion, or elsewhere than at the established depots of such company, or who shall get upon, cling to, or otherwise attach himself to any such engine or car, for the purpose of riding upon the same, intending to jump therefrom, when such engine or car is in motion, he shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.

CHAPTER 4.

LARCENY AND RECEIVING STOLEN GOODS.

Larceny.
R. § 4237.
C. '51, § 2212.

SECTION 3902. If any person steal, take, and carry away of the property of another, any money, goods, or chattels; any writ, process, or public record; any bond, bank note, promissory note, bill of exchange, or other bill, order, or certificate; or any book of accounts respecting money, goods, or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished, or diminished, he is guilty of larceny, and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

To constitute larceny, the property must have been feloniously taken from the owner without his consent, or obtained by false representations, etc. If given by the owner to the defendant by virtue of his employment as agent, servant, or otherwise, and afterwards converted, the offense is embezzlement: *Ennis v. The State*, 3 Gr. 67.

If the original possession of the property was innocent, a subsequent conversion will not constitute larceny: *The State v. Wood*, 46–116.

The ownership of property need not be shown to have been in the party from whom it was taken, if it was in his possession: *The State v. Stanley*, 48–221.

A taking from the person is not necessary to constitute larceny, (a special penalty therefor being provided in § 3905.) and picking up money dropped by another, with unlawful intent, and converting the same to one's own use without the knowledge of the owner, is sufficient to constitute the offense: *The State v. Pratt*, 20–267.

If one sell or dispose of the property of another under the well founded, though erroneous, belief that he is authorized so to do, he is not guilty of larceny: *The State v. Barracksmore*, 47–684.

Where an auctioneer employed to sell impounded animals sold one of them as his own, and it was taken away by the purchaser, *held*, that there was sufficient taking to constitute larceny on the part of the person selling: *The State v. Hunt*, 45–673.

"Money" and "bank notes" are subjects of larceny: *The State v. Carr*, 43–418; and an indictment describing such money and notes as "gold and silver coin" and "Clark's Exchange Bank bills of the value of," etc., *held* sufficient: *Munson v. The State* 4 Gr. 483; so, also, an indictment *held* sufficient which charged the taking of "a promissory note for the payment of money, commonly called a

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bank note, purporting, etc., of the value of", etc.: *The State v. Bond*, 8–540; so also one charging the larceny of "$180 in bank notes, usually known and described as greenbacks": *The State v. Hockenberry*, 30–504; so *held*, also, where the property was described as bank bills of the amount and value of, etc., "the number and denomination of which are to the jury unknown": *The State v. Hoppe*, 39–468.

Proof of the denomination, etc., of bills being made, it does not devolve upon the state to prove that they were genuine; that will be presumed: *The State v. Pratt*, 20–267.

The verdict on an indictment for larceny should fix the value of the property stolen, so that the court may know of which degree of the offense the defendant is convicted. If the verdict does not so fix the value, a new trial should be awarded: *Ray v. The State*, 1 Gr. 316; and such new trial will not be unlawful as putting the defendant twice in jeopardy (Const. art., § 12): *The State v. Redman*, 17–329.

The jury should be instructed to assess the value of the property at what it would bring in the market, and not at what it was worth to the owner: *The State v. Smith*, 48–595.

The fact that the value of the property was over twenty dollars, as well as the stealing itself, must be made out beyond a reasonable doubt to warrant a conviction of the higher offense. A preponderance of evidence alone will not be sufficient: *The State v. Wood*, 46–116.

The question whether the offense is to be tried as a felony or a misdemeanor is to be determined by the value of the property as stated in the indictment or information, and not by the value as found by the trial jury: *The State v. Church*, 8–252; and the jurisdiction of the district court, having once attached, is not defeated by a finding of the jury that the value of the goods did not exceed twenty dollars; and the court may impose the proper sentence for the lesser offense, although such offense in itself is only a misdemeanor, and therefore exclusively cognizable before a justice; *Ibid.*; *The State v. Stingley*, 10–488, and see notes to Const. art. 1. § 11.

Possession of the stolen property immediately after a larceny is presumptive proof that the party so in possession is guilty of the larceny: *The State v. Brady*, 27–126; *The State v. Golden*, 49–48; and such presumption is sufficient to convict unless rebutted: *The State v. Hessians*, 50–135; but such possession is presumptive proof only after the *stealing* has been proved: *The State v. Taylor*, 25–273.

See also, as to presumption from such possession, cases cited under § 3904.

It seems that where the party in whose possession recently stolen goods are found, claims to have bought them of a real person, naming him, or of the thief, when there was no previous acquaintance or evidence of collusion, such explanation must be negatived by the state; but an explanation by such party that he bought of a *stranger* is not sufficient to oblige the state to disprove the statement before the presumption of guilt will arise: *The State v. Brown*, 25–561.

When a thief who has stolen property in another state, brings it into this state, he is guilty of larceny here, and may be tried and punished in any county into which he takes the stolen goods: *The State v. Bennett*, 14–479.

In night time in house, store, boat, etc. R. § 4238. C. '51, § 2613.

SEC. 3903. If any person in the night time commit larceny in any dwelling house, store, or any public or private building, or in any boat, vessel, or water craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen does not exceed twenty dollars, by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

[A substitute for the original section; 15th G. A., ch. 11. The change consists in the substitution of the words "does not exceed," in the sixth line, for the words "is less than."]

Same in day time. R. § 4239. C. '51, § 2614.

SEC. 3904. If any person in the day time commit larceny as specified in the preceding section, and the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years; and when the

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value of the property stolen does not exceed twenty dollars, by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year.

[A substitute for the original section; 15th G. A., ch. 11. The change consists in the substitution of the words "does not exceed" in the fifth line, for the words "is less than."]

The possession of goods recently stolen by breaking into a storeroom, if not explained, raises the presumption that the party in possession thereof committed the breaking, with intent to commit larceny. Such possession is competent as tending to prove the guilty intent: *The State v. Golden*, 49–48; and as to the presumption from such possession in cases of larceny, see notes to § 3902.

From building on fire. R. § 4240 C. '51, § 2615.

SEC. 3905. If any person commit the crime of larceny by stealing from any building on fire; or by stealing any property removed in consequence of an alarm caused by fire; or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

Falsely personating another to receive money, etc. R. § 4241. C. '51, § 2616.

SEC. 3906. If any person falsely personate or represent another and in such assumed character receive any money or property intended to be delivered to the person so personated, with intent to convert the same to his own use, he is guilty of larceny, and shall be punished accordingly.

This section abrogates the common law rule that a trespass is necessary to constitute larceny. The cases provided for here would not be larceny at common law: *The State v. Brown*, 25–561.

Finding and appropriating property. R. § 4242. C. '51, § 2617.

SEC. 3907. If any person come, by finding, to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny, and shall be punished accordingly.

To constitute finding or conversion of lost property larceny, it must be shown that the person so finding and converting *knew the owner*: *The State v. Taylor*, 25–273.

The crime consists in the original taking, and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. An omission to take the steps specified in §§ 1514 *et seq*, will not render the party guilty under this section, where the owner was not known at the time of the taking: *The State v. Dean*, 49–73.

Embezzlement of public money by officers. R. §§ 806, 807, 4243. C. '51, § 2618.

SEC. 3908. If any state, county, township, school, or municipal officer, or officer of any state institution, or other public officer within the state, charged with the collection, safe keeping, transfer, or disbursement of public money, fails or refuses to keep in any place of deposit that may be provided by law for keeping such money, until the same is withdrawn therefrom upon warrants issued by the proper officer, or deposits such money in any other place than in such safe, or unlawfully converts to his own use in any way whatever, or use by way of investment in any kind of property, or loan without the authority of law any portion of the public money entrusted to him for collection, safe keeping, transfer or disbursement, or converts to his own use any money that may come into his hands by virtue of his office, shall be guilty of embezzlement to the amount of so much of said money as is thus taken, converted, invested, used, loaned, or unaccounted for, and, upon conviction thereof, he shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled; and, moreover,

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is forever after disqualified from holding any office under the laws or constitution of this state.

The offense here defined is different from the offenses described in §§ 911, 912. The latter sections contemplate cases where no loss results, but this one refers to cases where the money is unaccounted for; and to sustain this construction the word "or" preceding the words "unaccounted for" will be construed "and." An indictment under this section should charge that the money is "unaccounted for:" *The State v. Brandt*, 41–593.

A deputy state treasurer is an officer within the meaning of this section, and may be indicted for embezzlement: *Ibid.*, 606.

Conversion is established by showing demand and refusal, unless a sufficient excuse is shown for such refusal: *The State v. Bryan*, 40–379.

One who has acted *de facto* as a public officer cannot deny that he is such an officer when indicted for malfeasance: *The State v. Stone*, 40–547.

Same by officers, clerks, etc., of private persons or corporations. R. § 4244. C. '51, § 2619.

SEC. 3909. If any officer, agent, clerk, or servant of any incorporated company; or if any clerk, agent, or servant of a copartnership; or if any person over the age of sixteen years, embezzle and fraudulently convert to his own use, or take and secrete with intent to convert to his own use, without the consent of his employer or master, any money or property of another which has come to his possession or is under his care by virtue of such employment, he is guilty of larceny and shall be punished accordingly.

To constitute the crime here defined there must exist the relation of master and servant, or employer and employe, and the property stolen or converted must have been received by virtue of such employment: *The State v. Johnson*, 49–141.

"Money or property" as here used includes bills of exchange, etc. The crime defined is similar to that of larceny, and covers cases where, by reason of the trust reposed in defendant, the act would not be larceny at common law. Whatever would be property under one section would be under the other: *The State v. Orwig*, 24–102.

The clause "without the consent of his employer," applies to embezzling and converting, as well as to taking and secreting. That fact is a necessary element of the offense here defined, and should be charged in the indictment: *The State v. Foster*, 11–291.

Where defendant received of prosecutor a watch, which, for a compensation, he was to trade for a wagon, *held*, that he was the agent of the prosecutor in such sense that a conversion by him would constitute embezzlement: *The State v. Foster*, 37–404.

Where an agent, in order to make his books balance and cover up deficiencies on account of sums of money before appropriated to his own use, reported certain sums as unpaid which were in fact received by him, *held*, that he was guilty of embezzling such sums: *Bowman v. Brown*, 52–437.

The offense here described is different from that under the preceding section. To convict, it is not sufficient to prove conversion merely. (Bish. Cr. L. § 360, cited with approval): *The State v. Bryan*, 40–379, 382.

Same: by carriers and others. R. § 4245. C. '51, § 2620.

SEC. 3910. If any carrier or other person to whom any money, goods or other property, which may be the subject of larceny, has been delivered to be carried for hire, or if any other person entrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny and shall be punished accordingly.

The offense defined can only be committed upon property "which has been delivered to be carried for hire:" *The State v. Stoller*, 38–321.

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Receiving stolen goods.
R. § 4246.
C. '51, § 2621.
9 G. A. ch. 121.

SEC. 3911. If any person buy, receive, or aid in concealing any stolen money, goods, or any property, the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, he shall be punished, when the value of the property so bought, received, or concealed by him exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year; and when the value of the property so bought, received, or concealed by him does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Merely assisting the defendant by giving him his breakfast and feed for stolen horses, knowing that they were stolen, *held*, not sufficient to warrant a conviction of this offense. The accused must have aided in concealing or hiding the property: *Upton v. The State*, 5–465.

The fact of aiding in concealing stolen goods, knowing them to be stolen necessarily implies a felonious intent: *The State v. Turner*, 19–144.

Same on second conviction.
R. § 4248.
C. '51, § 2623.

SEC. 3912. If any person after having been convicted of the offense of buying, receiving, or aiding in the concealment of stolen money, goods, or any property, the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense; or if any person at the same term of court is convicted of three distinct acts of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished as provided in the preceding section.

Under Rev., § 4247, which provided that if a person previously convicted of larceny committed another larceny, or was convicted therefor, or was at the same term of court convicted of three distinct larcenies, he should be deemed a common and notorious thief, and be punished by imprisonment in the penitentiary for not less than three years, *held*, that the punishment there prescribed should be inflicted when the facts authorizing it appeared on the trial of the accused for larceny; that the section did not describe a distinct crime, and did not contemplate that the indictment need state the facts necessary to make the accused "a common and notorious thief," or charge him with being such: *The State v. Riley*, 28–547.

[This section is identical with Rev., § 4248, but there the "preceding section" was Rev., § 4247, which is not inserted in the Code, consequently the punishment under the "preceding section" as here provided, is very different from that contemplated in the section where it originally stood.]

Receiver convicted without proof that principal has been.
R. § 4249.
C. '51, § 2624.

SEC. 3913. In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing the same was so obtained, it shall not be necessary to aver nor to prove on the trial thereof that the person who stole, robbed, or took the property has been convicted.

Measure of value of stolen goods.
R. § 4250.
C. '51, § 2625.

SEC. 3914. If the property stolen consist of any bank-note, bond, bill, covenant, bill of exchange, draft, order, or receipt, or any evidence of debt whatever; or any public security, or any instrument whereby any demand, right, or obligation may be assigned, transferred, created, increased, released, extinguished, or diminished, the money due thereon or secured thereby and remaining unsatisfied, or which in any event or contingency might be collected

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thereon, or the value of the property transferred or affected, as the case may be, shall be adjudged the value of the thing stolen.

Removal of goods from custody of officer. R. § 4251.

SEC. 3915. If any person knowingly and without authority of law, take, carry away, secrete, or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and rightfully held by such officer by virtue of execution, writ of attachment, or other legal process issued under the laws of Iowa, he shall be deemed guilty of larceny, and shall be punished, when the value of the property so taken, carried away, secreted, or destroyed, exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than one year; and when the value of the same does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not more than thirty days.

Intoxicating liquors seized on a warrant issued on information for their forfeiture (under § 1544,) are not subject to replevin, and to take them from a proper officer under such writ, would be an unlawful act under this section: *The State v. Harris*, 38–242.

When left by officer with another for safe keeping. R. § 4252.

SEC. 3916. The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping, to be returned for the purpose of being disposed of on legal process, shall be deemed to be the possession and custody of the officer having or depositing the same, and entitled to the custody thereof, and in a prosecution under the preceding section, the property taken, carried away, secreted, or destroyed, as therein mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense.

CHAPTER 5.

FORGERY AND COUNTERFEITING.

Forgery of records and instruments in writing. R. § 4253. C. '51, § 2626.

SECTION 3917. If any person with intent to defraud, falsely make, alter, forge, or counterfeit any public record, or any process issued or purporting to be issued by any competent court, magistrate, or officer, or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note, or any order, acquittance, discharge, or accountable receipt for money, or other valuable thing; or any acceptance of any bill of exchange, or order; or any indorsement, or assignment of any bill of exchange, promissory note, or order, or of any debt or contract; or any instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is

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or purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be punished by imprisonment in the penitentiary not more than ten years.

Forgery is the feloniously making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability: *The State v. Johnson*, 26–407; *The State v. Thompson*, 19–299.

It is not necessary to aver the genuineness or validity of the instrument forged. The essence of the crime consists in the doing of the act with intent to defraud. If the writing is invalid on its face, it cannot be the subject of forgery, but it may be if the invalidity must be made out from extrinsic facts: *The State v. Pierce*, 8–231; *The State v. Johnson*, 26–407.

Where the defendant counterfeited the certificate of a justice of the peace as to the presentation and destruction of gopher scalps (§ 1488), *held*, that the act was sufficient to constitute forgery: *The State v. Johnson*, 26–407.

The instrument should be set forth, or some excuse for not doing so should be shown; but no technical form of words is necessary: *Ibid.*

In order to constitute forgery it is not necessary that the signature of the instrument be false; a fraudulent *alteration*, making the instrument such as was not signed by the maker, is sufficient; *Caulkins v. Whisler*, 29–495.

In a prosecution for forgery in altering a receipt, the fact that defendant could not reap any personal advantage from the alteration is not a defense; the making or alteration of *any writing* with a fraudulent intent whereby another may be prejudiced, is forgery: *The State v. Woodard*, 20–541.

The criminal intent, inferred from forging an instrument and using it in support of a claim, cannot be negatived by proof that the claim is a just one: *Ibid.*

The detaching of a condition from an instrument, by which it is converted from a non-negotiable to a negotiable instrument, *held*, to constitute forgery: *The State v. Stratton*, 27–420.

In a prosecution for forgery, *held*, that a particular instrument there set forth, sufficiently purported to create a liability against the person whose name was written thereto: *The State v. Baumon*, 52–68.

Uttering same. R. § 4254. C. '51, § 2627.

SEC. 3918. If any person utter and publish as true any record, process, certificate, deed, will, or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be punished by imprisonment in the penitentiary not more than fifteen years and fined not exceeding one thousand dollars.

Forgery of public securities. R. § 4255. C. '51, § 2628.

SEC. 3919. If any person with intent to defraud, falsely make, utter, forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money or other property issued or purporting to be issued by authority of this state, or any other of the United States; or any indorsement or or other writing purporting to transfer the right or interest of any holder of such public security, he shall be punished by imprisonment in the penitentiary not more than twenty years nor less than five years.

Counterfeiting bank notes, etc. R. § 4246. C. '51, § 2629.

SEC. 3920. If any person make, alter, forge, or counterfeit any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States, or any other government or country, with intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 3921. If any person has in his possession any forged,

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counterfeited, or altered bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be so forged, counterfeited or altered, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year. Having same in possession to defraud. R. § 4257. C. '51, § 2630.

The name of the person intended to be defrauded need not be set out (§ 4313), nor need it be alleged that the intent to defraud was "felonious" or "wilful": *The State v. Callendine*, 8-2-8.

The description of the bank bills in a particular case, *held*, insufficient, and, *held*, also, that a copy of such bills should have been set out in the indictment: *Ibid.*

SEC. 3922. If any person utter or pass, or tender in payment as true, any false, altered, forged, or counterfeited note, certificate, state bond, warrant, or other instrument of public security, or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized as heretofore mentioned, knowing the same to be false, altered, forged, or counterfeited, with the intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year. Uttering counterfeit securities. R. § 4258. C. '51, § 2631.

An indictment charging the accused with uttering, passing and tendering in payment, etc., is not bad as charging more than one offense: *The State v. Barrett*, 8-536.

The existence of the bank or corporation must be proved, but proof of that fact by reputation is sufficient (§ 3934): *Ibid.*; *The State v. Newlan*, 7-242.

SEC. 3923. If any person, having been convicted of the offenses described in the preceding section, afterward be convicted of a like offense; or if any person at the same term of the court is convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not less than two years, nor more than ten years. Second conviction. R. § 4259. C. '51, § 2632.

SEC. 3924. If any person engrave, make, or mend, or begin to engrave, make, or mend any plate, block, press, or other tool, instrument, or implement; or make or provide any paper or other materials adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant, or other instrument of public security for money or other property of this state, or any other of the United States; or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument or implement, paper or other material adapted and designed as aforesaid, with intent to use the same, or to cause or permit the same to be used in forging or making any such false and forged certificates, notes, bonds, warrants, public securities, or evidences of debt, shall be punished by imprisonment in the penitentiary for not more than five years nor less than two years. Making tools, etc., adapted for counterfeiting. R. § 4260. C. '51, § 2633.

SEC. 3925. If any person forge or counterfeit any gold or silver coin current by law or usage within this state, and if any Counterfeiting coin. R. § 4261. C. '51, § 2634.

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person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

On the trial of an indictment under this section, it should be proved that the accused had in his possession "five or more pieces" to make out the offense defined: *The State v. Pepper*, 11–347.

The word "and" occurring in the second line of this section, construed to mean "or," and *held*, that either of the acts described would constitute the offense; also, that an indictment charging both of them would charge but one offense, and would therefore not be open to the objection of duplicity: *The State v. Myers*, 10–448. So, also, if the counterfeiting and the having in possession with intent, etc., be charged in different counts, the indictment will not be bad if both counts refer to the same transaction: *The State v. McPherson*, 9–53.

The possession, as contemplated here, may consist in having the counterfeit coin deposited in a secret place within the knowledge and control of the accused: *The State v. Washburn*, 11–245.

It is not necessary to charge that the coin was counterfeited in a similitude to the current coin of the United States, or that it was of any value: *The State v. Williams*, 8–533.

The counterfeiting of coin of the United States may be punished under this section; the jurisdiction of the federal courts over such offense is not exclusive: *The State v. McPherson*, 9–53.

Uttering counterfeit coin and having possession thereof.
R. § 4262.
C. '51, § 2635.

SEC. 3926. Any person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in the preceding section, knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes, or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

Counterfeiting parts of bank notes and instruments.
R. § 4263.
C. '51, § 2636.

SEC. 3927. If any person fraudulently connect together different parts of several genuine bank bills, notes, or other instruments in writing, so at to produce one instrument; or alter any note or instrument in writing in a matter that is materia, with intent to defraud, the same shall be deemed forgery in like manner as if such bill or note or other instrument had been forged and counterfeited, and the offender shall be punished accordingly.

Affixing fictitious signatures.
R. § 4264.
C. '51, § 2637.

SEC. 3928. If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing, purporting to be a note, draft or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is a forgery, though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed. Every person guilty of this offense shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars, and imprisonment in the county jail not more than one year.

Fraudulent obliteration of instruments.
R. § 4265.
C. '51, § 2638.

SEC. 3929. The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter, with the intent to defraud,

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shall be deemed forgery, and the offender shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year.

Second and third convictions. R. § 4266. C. '51, § 2639.

SEC. 3930. If any person having been convicted of either of the offenses mentioned in the preceding section be afterwards convicted of a like offense; or if any person at the same term of court, be convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than three years.

Having instruments for counterfeiting. R. § 4267. C. '51, § 2640.

SEC. 3931. If any person cast, stamp, engrave, make, or mend, or have in his possession any mould, die, press, or other instrument or tool adapted and designed for the forging and counterfeiting of any coin before mentioned with intent to use the same, or permit the same to be used for that purpose, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

Counterfeiting foreign coin. R. § 4268. C. '51, § 2641.

SEC. 3932. If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

Forging or counterfeiting seals. R. § 4269. C. '51, § 2642.

SEC. 3933. Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of this state; or the seal of any public office authorized by law; or the seal of any court, corporation, city, or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal with intent to defraud, shall be punished by imprisonment in the penitentiary not exceeding ten years.

Existence of corporation proved by reputation. R. § 4270. C. '51, § 2643.

SEC. 3934. On the trial of any person for forging or counterfeiting any bill, note, or any other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing, or attempting to pass; or having in possession the same with intent to utter or pass such bill, note, or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof, but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit.

This section is equally applicable to the charge of falsely endorsing a note or bill, etc.: *The State v. Pierce*, 8–231.

Counterfeiting brands or stamps. R. § 1911.

SEC. 3935. If any person with intent to defraud, falsely make, forge, or counterfeit any stamp or brand authorized by law to be affixed to any substance or thing whatever; or, knowing such stamp or brand to be counterfeit, use the same as genuine with intent to defraud, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

See § 2073.

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CHAPTER 6.

OFFENSES AGAINST PUBLIC JUSTICE.

Perjury. R. § 4271. C. '51, § 2644.

SECTION 3936. If any person on oath or affirmation, lawfully administered, wilfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice, or before any officer thereof; or before any tribunal or officer created by law; or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury, and shall be punished, if the perjury was committed on the trial of a capital crime, by imprisonment in the penitentiary for life or any term not less than ten years; and if committed in any other case, by imprisonment in the penitentiary not more than ten years nor less than two years.

The matter falsely sworn to must be material, and its materiality must be established by the evidence, and cannot be left to presumption or inference: *The State v. Aikens*, 32–403. But *held*, that falsely swearing in an affidavit for continuance that a witness was absent from the county, constituted perjury, and that it could not be said that the oath was not material to the issues in the case: *The State v. Shupe*, 16–36.

An indictment charging perjury in testifying before a grand jury, and alleging that they were investigating a specified charge against a party named; that they had authority to investigate such charge, and that the matters sworn to by the defendant (particularly stated and their falsity charged) were material in that investigation, *held*, sufficient. It is not necessary in such a case to allege that the party charged with the offense under investigation by the grand jury was or was not guilty thereof, in order to state the facts constituting such offense: *The State v. Schill*, 27–263.

Held, that a defendant, who, under Rev. § 2742 (providing that a claim barred by the statute of limitations might be established by the testimony of the opposite party), was called by plaintiff as a witness for the purpose of establishing a claim by his own testimony, and who testified falsely, might be punished for perjury: *The State v. Voght*, 27–117.

An indictment for perjury need not charge that the prisoner knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *The State v. Raymond*, 20–5 2.

It is not necessary that there be two witnesses to the giving of testimony upon which the perjury is assigned, but only as to its falsity: *The State v. Wood*, 17–18.

The evidence of one witness as to the falsity of the matter sworn to, supported by evidence of strong corroborating circumstances, is sufficient to warrant a conviction: *The State v. Raymond*, 20–582.

Subornation of. R. § 4272. C. '51, § 2645.

SEC. 3937. If any person procure another to commit perjury, he is guilty of subornation of perjury, and shall be punished as provided in the preceding section.

Attempt to suborn. R. § 4273. C. '51, § 2646.

SEC. 3938. If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

Bribery of public officers. R. § 4274. C. '51, § 2647.

SEC. 3939. If any person give, offer, or promise to any executive or judicial officer or member of the general assembly after his election or appointment, and either before or after he has been qualified or has taken his seat, any valuable consideration,

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gratuity, service, or benefit whatever, with intent to influence his act, vote, opinion, or judgment in any matter, question, cause, or proceeding which may be pending or which may legally come or be brought before him in his official capacity, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not more than one thousand dollars and imprisonment in the county jail not more than one year.

Acceptance of bribes by such officers. R. § 4275. C. '51, § 2648.

SEC. 3940. If any executive or judicial officer, or member of the general assembly, accept any valuable consideration, gratuity, service, or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member under the agreement or with the understanding that his vote, opinion, decision, or judgment, shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is, or may by law be, brought before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year.

Same. R. § 4276. C. '51, § 2649.

SEC. 3941. Every person who is convicted under either of the two preceding sections of this chapter, shall forever afterward be disqualified from holding any office under the laws or constitution of this state.

Corrupt solicitation of places of trust. R. § 4277. C. '51, § 2650.

SEC. 3942. If any person, directly or indirectly, give, offer, or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such other person to procure for him by his interest, influence, or any other means whatever any place of trust within this state, he shall be punished by fine not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year.

Acceptance of such rewards. R. § 4278. C. '51, § 2651.

SEC. 3943. If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring, or attempting to procure, any office or place of trust within this state for any person, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

Bribery of jurors, referees, etc. R. § 4279. C. '51, § 2652.

SEC. 3944. If any person give, offer, or promise any valuable consideration or gratuity whatever, to any one summoned, appointed, or sworn as a juror; or appointed or chosen arbitrator, or umpire, or referee; or to any master in chancery; or appraiser of real or personal estate; or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest, or cause which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

Acceptance of bribes by such persons. R. § 4280. C. '51, § 2653.

SEC. 3945. If any person summoned, appointed, or sworn as a juror; or appointed arbitrator, umpire, or referee; or master in chancery; or auditor; or appraiser as aforesaid, take or receive any valuable consideration, or gratuity whatever to give his ver-

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dict, award, or report in favor of any particular party, in a matter for the hearing or decision of which such person has been summoned, appointed, or chosen as aforesaid, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Attempt to corrupt such persons. R. § 4281. C. '51, § 2654.

SEC. 3946. If any person attempt to improperly influence any juror in any civil or criminal cause, or any one drawn, or summoned, or appointed, or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in, or to be brought before the court for which such juror has been drawn, summoned, appointed, or sworn; or for the hearing and decision of which such abitrator or referee has been chosen or appointed, he shall be punished by a fine not exceeding five hundred dollars, and by imprisonment in the county jail not more than six months.

Jurors acting corruptly. R. § 4282. C. '51, § 2655.

SEC. 3947. If any person drawn, summoned, or sworn, as a juror, make any promise or agreement to give a verdict for or against any person in any civil or criminal case, or corruptly receive any paper, evidence, or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding three months.

Sheriff and other officers receiving bribes. R. § 4283. C. '51. § 2656.

SEC. 3948. If any sheriff, deputy sheriff, constable, or coroner, receive from a defendant, or any other person, any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison; or for postponing, delaying, or neglecting the sale of property on execution; or for omitting or delaying to perform any other duty pertaining to his office, he shall be punished by a fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or by both fine and imprisonment at the discretion of the court.

Refusing to execute process in criminal cases. R. § 4284. C. '51, § 2657.

SEC. 3949. If any officer authorized to serve process wilfully refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with, or convicted of, any public offense; or wilfully delay or omit to execute such process, whereby such person escape, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court.

Extortion. R. § 4285. C. '51, § 2658.

SEC. 3950. If any person corruptly and wilfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles, or attended more days than he has actually traveled or attended, he shall be punished by fine not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months.

Compounding felonies. R. § 4286. C. '51, § 2659.

SEC. 3951. If any person having knowledge of the commission of any offense punishable with imprisonment in the penitentiary for life, take any money or valuable consideration, or gratuity, or

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any promise therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be punished by imprisonment in the penitentiary not more than six years, or by fine not exceeding one thousand dollars.

A contract entered into for the compounding of a felony is void, and the law will not afford either party thereto affirmative relief: *Allison v. Hess*, 28–388; and an instrument based upon an agreement not to prosecute for a felony is void: *Peed v. McKee*, 42–689.

Same. R. § 4287. C. '51, § 2660.

SEC. 3952. If any person having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years, is guilty of the offense described in the preceding section, he shall be punished by imprisonment in the county jail not more than one year, and by fine not exceeding four hundred dollars.

Suffering prisoner to escape. R. § 4288. C. '51, § 2661.

SEC. 3953. If any jailor or other officer voluntarily suffer any prisoner in his custody upon a charge or conviction of a felony punishable by imprisonment for life, to escape, he shall be punished by imprisonment in the penitentiary not more than ten years, nor less than one year.

Same. R. § 4289. C. '51, § 2662.

SEC. 3954. If any jailor or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any other felony to escape, he shall be punished by imprisonment in the penitentiary not more than eight years, or by fine not more than one thousand dollars.

Same. R. § 4290. C. '51, § 2663.

SEC. 3955. If any jailor or other officer suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be punished by fine not exceeding one thousand dollars, and by imprisonment in the penitentiary not exceeding five years.

Assisting prisoner to escape. R. § 4291. C. '51, § 2664.

SEC. 3956. If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary, or in any jail or place of confinement for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

Same. R. § 4292. C. '51, § 2665.

SEC. 3957. Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement charged with or convicted of any criminal offense other than a felony in an attempt to escape, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms, or other things proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment at the discretion of the court.

Same from officer. R. § 4293. C. '51, § 2666.

SEC. 3958. Every person who aids or assists any prisoner in escaping, or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer or person who has the lawful charge of such prisoner upon any criminal charge, shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary not exceeding five years.

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Assisting a prisoner to escape from an officer having him in charge under a warrant, issued by a magistrate under § 4115 for threatening to commit a public offense, is within the meaning of this section. Whether the prisoner had in fact threatened to commit the offense as charged in the warrant, is immaterial: *The State v. Bates*, 23–96.

Prisoner escaping from county jail.
R. § 4295.
C. '51, § 2668.

SEC. 3959. If any person confined in a county jail upon any conviction for a criminal offense, break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of the former sentence, and fined not exceeding three hundred dollars.

Resisting execution of process.
R. § 4296.
C. '51, § 2669.
12 G. A. ch. 150.

SEC. 3960. If any person knowingly and wilfully resist or oppose any officer of this state, or any person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, or shall knowingly and wilfully resist any such officer in the discharge of his duties without such writ, rule, order, or process, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment at the discretion of the court.

It is no defense that the process is irregular or defective, if it is one that the magistrate has authority to issue: *The State v. Foster*, 10–435.

It will be presumed that the officer was proceeding to execute the process in a proper manner, and the indictment need not set forth the acts showing that he complied with the requisites of the statute: *The State v. Freeman*, 8–428.

The officers here contemplated are those only who are authorized to execute legal writs, orders, etc., and resistance to a road supervisor engaged in removing obstructions from a public road in his district is not within this section: *The State v. Putnam*, 35–561.

Under Rev. § 4296, before its amendment, it was held that to resist a peace officer making an arrest without a warrant, under § 4200, was not an offense under this statute: *The State v. Lovell*, 23–304.

Refusing to assist officer.
R. § 4297.
C. '51, § 2670.

SEC. 3961. If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, wilfully neglect or refuse to assist him in the execution of his office in any criminal case, or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months, or by fine not more than one hundred dollars.

Falsely assuming to be judge, etc.
R. § 4298.
C. '51, § 2671.

SEC. 3962. If any person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner, or constable, and take upon himself to act as such or require any one to aid or assist him in any matter pertaining to the duty of any such officer, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars.

Where a constable who, was reelected, proceeded to perform the duties of his office without qualifying anew as required by § 690, *held*, that he was not falsely assuming to be an officer, under this section: *The State v. Bates*, 23–96.

Exercising office without authority, and officers exceeding authority.
R. § 4299.
C. '51, § 2672.

SEC. 3963. If any person take upon himself to exercise or officiate in any office or place of authority in this state, without being legally authorized; or if any person by color of his office, wilfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail not more than one year; or by both fine and imprisonment.

A constable may be guilty of the offense here defined: *The State v. Bevans*, 37–178.

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Stirring up quarrels. R. § 4300. C. '51, § 2673.

SEC. 3964. If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law, encourage, excite, or stir up any suit, quarrel, or controversy between two or more persons, with intent to injure such person or persons, he shall be punished by fine not exceeding five hundred dollars; and shall be answerable to the party injured in treble damages.

Neglect of duty by public officers. R. § 4301. C. '51, § 2674.

SEC. 3965. When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency, is a misdemeanor.

Misdemeanors. R. § 4302. C. '51, § 2675.

SEC. 3966. When the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

Supervisors violating the provisions of § 303, ¶ 24, by voting to erect a public building without submitting the question to vote, in a case where such submission is required, are guilty, under this section, of a misdemeanor: *The State v. Conlee*, 25–237.

Punishment of when none other prescribed. R. § 4303. C. '51, § 2676.

SEC. 3967. Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Public officers making false entries and returns. R. § 4304. C. '51, § 2677.

SEC. 3968. If any public officer fraudulently make or give false entries, or false returns, or false certificates of receipts in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding one year, or both, at the discretion of the court.

[In the original rolls, between what are § § 3958 and 3959, occurs a section which is not in the printed code, but is substantially the same as this, except as to punishment. It reads as follows:

"If any public officer fraudulently make or give false entries, or false returns, or false certificates or receipts, where entries, returns, certificates or receipts are authorized by law, he shall be punished by fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding five years."]

It is not necessary, in charging this offense, to charge an intent to defraud any particular person: *The State v. Morse*, 52–509.

Oppression by officers. R. § § 4305–6.

SEC. 3969. If any judge or other officer by color of his office, wilfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not less than five nor more than thirty days, and be liable to the injured party for any damage sustained by him in consequence thereof.

Officers failing to pay over fees. R. § 4308.

SEC. 3970. If any justice of the peace, clerk of the district or other court, county recorder, or any other officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, shall fail, neglect, or refuse to pay over as prescribed, or as may hereafter be prescribed by law, all such fees and fines, he shall be deemed guilty of a misdemeanor, besides being liable in a civil action for

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the amount of such fines and fees as he may have thus illegally withheld or appropriated.

Making false entries in relation to fees. R. § 4309.

SEC. 3971. If any justice of the peace, clerk of the district or other court which is now or may hereafter be established, county recorder or other officer, who by law is authorized or required to keep a court docket, or who is or may be required to keep an account of fees or fines, and to pay over, or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect, or refuse to make an entry upon such docket or account, of such fees and fines, as are required to be paid over according to law, such justice of the peace, clerk of the district court, or clerk of any other court, county recorder and other officer shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense.

Officers appropriating fees to their own use. R. § 4310.

SEC. 3972. Any justice of the peace, clerk of the district or of any other court which is or may be established, county recorder, or other officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had, and each and every person so found guilty shall be punished by a fine not exceeding three hundred dollars nor less than ten dollars, or imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

Officers to report fees to supervisors. R. § 4314.

SEC. 3973. All officers required by the provisions of this code to collect and pay over fines and fees, shall, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed and the amount of fines and fees collected, together with the vouchers for the payment of all sums by him collected to the proper officer required to keep the same.

Clerks and justices to report fines, fees, etc.: penalty for failure. 9 G. A. ch. 29. 14 G. A. ch. 58.

SEC. 3974. The clerks of the several courts of this state, except of the supreme court, and all mayors of incorporated towns and cities, and justices of the peace, shall, on the first Monday of January of each year, make a report in writing to the board of supervisors of their respective counties, of all forfeited recognizances in their several offices; of all fines, penalties, and forfeitures imposed in their respective courts, and which by law go into the county treasury for the benefit of the school fund; in what cause or proceedings, when, for what purpose, against whom, and for what amount rendered; whether said fines, penalties, forfeitures and recognizances have been paid, remitted, canceled, or otherwise satisfied; if so, when, how, and in what manner; if not paid, remitted, canceled, or otherwise satisfied, what steps have been taken to enforce the collection thereof, and the prospect of such collection. Such report must be verified under oath, to the effect that the same is full, true, and complete of the matters therein contained, and of all things required by this section to be reported; and any officer failing so to do shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be fined in any sum not less than one hundred dollars.

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SEC. 3975. If any notary public exercise the duties of his office after the expiration of his commission, or when otherwise disqualified, or appends his official signature to documents when the parties have not appeared before him, he shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, and shall also be removed from office by the governor.

Notary public exercising improperly duties of office. R. § 210.

SEC. 3976. If any officer or person wilfully fails to take the oath required by law before entering on the discharge of the duties of any office, trust, or station, or makes any contract which contemplates an expenditure in excess of the law under which he was elected or appointed, or fails to report to the proper officer showing the expenditure of all public moneys with proper vouchers therefor by the time required by law, he shall be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both at the discretion of the court.

Failure to take oath before entering on duties of office. R. §§ 216, 2184.

CHAPTER 7.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

SECTION 3977. If any person maliciously kill, maim, or disfigure any horse, cattle, or other domestic beast of another; or maliciously administer poison to any such animals; or expose any poisonous substance with intent that the same should be taken by them, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding three hundred dollars.

Injuries to beasts. R. § 4318. C. '51, § 2678.

An indictment alleging the malicious killing of a sow, *held* sufficient; and *held* that it was not necessary to allege and prove that a hog is a "domestic beast": *The State v. Enslow*, 10–115.

An indictment charging the maiming and disfiguring of an animal is not bad for duplicity; any one or all of the acts here mentioned may be charged in the same indictment, and the proof need only cover so much of the allegation as constitutes a complete offense. To constitute the offense of disfiguring, the disfigurement need not be permanent or great: *The State v. Harris*, 11–414.

SEC. 3978. If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be punished by imprisonment in the county jail not exceeding one year and by fine not exceeding five hundred dollars.

To dams, locks, mills, machinery, etc. R. § 4319. C. '51, § 2679.

SEC. 3979. If any person maliciously injure, remove, or destroy any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any

To bridges, railways, highways, etc. R. § 4320. C. '51, § 2680.

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way break down, injure, or destroy any telegraph post, or in any way cut, break, or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

It is not a punishable offense to obstruct a highway which, by reason of natural obstacles, cannot be used by the public: *The State v. Shinkle*, 40–131.

But if part of the line of road is traveled, it would not excuse a party who obstructs it that another part was impassable as laid out: *The State v. McGee*, 40–595.

In prosecutions for obstructing a public highway, the state is not confined to documentary proof of the establishment thereof, but may show the highway by proof of consent and user, and the fact that the highway is not of statutory width will be no defense: *The State v. Robinson*, 28–514.

A party failing to remove a fence, where a newly established highway crosses his land, is not liable to indictment for obstructing a highway, at least until after reasonable notice by the supervisor to remove the same: *The State v. Ratliff*, 32–186.

Malice is not a necessary element of the offense of obstructing a highway; intent is only important to show whether it was wilful or merely accidental: *The State v. Gould*, 40–372.

In a prosecution for obstructing the track of a railway, it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *The State v. Clemens*, 38–257.

As to railroads, see § 5990.

Setting loose rafts, boats, and injuries to same.
R. § 4321.
C. '51, § 2681.

SEC. 3980. If any person maliciously cut away, let loose, injure, or destroy any boom or raft of wood, logs, or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person so injured double the amount of damages by him thereby sustained to be recovered in an action at law.

Injuring trees and breaking down fences, gates, etc.
R. § 4322.
C. '51, § 2682.

SEC. 3981. If any person maliciously cut down, injure, or destroy any fruit or ornamental trees or other tree, vine, or shrub of another, standing or growing for ornament or use; or maliciously break down, mar, deface, or injure any fence, hedge, or ditch enclosing lands belonging to another; or throw down or open any gate or bars not his own or under his charge and leave them open, whereby an injury is done to another; or maliciously injure, destroy, or sever from the land of another any produce thereof or anything attached thereto, he shall be punished by imprisonment in the couty jail not more than one year or by fine not exceeding one hundred dollars, or by both imprisonment and fine at the discretion of the court.

Injuring monuments, mile stones, sign boards, etc.
R. § 4323.
C. '51, § 2683.

SEC. 3982. If any person maliciously take down, injure, or remove any monument erected, or any tree marked as a boundary of any tract of land, city, or town lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary, or injure or deface any mile stone, post, or guide board erected on any public way; or remove, deface, or injure any sign board; or break or remove any lamp or lamp post, or extinguish any lamp on any bridge, way, street, or passage, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

[The word "or" in the second line, as it is in the original, is "on" in the printed code.]

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Trespass by digging, cutting, carrying away, etc. R. § 4324. C. '51, § 2684. 11 G. A. ch. 28.

SEC. 3983. If any person wilfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore, or any other ore or metal; or by taking and carrying from such land any grass, hay, corn, grain, fruit or other vegetables; or carrying away from any wharf, street, or landing place, any goods whatever in which he has no interest, he shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court. If in any case the value of the property so cut down, carried away, or otherwise taken shall not exceed the sum of fifty dollars, then the person so offending shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

The name of the owner of the land upon which the trespass is charged to have been committed, should be set out in the indictment, or, if unknown, the indictment should so state: *The State v. McConkey*, 20–574.

An indictment for cutting down and destroying, is not sustained by proof of carrying away only. The two acts as here specified are distinct: *Ibid.*

Under Rev., § 4324, *held*, that the value of the property need not be found, as is necessary in case of larceny, as the value does not necessarily fix the kind or amount of punishment: *The State v. Gigher*. 23–318. (This case was decided at Dec. T., 1867, but does not refer to the amendment of 1866, 11. G. A., ch. 28, and it does not appear whether the offense was committed before that act took effect or not. The decision would not apply to the section as it now stands.)

On gardens, orchards, etc. R. § 4325. C. '51, § 2685.

SEC. 3984. If any person wilfully commit any trespass by entering upon the garden, orchard, or improved land of another, with intent to take, carry away, destroy, or injure the trees, shrubs, grain, grass, hay, fruit, or vegetables there being, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not more than thirty days.

Injuries to buildings and fixtures. R. § 4326. C. '51, § 2686.

SEC. 3985. If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or wilfully and maliciously destroy, injure, or secrete any goods, chattels, or valuable papers of another, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, and is liable to the party injured in a sum equal to three times the value of the property so destroyed or injured in a civil action.

An indictment charging in one count, that accused "injured and defaced" a building, is not objectionable on the ground of duplicity. The clauses in the statute being disjunctive, either one or all the acts there specified may be charged in one count and constitute the same offense: *The State v. Hockenberry*, 11–269.

Malicious injury to a church building is punishable under this section, and it is sufficient to aver ownership in the trustees, as such, without setting out the character of their title: *The State v. Brant*, 14–180.

Defacing public buildings. R. § 4327. C. '51, § 2687.

SEC. 3986. If any person wilfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, school house, court house, or other public building; or wilfully injure or deface the same, or any wall or fence enclosing the same, he shall be punished by fine not exceeding one hundred

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dollars, or by imprisonment in the county jail not more than thirty days.

Defacing and destroying proclamations, notices, etc. R. § 4328. C. '51, § 2688.

SEC. 3987. If any person intentionally deface, obliterate, tear down, or destroy in whole or in part, any transcript, or extract from or of any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

Taking property from boat or vessel. R. § 4329. C. '51, § 2689.

SEC. 3988. If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft, take any cord wood or any other species of property from the owner or his agent, without the knowledge of such owner or agent, or without paying the customary price for the same, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months.

Injuries to monuments of state boundary. R. § 4330. C. '51, § 2690.

SEC. 3989. If any person wilfully dig up, pull down, break, or destroy, or in any other manner injure or remove any of the cast iron pillars or other evidences planted and fixed, or which may hereafter be planted or fixed, in and along any part of the boundaries of this state, he may be indicted therefor, and, upon conviction before any court having competent jurisdiction, shall be punished by fine not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the penitentiary for a term not less than six months, or by both such fine and imprisonment at the discretion of the court.

Placing obstructions on railways. R. § 4331.

SEC. 3990. If any person or persons shall wilfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years.

It being found that defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied: *The State v. Hessenkamp*, 17–25.

The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it, or had violated the covenants of its contract with respect thereto, would be no defense in an action under this section: *Ibid.*

See, also, § 3979.

Breaking levees. R. § 4332.

SEC. 3991. If any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within this state, such person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Obstructing public ditches or drains. 9 G. A. ch. 135.

SEC. 3992. If any person place any obstruction in any of the public ditches or drains made for the purpose of draining any of the swamp lands in this state, he shall, upon conviction, be compelled to remove said obstructions and be fined not less than five dollars nor more than one hundred dollars, or be imprisoned in the county jail not more than thirty days at the discretion of the court.

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SEC. 3992½. If any person without authority or permission from the proper road supervisor, shall in any manner obstruct, deface, or injure any public road or highway, by breaking up, plowing, or digging within the boundary lines thereof, he shall upon conviction be punished by a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment in the county jail not more than thirty days, at the discretion of the court. Penalty for obstructing or defacing roads.

[This section was inserted by 15th G. A., ch. 17.]

CHAPTER 8.

OFFENSES AGAINST THE RIGHT OF SUFFRAGE.

SECTION 3993. If any person offer or give a bribe to any elector for the purpose of influencing his vote at any election authorized by law; and if any elector entitled to vote at such election receives such bribe, he shall be punished by fine not exceeding five hundred dollars, or imprisoned in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court. Bribery of electors. R. § 4333.

Held, that it was not bribery at an election to re-locate a county seat, to agree to give certain facilities for the convenience of the whole county, such as offering a building for courts and offices, conveying real estate to the county, paying money towards the erection of a bridge, subscribing towards the high school, etc.: *Dishon v. Smith*, 10–212.

SEC. 3994. If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year. Voting more than once. R. § 4334. C. '51, § 2692.

SEC. 3995. If any person knowing himself not to be qualified, vote at any election authorized by law, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months. When not qualified. R. § 4335. C. '51, § 2693.

An indictment under this section in a particular case, *held* sufficient: *The State v. Douglas*, 7–413.

SEC. 3996. If any person go or come into any county of this state, and vote in such county, not being a resident thereof, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year. When not a resident of the county. R. § 4336. C. '51, § 2694.

SEC. 3997. If any person wilfully vote who has not been a resident of this state for six months next preceding the election, or who, at the time of the election, is not twenty-one years of age, or who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the place where, and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year. When not a resident of the state for six months. R. § 4337. C. '51, § 2695.

It is no defense under this section that defendant consulted others (not persons learned in the law), as to his right to vote, and was advised that he

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had a right to do so: *The State v. Sheeley*, 15–404.

Voting in a township other than that of the voter's residence is an offense under this section, and it is not necessary for conviction to charge or prove that accused voted for or against any one. The casting of a ballot being proved, it would be presumed that it designated the name of some person for some office: *The State v. Minnick*, 15–123.

Counseling one to vote when not qualified. R. § 4338. C. '51, § 2696.

SEC. 3998. If any person procure, aid, assist, counsel, or advise another to give his vote, knowing that such person is disqualified, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, and by imprisonment in the county jail not exceeding one year.

Inducing one to vote by false representation. R. § 4339. C. '51, § 2697.

SEC. 3999. If any person furnish an elector with a ticket or ballot, informing him that it contains a name or names different from those which are written or printed therein, with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector, by which such elector is deprived of voting for such candidate or person as he intended, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not exceeding one thousand dollars nor less than one hundred dollars.

Preventing from voting by force or threats. R. § 4340. C. '51, § 2698.

SEC. 4000. If any person unlawfully and by force, or threats of force, prevent or endeavor to prevent, an elector from giving his vote at any public election in this state, he shall be punished by imprisonment in the county jail not exceeding six months, and a fine not more than two hundred dollars.

Bribing clerks, judges, etc. R. § 4341. C. '51, § 2699.

SEC. 4001. If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done, or omitted to be done, contrary to his official duty in relation to such election, he shall be punished by fine not exceeding seven hundred dollars and imprisonment in the county jail not exceeding one year.

Procuring vote by influence or threats. R. § 4342. C. '51, § 2700.

SEC. 4002. If any person procure, or endeavor to procure, the vote of any elector, or the influence of any person over other electors at an election, for himself, or for or against any candidate by means of violence, threats of violence, or threats of withdrawing custom, or dealing in business or trade, or enforcing the payment of debts, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him, or by his means, he shall be punished by fine not exceeding five hundred dollars, or imprisonment in the county jail not more than one year.

Judges or clerks making false entries, etc. R. § 4343. C. '51, § 2701.

SEC. 4003. If any judge or clerk of any election authorized by law, knowingly make or consent to any false entry on the list of voters, or poll books; or put into the ballot box, or permit to be so put in, any ballot not given by a voter; or take out of such box, or permit to be so taken out, any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Refusing to permit electors to vote and the contrary. R. § 4344. C. '51, § 2702.

SEC. 4004. When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit

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him to vote without producing proof of such qualification in the manner directed by law, or if any such judge wilfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be punished by fine not exceeding two hundred dollars nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months.

Officers doing any act which renders election void. R. § 4345. C. '51, § 2703.

SEC. 4005. If any judge, clerk, or executive officer designedly omit to do any official act required by law; or designedly do any illegal act in relation to any public election, by which act or omission the votes taken at any such election in any city, town, precinct, township or district, be lost, or the electors thereof be deprived of their suffrage at such election; or designedly do any act which renders such election void, he shall be fined not less than one hundred dollars, nor more than one thousand dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

Not returning poll books. R. § 4346. C. '51, § 2704.

SEC. 4006. If any judge, clerk, or messenger, after having been deputed by the judges of the election to carry the poll-books of such election to the place where by law they are to be canvassed, wilfully or negligently fail to deliver such poll-books within the time prescribed by law, safe, with the seal unbroken, he shall, for every such offense, be punished by fine not exceeding five hundred dollars, nor less than fifty dollars.

Improper registry as a voter. 12 G. A. ch. 171, § 10.

SEC. 4007. Any person who shall cause his name to be registered, knowing that he is not or will not become a qualified voter in the township where his name is registered previous to the next election, or who shall wrongfully personate any registered voter, and any person causing, aiding, or abetting any person in either of said acts, shall be deemed guilty of a felony, and punished for each offense by imprisonment in the state prison not less than one year.

CHAPTER 9.

OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

Adultery. R. § 4347. C. '51, § 2705.

SECTION 4008. Every person who commits the crime of adultery, shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married, both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife.

If the prosecution is *commenced* by the husband or wife, that is sufficient; it may be continued without further co-operation on the part of such party: *The State v. Baldy*, 17–39. And where the wife instituted the proceedings before an examining magistrate, in which the defendant was held to answer, but did not appear before the grand jury or otherwise in the further prosecution of the case, *held*, that the prosecution was suffi-

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ciently commenced upon the complaint of the wife: *The State v. Dingee*, 17–232.

An averment in the indictment that the prosecution was commenced by the husband or wife, is not conclusive, and if not so commenced, advantage of that fact may be taken by defendant: *The State v. Roth*, 17–336.

An unmarried person may be guilty of the crime of adultery, and complaint against such person may be made by the husband or wife of the married party, although such married party is not prosecuted: *The State v. Wilson*, 22–364.

The provision contained in the last sentence of the section leads to the inference that the offense is a crime against the partner of the marital relation rather than against society in general; therefore, under § 3641, the one may, in such case, be a witness against the other: *The State v. Bennett*, 31–24.

Where defendant procured a decree of divorce from his wife, and married again, and subsequently, in a proceeding brought under title 19, ch. 1 of the Code, such decree was declared void as procured by fraud, *held*, that the decree of divorce being thus shown to have been void from the beginning, it would be no defense in a prosecution for adultery committed in living with the wife of the second marriage: *The State v. Whitcomb*, 52–85.

In a prosecution for adultery, record proof of marriage is not indispensable. It may be established by the testimony of the husband or wife: *The State v. Wilson*, 22–364; so, also, admissions of defendant that he was married, are properly receivable to establish the crime: *The State v. Sanders*, 30–582.

Proof that, as to the woman, the connection was by force, and without her consent, will not, as to the man, deprive the offense of the character of adultery: *Ibid.*

Bigamy.
R. § 4348.
C. '51, § 2706.

SEC. 4009. If any person who has a former husband or wife living, marry another person, or continue to cohabit with such second husband or wife in this state, he or she, except in the cases mentioned in the following section, is guilty of bigamy and shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

An indictment under this section need not negative the exceptions contained in the next section: *The State v. Williams*, 20–98.

The testimony of a witness who saw the marriage is sufficient, without record evidence thereof: *Ibid.*

Exceptions.
R. § 4349.
C. '51, § 2707.

SEC. 4010. The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas, or who has voluntarily withdrawn from the other and remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony.

Knowingly marrying husband or wife.
R. § 4350.
C. '51, § 2708.

SEC. 4011. Every unmarried person who knowingly marries the husband or wife of another, when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars and imprisonment in the county jail not exceeding one year.

Lewdness.
R. § 4351.
C. '51, § 2709.

SEC. 4012. If any man or woman not being married to each other lewdly and viciously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and designedly make any open and indecent, or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county

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jail not exceeding six months, or by fine not exceeding two hundred dollars.

Acts of private incontinence are not sufficient to constitute the offense here described: *The State v. Marvin*, 12–499.

An indictment under this section should charge that the parties were not married to each other: *The State v. Clinch*, 8–401.

SEC. 4013. If any person keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars; and any person who, after having been once convicted of such offense, is again convicted of the like offense, shall be punished by imprisonment in the penitentiary not less that one year nor more than three years. Keeping house of ill-fame. R. § 4352. C. '51, § 2710.

If the facts constituting an offense under this section be properly charged in the indictment, the fact that the term nuisance is used to designate it, will not invalidate the indictment nor make it an indictment for the offense defined in § 4091: *The State v. Snaw*, 35–575.

The offense here defined is distinct from that defined in § 4091, in that, in the latter case, it must be "to the disturbance of others": *The State v. Odell*, 42–75; *The State v. Alderman*, 40–375.

SEC. 4014. When the lessee of a dwelling house is convicted of keeping the same as a house of ill-fame, the lease or contract for letting such house is, at the option of the lessor, void, and such lessor may thereupon have the like remedy to recover possession as against a tenant holding over after the expiration of his term. Lease of to person convicted void. R. § 4353. C. '51, § 2711.

SEC. 4015. If any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine not exceeding three hundred dollars, or imprisoned in the county jail not exceeding six months. Leasing house for such purpose. R. § 4354. C. '51, § 2712.

The acts here described constitute but one offense, and an indictment charging both of them is not bad for duplicity: *The State v. Abrahams*, 6–117.

To render the defendant guilty of *knowingly permitting* the use, something more must be shown than his mere inactivity, or failure to take steps to prevent such illegal use. Some act or declaration showing an affirmative assent, must be shown: *Ibid.; S. C.* 4–541.

SEC. 4016. If any person inveigle or entice any female, before reputed virtuous, to a house of ill-fame, or knowingly conceal or aid or abet in concealing such female so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than three years. Enticing virtuous females to house of ill-fame. R. § 4355. C. '51, § 2713.

SEC. 4017. If any person, without lawful authority, wilfully dig up, disinter, remove or carry away any human body, or the remains thereof, from its place of interment; or aid, assist, encourage, incite or procure the same to be done or attempted; or wilfully receive, conceal, or dispose of any such human body, or the remains thereof; or if any person, with the intent to commit any of the aforesaid acts, partially performs the same; or if any person wilfully and unnecessarily, and in an improper manner, indecently expose, throw away, or abandon any human body, or Violating of sepulchre and exposure of dead bodies. R. § 4356. C. '51, § 2714.

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the remains thereof, in any public place, or in any river, stream, pond, or other place, every such offender shall be punished by imprisonment in the penitentiary not more than two years, or by fine not exceeding twenty-five hundred dollars, or by both fine and imprisonment.

[A substitute for the original section; 18th G. A., ch. 182, § 2. The change consists in more fully specifying the acts punished and in increasing the punishment.]

Remains of deceased persons delivered to medical schools or physician. 14 G. A. ch. 82, §§ 1, 4.

SEC. 4018. Any coroner or undertaker in any county or city in which the population exceeds one thousand inhabitants, may deliver to any medical college or school, or any physician in this state, for the purpose of medical and surgical study, the body or remains of any deceased person, except where such body has been interred or dressed for interment; but no such body shall be so delivered without the consent of the relatives or friends of such deceased person, if any such are known, nor where such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any person who has been a resident of the county when death took place for six months is so delivered, and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains, having knowledge that any of the foregoing provisions have been violated, shall, upon conviction thereof, be punished as provided in the preceding section.

Burial of remains after dissection. Same, § 2.

SEC. 4019. The person receiving such body as contemplated in the preceding section, shall decently bury the remains thereof after such body shall have been used as aforesaid, and in case of a failure to so do such person shall be deemed guilty of a misdemeanor, and punished by fine not less than ten nor more than fifty dollars.

Record of bodies to be kept.

SEC. 4019½. Any physician receiving the body or remains of a deceased person for the purpose of medical or surgical study; and any professor or person in charge of a medical college or school at which such body or remains are received for such purpose, shall, in a suitable book, make or cause to be made a legible record of the time when, the name and description of the person from whom, and the place where such body or remains were received, and whether or not such body or remains when so received was inclosed in any box, cask or other receptacle, and, if so enclosed, shall record a description of such box, cask or receptacle, sufficient to identify the same, together with the shipping marks or directions, if any, on same; and also a description of such body or remains, including the length, weight and sex of same, the apparent age of the person at the time of death, color of hair, or beard if any, and any and all marks or scars on such body by which same might be identified, and whether or not such body when so received was mutilated so as to prevent identification of same. And such physician, professor or person, shall keep the said record, and on demand exhibit same, as also any and all such bodies or remains of deceased persons then in his charge, for the inspection of any sheriff or his deputy: *provided*, such record shall not be required one year or more after such body was received. Any physician or

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professor or teacher in a medical college or school who uses or allows or permits others under his or her control or charge to use the body or remains of a deceased person for the purpose of medical or surgical study without the record as aforesaid having been first made; or on demand being made by the sheriff or his deputy as aforesaid, shall refuse and fail to exhibit any such record or body in his charge or under his control to such officer for his inspection, shall be guilty of a misdemeanor, and upon conviction be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

[This section was inserted by 18th G. A., ch. 182, § 3.]

Remains to be used for medical study alone. Same, § 3.

SEC. 4020. The remains of any person received as aforesaid, shall be used for the purpose of medical and surgical study alone, and in this state only, and whoever shall use such remains for any other purpose, or shall remove the same beyond the limits of this state, or in any manner traffic therein, shall be guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding one year in a county jail.

Injuring monuments, tombstones, etc. R. § 4357. C. '51, § 2715.

SEC. 4021. If any person wilfully destroy or injure any tomb, grave-stone, monument, or other thing placed or designated as a memorial of the dead; or any fence, railing, or other thing placed about the same; or any place enclosed for the burial of the dead; or wilfully destroy, injure or remove any tree, shrub, or plant within such enclosure, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment.

Selling obscene books, pictures, etc. R. § 4359. C. '51, § 2717.

SEC. 4022. If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed paper containing obscene language or obscene prints, pictures, or descriptions manifestly tending to corrupt the morals of youth; or introduce into any family, school, or place of education; or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation; or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Disturbing worshipping congregations. R. § 4360. C. '51, § 2718. 9 G. A. ch. 146.

SEC. 4023. If any person wilfully disturb or disquiet any assembly of persons met for religious worship, by profane discourse or rude and indecent behavior, or by making a noise either within the place of worship or so near as to disturb the order and solemnity of the assembly, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. If any person or persons unlawfully or wilfully disturb or interrupt any school, school meeting, teachers' institute, lyceum, literary society, or any other lawful assembly of persons being in the peace of the state, such person or persons shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

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Same.
R. § 4361.
C. '51, § 2719.

SEC. 4024. If any person within one mile from the place where any religious society is collected together for religious worship in any field or woodland, expose to sale or gift any spirituous or other liquors, or any article of merchandise, or any provisions or other article of traffic, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Exceptions.
R. § 4362.
C. '51, § 2720.

SEC. 4025. The preceding section does not apply to tavern or grocery keepers exercising their calling or business in the places mentioned in their licenses, if they have such; nor to any distillers or manufacturers or others in the prosecution of their ordinary calling or business, so as to prevent them from vending or exposing to sale the articles above prohibited at their place of residence; nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles, on complying with the regulations of such religious assembly and with the laws of the state.

Keeping gambling houses.
R. § 4363.
C. '51, § 2721.

SEC. 4026. If any person keep a house, shop, or place resorted to for the purpose of gambling; or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, dice, faro, roulette, equality, or other game, for money or other thing, such offender shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, or be imprisoned in the county jail not exceeding one year, or be both fined and imprisoned. In a prosecution under this section, any person who has the charge of or attends to any such house, shop, or place, may be deemed the keeper thereof.

To constitute gambling as here contemplated, it is not necessary that the money or "other thing" should be "put up;" playing with the understanding that the loser shall pay for the drinks around, which arrangement is carried out, is sufficient: *The State v. Leicht*, 17–28; *The State v. Maurer*, 7–406; *The State v. Cooster*, 10–453; *The State v. Bishel*, 39–42.

But playing at cards for recreation or amusement is not prohibited: *The State v. Leicht*, 17–28.

It is not necessary that the place occupied be *generally* or habitually resorted to, if it is kept for that purpose. One act of gambling, as well as many, will complete the offense: *The State v. Cooster*, 10–453. So the offense is as complete if the house is kept for one day as if kept for a year. It does not consist in causing or continuing a public nuisance as contemplated in § 4091: *The State v. Crogan*, 8–523.

A charge that defendant *keeps* a house *resorted to*, sufficiently charges intent and knowledge, and still more does the charge that he *permits*, etc., gambling, imply knowledge: *The State v. Cure*, 7–479. And an indictment charging that accused, being the keeper of a house resorted to for the purpose of gambling, knowingly and unlawfully did permit, etc., *held*, sufficient, although it would have been better to have expressly charged that the house was under the control of accused: *The State v. Middleton*, 11–246.

The "keeping," etc., and the "permitting," etc., constitute one and the same offense, and an indictment charging them both in separate counts is not objectionable on the ground of duplicity: *The State v. Cooster*, 10–453.

Search warrant against.
R. § 4364.
C. '51, § 2722.

SEC. 4027. If any person make oath before a justice of the peace that he has probable cause to suspect, and does suspect that any house, building, or place, naming the house or place and the occupant, is unlawfully used as a common gaming house, or place for the purpose of gaming for money or other property, and that persons resort to the same for that purpose, whether they be known to the complainant or not, such justice may issue his war-

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rant for the purpose of searching such house or building for all such implements or gambling devices mentioned in the preceding section, and for the apprehension of the occupant or keeper of said house or building; and after such search, seizure, and arrest, the said implements and keeper shall be carried before such justice of the peace to be dealt with as provided by law. And any gambling device brought before the justice may be destroyed by him, and an entry thereof shall be made upon his docket.

Gaming and betting. R. § 4365. C. '51, § 2723.

SEC. 4028. If any person play at any game for any sum of money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Playing at billiards or "pin-pool" with the agreement or understanding that the losing party shall pay for the game, is gambling: *The State v. Book*, 41–550.

Gaming contracts void. R. § 4366. C. '51, § 2724.

SEC. 4029. All promises, agreements, notes, bills, bonds, or other contracts, mortgages, or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or bet, at or upon any game of any kind or on any wager, are absolutely void and of no effect.

Money lost on a wager and paid over, cannot be recovered back: *Thrift v. Redman*, 13–25; but a party depositing money or other property with a stakeholder as a wager, may recover it back before it is paid over to the winner: *Shannon v. Baumer*, 10–210; and an action may be maintained against a stakeholder who has paid over to the winning party money placed in his hands as a wager after he has been notified by the loser not to do so: *Adkins v. Fleming*, 29–122.

Where a note for a larger amount than the bet, was deposited, and was given to the winner, and the proceeds realized by him, *held*, that the loser might recover from him the amount so realized in excess of the bet: *Shaw v. Gardner*, 30–111.

Action cannot be maintained upon a note showing upon its face that it was given in a betting transaction: *Sipe v. Finarty*, 6–394. And even if the note is given upon an apparent consideration, the agreement between the parties may be such as to make it clearly a wagering contract: *Craig v. Andrews*, 7–17.

The contracts specified in this section are void, even in the hands of an innocent purchaser: *Ibid.*

Where one, in behalf of himself and others, deposited a sum as a wager, *held*, that in an action to recover such sum from the stakeholder, he could only recover the amount actually belonging to him, and that, the transaction being void, he could not recover the whole amount under § 2544, as the party with whom, or in whose name, a contract is made for the benefit of another: *Toney v. Snyder*, 50–73.

Incest. R. §§ 4367-9.

SEC. 4030. If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son; or if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the

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state penitentiary for a term not exceeding ten years and not less than one year.

The marriage of persons sustaining to each other any of the degrees of relationship here specified, is incest. Carnal knowledge in such case need not be alleged or shown: *The State v. Schaunhurst*, 34–547.

The words brother and sister, as here used, refer to illegitimate as well as legitimate children of the same parents: *Ibid.*

The register of marriages is sufficient evidence of the marriage. (§ 2197): *Ibid.*

Cruelty to animals.
R. § 4358.
C. 51. § 2716.
13 G. A. ch. 176, §§ 1, 2.

SEC. 4031. If any person torture, torment, deprive of necessary sustenance, cruelly beat, mutilate, cruelly kill, or overdrive any animal; or unnecessarily fail to provide the same with proper food, drink, shelter, or protection from the weather; or cruelly drive or work the same when unfit for labor; or cruelly abandon the same; or carry or cause the same to be carried on any vehicle, or otherwise, in an unnecessarily cruel and inhuman manner, he shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

By railways: when transporting.
Same, § 3.

SEC. 4032. No railway company in this state, in the carrying or transportation of cattle, sheep, swine, or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water, and feeding, for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their continuous confinement beyond twenty-eight hours, except upon contingencies hereinbefore stated; and animals unloaded for rest, water, and feeding, under the provisions of this section, shall be properly fed, watered, and sheltered during such rest by the owners or persons in custody thereof, or in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals authorized by this section. Any railway company, owner, or custodian of such animals who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for, and forfeit and pay a penalty of not less than one hundred and not greater than five hundred dollars. But when such animals shall be carried in cars in which they shall and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply.

Keeping cockpits and fighting dogs, bears, etc.
Same, § 7.

SEC. 4033. If any person keep or use, or in any way be connected with, or be interested in the management of, or receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock, or other creature, or engage in, aid, abet, encourage, or assist in any bull, bear, dog, or cock fight, or a fight between any other creature, he shall be deemed guilty of a misdemeanor.

SEC. 4034. If any person impound or confine, or cause to be

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impounded or confined in any pound or other place, any creature, and fail to supply the same during such confinement with a sufficient quantity of food and water, he shall be deemed guilty of a misdemeanor.

Impounding animals without food or water. Same, § 8.

CHAPTER 10.

OFFENSES AGAINST PUBLIC HEALTH.

SECTION 4035. If any person knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Selling unwholesome provisions. R. § 4371. C. '51, § 2725.

SEC. 4036. If any person fraudulently adulterate for the purpose of sale, any substance intended for food, or any wine, spirituous or malt liquor, or other liquor intended for drinking, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars, and the article so adulterated shall be forfeited and destroyed.

Adulterating food or liquor. R. § 4372. C. '51, § 2726.

SEC. 4037. If any person fraudulently adulterate, for the purpose of sale, any drug or medicine in such manner as to lessen the efficacy, or change the operation of such drugs or medicines, or to make them injurious to health; or sell them knowing that they are thus adulterated, he shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, and such adulterated drugs and medicines shall be forfeited and destroyed.

Drugs or medicines. R. § 4373. C. '51, § 2727.

SEC. 4038. If any apothecary, druggist, or other person, sell and deliver any arsenic, corrosive sublimate, prussic acid, or any poisonous liquid or substance, without having the word "poison," and the true name thereof written or printed upon a label attached to the vial, box, or parcel containing the same, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars. Any person who may dispose of at retail any poisonous substance or liquid to any one, for any purpose, is hereby required to enter in a book, to be kept by such apothecary, druggist, or other person so disposing, the name of the poison, when bought, by whom, and for what purpose; and if the person who calls for such poison is not personally known to the vendor, then such person shall be identified by some one known to the vendor, whose name shall also be entered in such book. Any failure to comply with the requirements of this provision shall subject the party so failing to imprisonment in the county jail not more than thirty days, or to a fine not exceeding one hundred dollars.

Apothecaries, etc.: neglecting to label poisons. R. § 4374. C. '51, § 2728. 10 G. A. ch. 110.

See, also, 18 G. A., ch. 75, § 9.

SEC. 4039. If any person innoculate himself or any other person, or suffer himself to be innoculated with the small pox within this state, or come within the state with the intent to cause

Inoculating with small pox with intent to spread disease. R. § 4375. C. '51, § 2729.

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the prevalence or spread of this infectious disease, he shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Selling drugged liquors. R. § 4376.

SEC. 4040. If any person wilfully sell, or keep for sale, intoxicating, malt, or vinous liquors, which have been adulterated or drugged by admixture with any deleterious or poisonous substance, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years.

Throwing dead animals in stream, spring, etc. 10 G. A. ch. 18.

SEC. 4041. If any person throw, or cause to be thrown, any dead animal into any river, well, spring, cistern, reservoir, stream, or pond, he shall be punished by imprisonment in the county jail not less than ten nor more than thirty days, or by fine not less than five nor more than one hundred dollars.

Selling diluted milk or using poisonous material in making cheese or butter. 13 G. A. ch. 156.

SEC. 4042. If any person knowingly sell to another, or knowingly deliver or bring to be manufactured to any cheese or butter manufactory in this state, any milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as "skimmed milk," or shall keep back any part of milk known as "strippings" with intent to defraud, or shall knowingly sell the milk, the product of a diseased animal or animals, or shall knowingly use any poisonous or deleterious material in the manufacture of cheese or butter, he shall, upon conviction thereof, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and be liable in double the amount of damages to the person or persons, firm, association, or corporation, upon whom such fraud shall be committed.

[Eighteenth General Assembly, Chapter 39.]

Oleomargerine to be labeled as such.

SEC. 1. Every person who shall manufacture for sale, or who shall offer or expose for sale, any article or substance in semblance of butter, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals enters as one of the component parts, or into which a portion of melted butter, or any oil thereof, has been introduced to take the place of cream, shall distinctly, legibly, and durably brand, stamp, or mark the word "oleomargerine" upon every tub, firkin, or other package of the said substance; and all letters used in stamping, branding or marking said package to be not less in size than three-fourths of an inch in length and one-half inch in width; and in case of retail sale of such article or substance in parcels, the seller shall in all cases deliver therewith to the purchaser a written or printed label, bearing the plainly written or printed word "oleomargerine."

Failure deemed misdemeanor.

SEC. 2. Every person who shall knowingly sell, or offer or expose for sale, or who shall cause or procure to be sold, any article or substance required by the first section of this act to be branded, stamped, or labeled, not so marked, branded, stamped or labeled, shall be guilty of a misdemeanor. Proof of the sale, or offer, or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold, or offered, and that the same was not marked, branded, stamped or labeled, as required by this act.

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SEC. 3. Any person violating the provisions of this act shall, for each and every violation, be fined not less than twenty dollars, nor more than one hundred dollars, or shall be confined in the county jail not less than ten days nor more than ninety days, or both, at the discretion of the court. Penalty.

[Eighteenth General Assembly, Chapter 137.]

SEC. 1. All persons or associations who shall engage in the business of selling lard rendered from swine that have died of hog cholera, or other diseases, shall, before selling or offering to sell any such lard, plainly stamp, print, or write upon the cask, barrel, or other vessel containing such lard, "Lard from hogs which have died of disease," or if sold without such casks, barrel, or other receptacles, the purchaser shall be informed that the lard is from hogs that have died from disease. Lard manufactured from diseased hogs to be so labeled.

SEC. 2. For a violation of the provisions of the foregoing section, the vendor shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days. Penalty for violation.

CHAPTER 11.

OFFENSES AGAINST PUBLIC POLICY.

SECTION 4043. If any person make, or aid in making or establishing any lottery in this state; or advertise or make public any scheme for any such lottery; or advertise or offer for sale any ticket or part of a ticket in any lottery; or sell, negotiate, dispose of, purchase, or receive the same; or have in his possession any ticket or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars, or by both fine and imprisonment at the discretion of the court. Lotteries and selling tickets. R. § 4377. C. '51, § 2730.

The disposal of lands by a scheme in which parties were to buy tickets and draw therefor, *held*, a lottery, and a contract of purchase thus entered into was held void: *Guenther v. Dewein*, 11-133.

SEC. 4044. If any person give, sell, or dispose of, any spirituous or intoxicating drinks to any Indian within this state, or to any person who is intoxicated, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court. Disposing of liquors to Indians or intoxicated persons. R. § 4378. C. '51, § 2735.

[Fifteenth General Assembly, Chapter 59.]

SEC. 1. It shall be unlawful for any person who keeps a billiard-hall, beer-saloon, or nine or ten pin alley, or the agent, clerk, or servant of any such person, or any person having charge or control of any such hall, saloon, or alley, to permit any minor Minors not to be allowed to remain in billiard-rooms, saloons, etc.

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or minors to remain in such hall, saloon, or alley, or to take part in any of the games known as billiards, nine or ten pins.

Penalty for violation.

SEC. 2. For a violation of the provisions of the foregoing section the offender shall, on conviction thereof, be punished by a fine not less than five dollars nor exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

Bringing paupers into this state. R. § 4379. C. '51, § 2736.

SEC. 4045. If any person knowingly bring within this state any pauper or poor person, with the intent of making him a charge on any of the townships or counties therein, he shall be punished by fine not exceeding five hundred dollars and stand charged with his support.

Transacting business without license. R. § 4380. C. '51, § 2737.

SEC. 4046. If any person carry on or transact any business or occupation without license therefor, when such license is required by any law of this state, he shall be fined in a sum not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days.

Circulation of foreign bank notes prohibited: penalty for. 10 G. A. ch. 53.

SEC. 4047. If any person pay out, or offer to pay, or in any manner put in circulation, or offer to put in circulation, any bank note, bill, or other instrument intended to circulate as money issued or purporting to be issued by any bank, individual, or corporation elsewhere than in this state, excepting treasury notes, notes of any bank organized under the law of the United States, any other description of currency issued by the authority of congress, or notes of the branches of the state bank of Iowa, he shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court having jurisdiction, be fined the sum of five dollars for each note, bill, or other instrument as aforesaid so paid out or offered to be paid out, put in circulation or offered to be put in circulation. In prosecutions under this section it shall not be necessary to state in the indictment or information the name of the bank issuing the notes, nor to prove the existence of the bank or other person purporting to issue the notes; but it shall be sufficient to allege in general terms the fact of paying out, or attempting to pay out, as the case may be, of bank notes issued out of this state; and the proof may be made as if the particulars were alleged; and any number of offenses may be included in the same prosecution, provided that where the total fines alleged shall not exceed one hundred dollars, the offense shall be cognizable and may be tried before a justice of the peace and other co-ordinate jurisdictions; and when the total fines alleged exceed one hundred dollars, it shall be within the jurisdiction of the district court.

Under ch. 147, of Code of '51, providing a penalty for issuing any bills, etc., to be put in circulation as money, *held*, that a deed given to secure the issuance of such notes was void: *Reynolds v. Nichols*, 12–398.

[Sec. 4048 was repealed by 15th G. A., ch. 69, and a substitute enacted, which was amended by 16th G. A., ch. 122.

Sec's. 4048, 4049, 4050 and 4051, together with the two acts just referred to, are repealed by the following act.]

[Seventeenth General Assembly, Chapter 156.]

[Sec. 1 repeals § § 4048 to 4051 inclusive; also, 15th G. A., ch. 69, and 16th G. A., ch. 122, and provides that the following be enacted in lieu thereof]:

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Killing of certain game at certain seasons punished.

SEC. 2. It shall be unlawful for any person within this state to shoot or kill any pinnated grouse or prairie chicken, between the first day of December and the fifteenth day of August next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the first day of January and the first day of October; any wild duck, goose, or brant, between the first day of May and the fifteenth day of August; or any wild deer, elk or fawn, between the first day of January and the first day of September.

[As amended by 18th G. A., ch. 193, § 1, substituting in the third line "fifteenth day of August" for "first day of September" and striking out the words "or snipe," following "wild duck," in the seventh line of the section as it stood.]

Killing of certain game at any time punished.

SEC. 3. It shall be unlawful for any person, at any time, or at any place within this state, to shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, ruffed grouse or pheasant; or for any one person to shoot or kill during any one day, more than twenty-five of either kind of said named birds; or for any one person, firm, or corporation, to have more than twenty-five of either kind of said named birds in his or their possession at any one time, unless lawfully received for transportation; or to catch or take, or attempt to catch or take, with any trap, snare or net, any of the birds or animals named in section two of this act, or in any manner wilfully to destroy the eggs or nests of any of the birds hereby intended to be protected from destruction.

[As amended by 18th G. A., ch. 193, § 2, which struck out the word "snipe" occurring in the third line of the section as it stood.]

Trapping beaver, &c.

SEC. 4. It shall be unlawful for any person to kill, trap, or ensnare, any beaver, mink, otter, or muskrat, between the first day of April and the first day of November, except where such killing, trapping, or snaring may be for the protection of private property.

Unlawful to have in possession certain birds or animals at certain seasons.

SEC. 5. It shall be unlawful for any person, company, or corporation, to buy or sell, or have in possession, any of the birds or animals named in section two of this act during the period when the killing of such bird or animal is prohibited by said section two, except during the first five days of such prohibited period; and the having in possession by any person, company, or corporation of any such birds or animals during such prohibited period, except during the first five days thereof, shall be deemed *prima facie* evidence of a violation of this act.

Shipping of birds or animals out of the state prohibited.

SEC. 6. It shall be unlawful for any person, company, or corporation at any time to ship, take, or carry out of this state any of the birds or animals named in section two of this act; but it shall be lawful for any person to ship to any person within this state, any game birds named in said section two, not to exceed one dozen in number in any one day, during the period when by this act the killing of such birds is not prohibited: *Provided*, he shall first make an affidavit before some person authorized to administer oaths, that said birds have not been unlawfully killed, bought, sold, or had in possession, are not being shipped for sale or profit, giving the name and post-office address of the

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person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, endorsed, "A true copy of the original," by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of this act. Any person swearing falsely to any material fact of said affidavit, shall be guilty of perjury, and punished accordingly.

Penalty for violation of this act.

SEC. 7. If any person shall kill, trap, ensnare, buy, sell, ship, or have in possession, or ship, take, or carry out of the state, contrary to the provisions of this act, any of the birds or animals named in this act, or shall wilfully destroy any eggs or nests of birds named in this act, shall be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat; twenty-five dollars for each wild deer, elk, or fawn, and ten dollars for each nest or the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecution are sooner paid.

Penalty against railways, &c., who shall transport.

SEC. 8. If any railway, express company, or other common carrier, or any of their agents or servants, knowingly receive any of the above mentioned birds or animals for transportation or other purpose, during the periods hereinbefore limited and prohibited, or at any other time except in the manner provided in section six of this act, they shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

Penalty for using swivel gun or poison.

SEC. 9. If any person shall shoot or kill any wild duck, goose, or brant, with any swivel gun or any kind of gun except such as is commonly shot from the shoulder; or shall use medicated or poisoned food to capture or kill any of the birds named in this act, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined twenty-five dollars for each offense, and shall stand committed to the county jail for thirty days, unless such fine and the costs of prosecution are sooner paid.

Where prosecution may be brought.

SEC. 10. Prosecutions for violations of this act may be brought either in the country in which the offense was committed or in any other country where the person, company, or corporation complained of has had or has in his or their possession any birds or animals herein named, bought, sold, killed, trapped, or ensnared, in violation of any of the provisions of this act.

Court to appoint attorney to manage prosecution.

SEC. 11. In all prosecutions under this act the court before whom the same is brought shall appoint some attorney-at-law for the purpose of managing the prosecution of the cause, and such attorney shall be entitled to a fee of ten dollars in each and every case in which he is so appointed, and the person filing an information under this act shall, in case of conviction, be entitled to a

Fee.

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fee equal to one-half of the amount of the fine imposed on each conviction, and both the fee of such attorney and the informant shall be taxed as costs in the case against the person convicted. *Provided*, that the county shall in no case be held liable for said attorney's fee or penalty. Fee to informant.

SEC. 12. All acts and parts of acts inconsistent with this act are hereby repealed. Repealing clause.

[Sec's 4052 and 4053 are repealed by 15th G. A., ch. 50, § 10. Other portions of that act are inserted following:]

[Fifteenth General Assembly, Chapter 50.]

[Sec's 1 to 5, 8 and 9, seem to be superseded by later acts, which are inserted following § 1488.]

SEC. 6. No person shall place, erect, or cause to be placed or erected, across any of the rivers, creeks, ponds, or lakes of this state, any dam, seine, weir, fish-dam, or other obstruction, in such manner as to prevent the free passage of fish up or down through such water courses, unless otherwise ordered by the commissioner; and from and after the passage of this act, it shall be unlawful for any person to use any seine or net for the purpose of catching fish, except minnows, that are natives of the waters of the state; *provided*, always, that it shall be lawful for the fish commissioner to take fish in any of the public waters at any time and by any method, for the purpose of propagation or for the purpose of exchanging with fish commissioners of other states or of the United States. Nothing in this section shall be so construed as to prohibit the erection of dams for manufacturing purposes, as now provided by law. Obstructing free passage of fish. Fishing with seine or net prohibited.

SEC. 7. Any person found guilty of a violation of the provisions of section six of this act, shall, upon conviction before a justice of the peace, be fined not less than five nor more than fifty dollars for the first offense, and for the second, or any subsequent offense, not less than twenty dollars, and shall stand committed until such fine be paid. Penalty.

[The two preceding sections are as amended by 16th G. A., ch. 70.]

For somewhat similar provisions, see 17th G. A., ch. 80, § § 5, 6, inserted following § 1488.

SEC. 4054. Any person who shall go upon the premises of any person or corporation, whether enclosed or not, and shall be found seeking to take, by any means whatsoever, except a hook and line, any fish, shall be deemed guilty of trespass, and may be prosecuted in the name of the state of Iowa by any person in possession of said premises, before any justice of the peace, or other court of competent jurisdiction, and fined in any sum not less than five nor more than fifty dollars. Trapping fish on the premises of another. 9 G. A. ch. 4, § 4. 14 G. A. ch. 54, § 3.

[As amended by 15th G. A., ch. 50, § 10, which repealed the last clause of the section as it originally stood.]

SEC. 4055. If the owner of sheep, or any person having the same in charge, knowingly import or drive into this state sheep having any contagious disease; or turn out or suffer any sheep having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway, or unenclosed lands; or sell or dispose of any sheep, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not less than fifty dollars nor more than one hundred dollars. Bringing diseased sheep into the state. 9 G. A. ch. 35, § § 1, 2.

A contract for the sale of sheep having contagious diseases cannot be enforced against the purchaser, even when he knew of such disease before

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purchasing. The statute is intended, not for the protection of the purchaser only, but of the public. *Held*, however, that the statute would not apply where the seller did not know that the disease with which the sheep were afflicted was contageous, and that in such case the contract could be enforced: *Caldwell v. Bridal*, 48–15.

Same as to horses, mules, etc. 11 G. A. ch. 10, §§ 1, 2.

SEC. 4056. If any person knowingly import or bring within this state, any horse, mule, or ass, affected by the diseases known as nasal gleet, glanders, or button-farcey, or suffer the same to run at large upon any common, highway, or unenclosed land, or use or tie the same in any public place, or off his own premises, or sell, trade, or offer for sale or trade any such horse, mule, or ass, knowing the same to be so diseased, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than fifty dollars nor more than five hundred dollars; and in default of payment shall be imprisoned for any period not to exceed twelve months, or by both fine and imprisonment at the discretion of the court.

Diseased horses, mules, etc., running at large. Same, § 5.

SEC. 4057. If any horse, mule, or ass, reasonably supposed to be diseased with nasal gleet, glanders, or button-farcey, be found running at large without any known owner, it shall be lawful for the finder therof to take such horse, mule, or ass, so found, before some justice of the peace, who shall forthwith cause the same to be examined by some veterinary surgeon, or other person skilled in such diseases, and if, on examination, it is ascertained to be so diseased, it shall be lawful for such justice of the peace to order such diseased animal to be immediately destroyed and buried; and the necessary expense accruing under the provisions of this section shall be defrayed out of the county treasury.

See § 1484

Bringing Texas cattle into the state. 12 G. A. ch. 195, §§ 1, 3, 4.

SEC. 4058. If any person bring into this state any Texas cattle, he shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; *provided*, that nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this state on railways, or to prohibit the driving through any part of this state, or having in possession any Texas cattle between the first day of November and the first day of April following.

Having such cattle in possession. Same, §§ 2, 4.

SEC. 4059. If any person now or hereafter has in his possession in this state any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section.

Bringing diseased hop-roots or cuttings into state. 12 G. A. ch. 195, §§ 1, 2.

SEC. 4060. If any person use, transplant, or cultivate, or bring into this state for the purpose of using, planting, cultivating, or selling, any hop roots, plants, or cuttings, which may be diseased in any manner, or infected with lice or vermin of any kind, or which may be brought from any state or country in which the cultivation of hops has been retarded or impaired by the presence of any disease, lice, or vermin of a contagious character, he shall be fined not less than ten nor more than one hundred dollars, and imprisoned not less than five nor more than twenty days.

SEC. 4061. If complaint is made before a justice of the peace

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by one or more responsible persons, that they have good reason to believe that hop roots have been introduced into, or are being cultivated in the city or township where they reside in violation of this act, the justice before whom such complaint is made shall issue a warrant authorizing any peace officer to seize such roots, and they shall be held in charge by such officer until suit has been brought against the person or persons so offending, and the cause determined; and in case it is found that the said plants, roots, or cuttings are diseased, or are infected by lice or vermin of a contagious character, the officer before whom suit is brought will order the said roots, plants or cuttings to be burned, charging the expense of doing the same as costs upon the party owning or cultivating the roots, plants, or cuttings; and in no case will he allow them to be planted or delivered to a third party, until the fact is established that they are not infected with any vermin or disease of a contagious character.

Search warrant and seizure and destruction of diseased plants and roots. Same, § 3.

SEC. 4062. If any person or corporation, after having been notified in writing of the presence of Canada thistles on any lands owned or occupied by such person or corporation; or if any highway supervisor, after having been notified in writing of the presence of Canada thistles on the highway under his jurisdiction, shall permit such thistles or any part thereof to blossom or mature, such person, corporation, or highway supervisor, shall be deemed guilty of a misdemeanor and be punished accordingly.

Canada thistles. 12 G. A. ch. 143. 13 G. A. ch. 177.

SEC. 4063. If any person kill, trap, ensnare, or in any manner destroy any of the birds of this state, excepting birds of prey, the migratory aquatic birds, and those which are useful for food, and the killing of which at certain seasons of the year is now permitted by law, or in any manner destroy the eggs of such birds as are hereby intended to be protected from destruction, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five nor more than twenty-five dollars. But persons killing birds for scientific purposes, or for preservation in museums and cabinets, shall be exempt from the penalties of this section, upon making satisfactory proof of the purposes for which they have killed any such bird or birds.

Killing birds except of prey and those useful for food. 13 G. A. ch. 74.

SEC. 4064. If any person run any threshing machine in this state, without having the two lengths of tumbling rods next the machine, together with the knuckles or joints and jacks of the tumbling rods, safely boxed and secured while the machine is running, he shall be deemed guilty of a misdemeanor and be punished by fine of not less than ten nor more than fifty dollars for every day or part of a day he shall violate this section; and any person who shall, knowingly, permit either his own grain, or any that may be in his possession or under his control, to be threshed by a machine the rods, knuckles, or joints of which are not boxed in accordance with the requirements of this section, shall be liable to a like fine as that prescribed for the person running such machine, both of which fines may be recovered in an action brought before any court of competent jurisdiction.

Running threshing machines without boxing tumbling rods. 11 G. A. ch. 135, §§ 1, 2. 12 G. A. ch. 45.

Person permitting use of such machine punished.

[As amended by 15th G. A., ch. 38, which struck out the last clause of the section as it originally stood (providing for an action in favor of the school fund), and added all following the words "violate this section" in the seventh line of the section as it now stands.]

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This section does not make defendant absolutely liable. Proof of running a threshing machine, not secured as here required, establishes negligence, but the rule still applies that contributory negligence on the part of the person injured will defeat a recovery: *Reynolds v. Hindman*, 32–146.

A person injured through a violation of this provision has a right of action, and it is sufficient to allege the violation as the basis of the right to recover, and as constituting the negligence complained of: *Messenger v. Pate*, 42–443.

Where a contract was made for threshing to be done with a machine not boxed, etc., as here required, *held*, that the contract was void, and that such fact was a good defense in an action for services rendered thereunder: *Dillon v. Allen*, 46–299.

[Fifteenth General Assembly, Chapter 14.]

Steam boilers: how to be equipped.

SEC. 1. It shall be the duty of any person ow[n]ing or operating steam boilers in this state to provide such boilers with steam-gauge, safety-valve, and water-guage and keep the same in good order.

Fine for neglect.

SEC. 2. Any person neglecting to comply with the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by fine not less than fifty nor more than five hundred dollars.

CHAPTER 12.

OFFENSES AGAINST THE PUBLIC PEACE.

Affray between two or more persons.
R. § 4386.
C. '51, § 2738.

SECTION 4065. If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in an angry or quarrelsome manner, in any public place to the disturbance of others, they are guilty of an affray, and shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars.

Unlawful assembly of three or more.
R. § 4387.
C. '51, § 2739.

SEC. 4066. When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of an unlawful assembly, and every such offender shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.

Riot.
R. § 4388.
C. '51, § 2740.

SEC. 4067. When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of a riot, and every such offender shall be punished as is provided in the preceding section.

Who may be convicted.
R. § 4389.
C. '51, § 2741.

SEC. 4068. Any person guilty of unlawfully assembling, or of a riot, may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein.

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Exciting disturbance in certain houses. R. § 4390. C. '51, § 2742.

SEC. 4069. If any person make or excite any disturbance in any tavern, store, or grocery, or at any election, or public meeting, or in any other place where the citizens are peaceably and lawfully assembled, he shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Injuring or destroying houses, boats, etc. R. § 4391. C. '51, § 2743.

SEC. 4070. If any person or persons unlawfully or riotously assembled, pull down, injure, or destroy, or begin to pull down, injure, or destroy, any dwelling house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained, in an action at law.

Racing or fast driving on highways.

SEC. 4071. Any person who shall be guilty of racing horses, or driving upon the public highway in a manner likely to endanger the persons or lives of others, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days.

Breach of Sabbath. R. §§ 4392-3.

SEC. 4072. If any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire arms, fishing, horse racing, dancing, or in any manner disturbing any worshiping assembly, or private family; or in buying or selling property of any kind, or in any labor, the work of necessity and charity only excepted, every person so offending shall, on conviction, be fined in a sum not more than five dollars nor less than one dollar, to be recovered before any justice of the peace in the county where such offense is committed, and shall be committed to the jail of said county until the said fine, together with the costs of prosecution, shall be paid; but nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling, or families emigrating, from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending the same.

An express or implied contract for sale of property, made on Sunday, where the parties are not embraced within the exceptions of this section, will not be enforced by the courts: *Watrous v. Blair*, 32–58, 61; *Pike v. King*, 16–49.

In the absence of proof, it will not be held that the case comes within one of the exceptions: *Sayre v. Wheeler*, 31–112, S. C. 32–559; and where the contract is to pay for property sold and delivered on Sunday, the plaintiff cannot recover the value, aside from the contract, as such sale and delivery were unlawful, and the plaintiff will not be allowed to allege his own unlawful act: *Pike v. King*, 16–49.

It does not follow, however, where the contract, only, is unlawful, that the plaintiff cannot recover upon the original consideration in a proper case: *Sayre v. Wheeler*, 31–112.

Though the contract be void as made on Sunday, the parties may make a valid contract with reference to the same subject matter on a subsequent week day, and it would seem that a subsequent ratification of the Sunday contract would be binding: *Harrison v Colton*, 31–16.

A contract, void as between the parties as being made on Sunday, will be

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good in the hands of a transferee in good faith without notice: *Johns v. Bailey*, 45-241.

A promissory note made and delivered on Sunday, but bearing date and appearing on its face to have been executed on another day, *held*, valid in the hands of a *bona fide* holder for value before due: *Clinton National Bank v. Graves*, 48-228.

The admission of a debt such as will take it out of the bar of the statute of limitations, is not void because made on Sunday: *Ayres v. Bane*, 39-518.

In an action for damages resulting from the frightening of plaintiff's horse by defendant's dog, *held*, that the fact that the accident happened on Sunday, while plaintiff was riding on a business errand, would not defeat his right of recovery: *Schmid v. Humphrey*, 48-652.

CHAPTER 13.

CHEATING BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY.

False pretenses. R. § 4394. C. '51, § 2744.

SECTION 4073. If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property; or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

This changes the common law rule as to cheats, and a person may be guilty of cheating by false pretenses, consisting of representations and acts, although no false tokens are used: *The State v. Reidel*, 26-430.

A false promise will not sustain the charge of a crime under this section. There must be a pretense and representation, in fact, that is false, and which was relied upon by the party defrauded; but the fact that a false promise was combined with the false pretense does not take away the criminal character of the act. So, where a party, under the pretense of having come to pay a debt, on promise to pay the same, fraudulently procured from his creditor and got into his possession a receipt for his debt, *held*, that the facts constituted an offense as here contemplated: *The State v. Dowe*, 27-273.

An indictment for this offense cannot be predicated upon representations which are mere matters of opinion: *The State v. Webb*, 26-269.

To constitute the crime, the person must have obtained, by means of the false pretenses, either *the title* to the property, or the unqualified right of possession thereof, for some length of time: *The State v. Anderson*, 47-142.

Obtaining an indorsement of credit on a note by false pretenses, with intent to defraud, does not constitute an offense under this section: *The State v. Moore*, 15-412.

An indictment charging that by means of false tokens and pretenses, etc., the defendant obtained the property described, *held*, to sufficiently charge that the party to whom the pretense was made relied thereon: *The State v. McConkey*, 49-499.

A person who, by falsely personating another, obtains property with intent to convert it to his own use, is guilty of larceny (§ 3906): *The State v. Brown*, 25-561.

Section applied: *The State v. Joaquin*, 43-131.

Fraudulent conveyances. R. § 4395. C. '51, § 2745.

SEC. 4074. Any person who knowingly being a party to any conveyance, or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom; or being a party to any charge on such estate, interest,

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rents, or profits, made or created with intent to defraud prior or subsequent purchasers, or to hinder, delay, or defraud creditors or other persons; and every person who, being privy to or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year.

The intention to hinder and delay creditors is the essential element in the crime here defined. An instrument such as is referred to is void: *Davenport v. Cummings*, 15–219.

To establish the crime, a fraudulent intent in fact, as distinguished from an intent which may be presumed in law, must be shown: *Lillie v. McMillen*, 52–463.

"Other persons," as here used, means some one who had, or might have, a claim of right to the property conveyed, which might be enforced at law or in equity. The intention with which a conveyance is made cannot render the act criminal, if no legal or equitable rights of others are affected thereby: *Day v. Lown*, 51–364.

Suppression of any last will. R. § 4396. C. '51, § 2746.

SEC. 4075. If any person having in his possession, or under his control, any last will and testament of any deceased person, wilfully suppress, secrete, deface, or destroy the same, or any codicil thereto belonging, with intent to injure or defraud any devisee, legatee, or other person, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

False weights and measures. R. § 4397. C. '51, § 2747.

SEC. 4076. If any person with intent to defraud, use a false balance, weight, or measure, in the weighing or measuring of anything whatever that is purchased, sold, bartered, shipped, or delivered for sale or barter, or that is pledged or given in payment, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment at the discretion of the court.

Same. R. § 4398. C. '51, § 2748.

SEC. 4077. The magistrate granting the warrant of arrest for this offense must also direct the seizure of the false weights, balances or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county, and, after being made of the standard weight or measure, may be sold and the money arising from such sale must be paid into the county treasury.

Altering brands, stamps, marks, etc. R. § 4399. C. '51, § 2749.

SEC. 4078. If any person falsely alter any stamp, brand, or mark on any cask, package, box or bale, containing merchandise or produce, made by a public officer appointed for that purpose, in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

Counterfeiting mark of another. R. § 4400. C. '51, § 2750.

SEC. 4079. If any person counterfeit any mark, stamp or brand of another, or falsely mark any cask, package, box, or bale, as to quality or quantity, with intent to defraud, he shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

SEC. 4080. If any person with intent to defraud, use any cask, package, box, or bale, marked, branded, or stamped by another,

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Using box marked by another with intent to defraud. R. § 4401. C. '51, § 2751.

for the sale of merchandise or produce of an inferior quality, or less in quantity or weight than is denoted by such mark, stamp, or brand, he shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding two hundred dollars, or by both fine and imprisonment at the discretion of the court.

Gross fraud or cheat. R. § 4402. C. '51, § 2752.

SEC. 4081. Every person who is convicted of any gross fraud or cheat at common law, shall be punished as provided in the preceding section.

Punishment is here provided for *gross* frauds and cheats, and under this provision all frauds and cheats are certainly not punishable. Slanderous words charging a person with cheating, defrauding, etc., are, therefore, not actionable *per se: Lucas v. Flinn*, 35-9.

Fraudulent destruction of boats, etc. R. § 4403. C. '51. § 2753.

SEC. 4082. If any person cast away, sink, or otherwise destroy, any raft, boat, or vessel, within any county of this state with intent to defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year.

Fitting out for that purpose. R. § 4404. C. '51, § 2754.

SEC. 4083. If any person lade, equip, or fit out, or assist in lading, equipping, or fitting out, any raft, boat, or vessel, with intent that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Making false bills of lading. R. § 4405. C. '51, § 2755.

SEC. 4084. If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same; or if any other person concerned in the lading or fitting out such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden, or pretended to be laden, on board such boat or vessel with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years.

Making false affidavits or protests. R. § 4406. C. '51, § 2756.

SEC. 4085. If any master or other officer of any boat or vessel, make, or cause to be made, any false affidavit or protest; or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or protest to be made, or exhibit the same with intent to injure, deceive, or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding three thousand dollars and imprisonment in the county jail not exceeding one year.

Conspiracy to prosecute. R. § 4407. C. '51, § 2757.

SEC. 4086. If two or more persons conspire or confederate together with intent, falsely and maliciously, to cause or procure another person to be indicted, or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted, or prosecuted or not, they shall be deemed guilty of a conspiracy, and, upon conviction thereof, shall

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be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars nor less than one hundred dollars and imprisonment in the county jail not exceeding one year.

In other cases. R. § 4408. C. '51, § 2758.

SEC. 4087. If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business or property of another; or to do any illegal act injurious to the public trade, health, morals or police; or to the administration of public justice; or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of a conspiracy at common law, shall be punished by imprisonment in the penitentiary not more than three years.

To constitute the crime of conspiracy, the accused must confederate together to do, either a criminal act, or an act which is not criminal by illegal means. In the latter case the acts constituting the illegal means must be specifically charged: *The State v. Potter*, 28–554; *The State v. Stevens*, 30–391. But where the conspiracy is to do a criminal act, it is sufficient if it be described by the proper name or term by which it is usually known in law: *The State v. Potter*, 28–554; *The State v. Savoye*, 48–562.

A charge that defendants conspired to "cheat and defraud," *held*, not sufficient to charge the crime of conspiracy: *The State v. Jones*, 13–269.

A conspiracy to take from an officer, on a writ of replevin, intoxicating liquors seized under information for their forfeiture, is a conspiracy to do an unlawful act, under § 3915, and punishable under this section: *The State v. Harris*, 38–242.

An indictment charging a conspiracy to bring about the sham marriage of one of the defendants and a woman, and thus accomplish the seduction of the woman, *held*, sufficient without charging that such woman was unmarried, or of previously chaste character: *The State v. Savoye*, 48–562.

An indictment for a conspiracy to "rob and steal" is not bad as charging more than one offense. Even should the conspiracy contemplate the commission of several distinct felonies, the crime would be single: *The State v. Sterling*, 34–443.

Issuing false voucher by warehouse men, etc. 9 G. A. ch. 84.

SEC. 4088. If any person issue any receipt or voucher, stating or purporting to state the receipt by him from another, of any property for storage or safe keeping without having in good faith received, and at the time having in his possession or under his control, such property; or issue any second receipt or voucher for any property while his former receipt or voucher for the same, or any part thereof, shall be outstanding and uncancelled; or sell, encumber, transfer, ship, or in any manner remove beyond his immediate control, any property for which a receipt or voucher has been given by him as aforesaid, in violation of the terms of such receipt or voucher, without the written consent of the person holding such receipt or voucher, except to enforce his lien for storage and warehouse charges as provided by law; or sell, transfer, or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property or any part thereof, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the penitentiary of this state not exceeding five years.

See *The State v. Stevenson*, 52–701.

SWINDLING.

[Sixteenth General Assembly, Chapter 102]

Swindling by three-card monte.

SEC. 1. Whoever by the means of three card monte, so called, or any other form or device, sleight of hand, or other means what-

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ever, by use of cards or instruments of like character, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling, and shall, on conviction thereof, be punished by fine not less than two hundred dollars nor more than two thousand dollars, or by imprisonment in the penitentiary not less than two years nor more than five years, or by both such fine and imprisonment in the discretion of the court. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing, any such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed principals therein, and punished accordingly.

Accessories.

This act embraces any "slight-of-hand" performance, whether done by the use of cards or other devices: *The State v. Quinn*, 47–368.

SEC. 2. The jurisdiction of all the offenses described in section one of this act which shall be committed on any railroad car, coach, train, boat, or other public conveyance, or in or at any railroad station or depot, shall be in any county through which said car, coach, train, boat, or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate, and in all other cases the jurisdiction shall be in the county in which the offense is committed.

Jurisdiction in any county passed through.

SEC. 3. Every person shall possess the power and authority, and it shall be the duty of every conductor, or other employe on any railroad, car or train, and of every captain, clerk or other employe on any boat, or station agent at any railway depot, or the officers of any fairs or fair grounds, and the proprietors of any place of public resort, and their employes, with or without warrant, to arrest any person or persons whom they or either of them shall find in the act of committing any of the offenses mentioned in the first section of this act, or any person or persons, whom he or they may have good reason to believe to have been guilty of the commission of the said offenses, and to take such person or persons before a magistrate in any county where jurisdiction to try said offenses exists by virtue of this act, and deliver such person or persons so arrested to the magistrate, and make written complaints under oath of the facts. And for executing the powers conferred by this section, the person making the arrest shall possess the same powers in all respects as are exercised by officers with warrants, including the power to summon assistance; and it shall be the duty of the person making such arrest to also arrest the person injured or defrauded by reason of the commission of any of the offenses mentioned in section one of this act, and take such person before the examining magistrate, who shall require such person to give security to appear and testify on the trial of the cause, and such person or persons shall not be deemed to be guilty of the offense mentioned in section one of this act, nor of the offense of gambling, unless such person or persons shall have failed to appear and give evidence on the trial. And the persons performing the services required by this act shall receive the same compensation as sheriffs receive for like services.

Who may make arrest.

With what powers.

Person defrauded to be arrested.

Compensation.

SEC. 4. It shall be the duty of any conductor, captain, hotel

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or saloon keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, to eject from his car, train, boat, hotel, saloon, public conveyance, fair grounds or place of public resort, any person known to him or whom he has good reason to believe to be a three-card-monte-man, or who offers to wager or bet money or other valuable things upon what is commonly known as three-card-monte, or bet on any trick, or game with cards or other gaming device and for such ejectment no action for damage shall be maintained. And any parties operating any public conveyance by which passengers are carried shall keep posted up a copy of this law in such conveyance. Duty of conductor, captain, etc.

SEC. 5. Any conductor of a railroad train, captain of any steamboat, proprietor or manager of any public conveyance, officer of any fair or fair grounds, or place of public resort, any hotel or saloon keeper or their agent or employe, who shall fail, neglect or refuse to perform the duties herein mentioned, or who shall knowingly suffer or permit a violation of this act, shall be deemed guilty of a misdemeanor, and the jurisdiction of such offense shall be the same as that provided in section two of this act. Conductor, captain, etc., to be deemed guilty.

SEC. 6. Any person may be convicted for violation of section number one of this act, on his own confession out of court, or upon the testimony of an accomplice. Evidence.

[16th G. A., ch. 30, is identical with the foregoing, except as to two or three words in the third section which are evidently errors. The later act was probably passed to cure such errors, and it alone is inserted here.]

FRAUDS UPON HOTEL-KEEPERS.

[Eighteenth General Assembly, Chapter 76.]

SEC. 1. Any person who shall obtain food, lodging, or other accommodation at any hotel, inn, boarding or eating house, with intent to defraud the owner or keeper thereof, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days. Obtaining accommodation with intent to defraud.

SEC. 2. Proof that lodging, food or other accommodation was obtained by false pretense, or by false or fictitious show or pretense of baggage, or that the party refused or neglected to pay for such food, lodging or other accommodation on demand, or that he absconded or left the premises without paying or offering to pay for such food, lodging or other accommodation, or that he surreptitiously removed, or attempted to remove, his baggage, shall be *prima facie* proof of the fraudulent intent mentioned in section one of this act; but this act shall not apply to regular boarders, nor when there has been an agreement for delay in payment. Evidence.

CHAPTER 14.

NUISANCES, AND ABATEMENT THEREOF.

SECTION 4089. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or What deemed nuisances. R. § 4409. C. '51, § 2759.

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manufacture, which by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public, the causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure the water of any river, stream, or pond; or unlawfully diverting the same from its natural course or state to the injury or prejudice of others; and the obstructing or encumbering by fences, buildings or otherwise, the public highways, private ways, streets, alleys, commons, landing places, or burying grounds, are nuisances.

While each of the acts enumerated is declared to be a nuisance, it is not declared in express terms which of them, or whether any of them, is a common nuisance under § 4092. They are public or private, as they tend to the public injury or only to the injury of private individuals: *The State v. Close*, 35–570.

The close proximity of such a nuisance to a public highway, thus affecting those passing, would constitute it a public nuisance; so would causing the water of a mill-dam to become corrupt and to overflow, thus rendering the adjoining land marshy, etc., whereby the air should become corrupted and infected, etc: *Ibid.*

A party obstructing a highway by a fence or otherwise, may be punished under this section, although the road supervisor might, under § 993, have a right to remove the obstruction: *The State v. Berry*, 12–58.

The punishment for the acts here described as nuisances, is prescribed by § 4092: *The State v. Kaster*, 35–221.

Manufacture of gunpowder. R. § 4410. C. '51, § 2760.

SEC. 4090. If any person carry on the business of manufacturing gunpowder, or of mixing or grinding the composition therefor, in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance, and such person is liable to be prosecuted accordingly.

Houses of ill-fame, gambling, etc. R. § 4411. C. '51, § 2761.

SEC. 4091. Houses of ill-fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted, to the disturbance of others, are nuisances, and may be abated and punished as provided in this chapter.

"To the disturbance of others" is the feature of the offense of keeping a house of ill-fame, as here described, which distinguishes it from that defined by § 4013: *The State v. Odell*, 42–75; *The State v. Alderman*, 40–375

Failure to use the words "to the disturbance of others" in charging the keeping of a house where drunkenness, etc., are carried on, renders the indictment bad, but does not make it an indictment for an offense under § 4026: *The State v. Dean*, 44–648

Although the quarreling, fighting, etc., occur on the sidewalk *in front of*, and not *in*, the house of defendant, yet if it is the character of the house which attracts the disorderly persons there, the defendant is guilty of keeping a nuisance: *The State v. Webb*, 25–235.

Where defendant, at a farm house, kept and sold wine which was not drank upon the premises by those buying it, but upon the highway a half mile or more from the house, resulting in riotous conduct, etc., *held*, that he was not guilty of an offense under this section: *The State v. Dieffenbach*, 47–638.

A boat may be within the meaning of the term "house of ill-fame" as here used: *The State v. Mullen*, 35–199.

An indictment charging all these offenses as constituting a nuisance, does not charge more than one offense: *The State v. Spurbeck*, 44–667.

SEC. 4092. Whoever is convicted of erecting, causing, or con-

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tinuing a public or common nuisance as described in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be punished by a fine not exceeding one thousand dollars, and the court, with or without such fine, may order such nuisance to be abated, and issue a warrant as hereinafter provided.

Punishment and abatement of
R. § 4412.
C. '51, § 2762.

The punishment here provided for the crime of nuisance is also to be applied to a person found guilty of that offense under § 1543 (keeping a building, etc., where intoxicating liquors are sold contrary to law): *The State v. McGrew*, 11–112; *The State v. Collins*, 11–141; *The State v. Schilling*, 14–455; *The State v. Little*, 42–51, 54; *The State v. Dean*, 44–648.

The nuisance may be single, though all the various acts constituting it under the last section are charged: *The State v. Spurbeck*, 44–667; and so an indictment charging the doing of the acts prohibited in § 1543 and § 4001, is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and defendant cannot be convicted of separate nuisances for acts committed under those two sections at the same time: *The State v. Dean*, 44–648.

The court may order a defendant fined under this section, to be imprisoned until the fine is paid, in accordance with the provisions of § 4509, or imprisoned at hard labor under § 4736: *The State v. Jordan*, 39–387; *The State v. Ancerda*, 40–151.

SEC. 4093. When upon indictment, complaint, or action, any person is adjudged guilty of a nuisance, the court before whom such conviction is had, may, in addition to the fine imposed, if any, or to the judgment for damages or costs for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and after inquiry into and estimating as nearly as may be the sum necessary to defray the expenses of such abatement, the court may issue a warrant therefor.

Process.
R. § 4413.
C. '51, § 2763.

Where the nuisance to be abated was a boat on the Mississippi river, anchored east of the middle of the channel, *held*, that as the Iowa court had jurisdiction, under § 3, to arrest an offender and punish an offense committed thereon, it also had power to order such boat seized and sold in case it was found to be a nuisance: *The State v. Mullen*, 35–199.

SEC. 4094. When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice, after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance, may issue a like warrant.

Warrant.
R. § 4414.
C. '51, § 2764.

SEC. 4095. Instead of issuing such warrant, the court or justice may order the same to be stayed upon motion of the defendant, and upon his entering into an undertaking in such sum and with such surety as the court or justice may direct, to the state, conditioned either that the defendant will discontinue said nuisance, or that within a time limited by the court and not exceeding six months, he will cause the same to be abated and removed as either is directed by the court; and upon his default to perform the condition of his undertaking, the same shall be forfeited and the court in term time or vacation, or justice of the peace, as the case may be, upon being satisfied of such default, may order such warrant forthwith to issue, and a *scire facias* on such undertaking.

Execution of stayed.
R. § 4415.
C. '51, § 2765.

SEC. 4096. The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any buildings, fences, or other things, that may be

Expenses.
R. § 4416.
C. '51, § 2766.

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removed as a nuisance, may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal, such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses, the officer must collect the residue thereof.

CHAPTER 15.

OF LIBEL.

Definition. R. § 4417. C. '51, § 2767.

SECTION 4097. A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

Punishment. R. § 4418. C. '51, § 2768.

SEC. 4098. Every person who makes, composes, dictates, or procures the same to be done; or who wilfully publishes or circulates such libel; or in any way knowingly or wilfully aids or assists in making, publishing, or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars.

Truth given in evidence. R. § 4419. C. '51, § 2769.

SEC. 4099. In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted.

See Cons. Art. 1, § 7.

Publication. R. § 4420. C. '51, § 2770.

SEC. 4100. No printing, writing, or other thing is a libel unless there has been a publication thereof.

Definition of. R. § 4421. C. '51, § 2771.

SEC. 4101. The delivering, selling, reading, or otherwise communicating a libel; or causing the same to be delivered, sold, read, or otherwise communicated to one or more persons or to the party libeled, is a publication thereof.

Law and fact. R. § 4422. C. '51, § 2772.

SEC. 4102. In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact.

The "direction of the court" means instructions by the court. This section applies only in criminal prosecutions for libel, not in actions for damages: *Forshee v. Abrams*, 2-571.

Similar provision, see § 4438.

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TITLE XXV.

OF CRIMINAL PROCEDURE

CHAPTER 1.

OF PUBLIC OFFENSES.

Division of. R. § 4428. C. '51, § 2816.

SECTION 4103. Public offenses are divided into:

1. Felonies;
2. Misdemeanors.

Felony. R. § 4429. C. '51, § 2817.

SEC. 4104. A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary.

Misdemeanor. R. § 4430. C. '51, § 2818.

SEC. 4105. Every other public offense is a misdemeanor.

How punishable. R. § 4431. C. '51, § 2819.

SEC. 4106. No person can be punished for a public offense except upon legal conviction in a court having jurisdiction thereof.

All offenses bailable except.

SEC. 4107. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses heretofore punishable with death under the laws of the state, where the proof is evident, or the presumption great.

[Seventeenth General Assembly, Chapter 103.]

Defendant convicted of murder.

SEC. 1. No defendant convicted of murder shall be admitted to bail.

CHAPTER 2.

OF THE TERM MAGISTRATE, AND HIS POWERS, PEACE OFFICERS AND OFFICERS OF JUSTICE, AND COMPLAINTS.

Who are magistrates: duties. R. §§ 4439, 4447. C. '51, §§ 2823, 2778.

SECTION 4108. Any judge of the supreme, district, or circuit courts, any judge of any city court, any justice of the peace, any mayor of any incorporated city or town, any police, or other special justice of such city, or town, shall have power to hear complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments, and take bail in the manner directed by this code. They are designated under the general term magistrate, and may exercise the jurisdiction hereby conferred on them as follows:

1. Judges of the supreme, district, and circuit courts through-

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out the state, in any county in which they may be at the time of complaint made;

2. Judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns, within their respective counties.

Who are peace officers. R. § 4440. C. '51, § 2830.

SEC. 4109. The following persons respectively are designated in this code under the general term, peace officer:

1. Sheriffs and their deputies;
2. Constables;
3. Marshals and policemen of incorporated cities and towns.

A special constable appointed by a justice of the peace, under § 3630, is not a peace officer: *Foster v. Clinton Co.*, 51–541.

Same. R. § 4441.

SEC. 4110. Magistrates and peace officers are sometimes designated by the term, officers of justice.

Infirmation defined. R. § 4530. C. '51, § 2822.

SEC. 4111. Complaint of preliminary information is a statement in writing, under oath or affirmation made before a magistrate, of the commission, or threatened commission, of a public offense and accusing some one thereof.

CHAPTER 3.

OF THE PREVENTION OF PUBLIC OFFENSES BY THE RESISTANCE OF THE PARTY ABOUT TO BE INJURED AND OTHERS.

Who may resist. R. § 4442.

SECTION 4112. Lawful resistance to the commission of a public offense may be made by the party about to be injured; or by others.

In what cases. R. § 4443.

SEC. 4113. Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person;
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

The nature of the resistance must, however, have regard to the nature of the offense to be committed. The common law rule that the party is only justified in using a deadly weapon in a deadly manner, in self-defense, when it appears that he is in imminent peril of death or great bodily harm (see *The State v. Thompson*, 9–188), is not changed by this section: *The State v. Kennedy*, 20–569.

Any person may aid another. R. § 4444.

SEC. 4114. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

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CHAPTER 4.

OF SECURITY TO KEEP THE PEACE.

Duty of magistrates when complaint is made that a public offense is threatened. R. §§ 4447-54.

SECTION 4115. Whenever complaint is made before a magistrate, that any person has threatened to commit any public offense punishable by the laws of this state, and such magistrate is satisfied that there is reason to fear the commission of such offense, he may issue a warrant for the arrest of the person complained of; and the officer to whom the same shall be delivered for service, shall forthwith arrest and bring the accused before such magistrate; or, in case of his absence or inability to act, before the nearest and most accessible magistrate of the same county. When the name of the person complained of is unknown, he may be designated in the warrant by any name, and the warrant issued in pursuance hereof may be executed by any peace officer in any county of the state; *provided*, that when issued by a magistrate other than a judge of the supreme, district, or circuit courts, it cannot be served in any county other than that in which it is issued, unless authenticated as is required in case of a warrant of arrest issued on a preliminary information.

Proceedings when taken before magistrate. R. § 4455.

SEC. 4116. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same, and who has charge of the person arrested, must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant with his return endorsed and subscribed by him, and the complaint and other affidavits, if any, on which the warrant was issued, must be sent to the magistrate before whom the person arrested is taken, and if they cannot be procured, the complainant and his witnesses, if any, must be subpœnaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits.

Same. R. § 4456.

SEC. 4117. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto; and a change of venue may be had as in preliminary examinations. The evidence must be reduced to writing and subscribed by the witnesses.

[As amended by 17th G. A., ch. 35, which inserted the provision as to change of venue.]

A failure of the justice to reduce the examination to writing is no ground for dismissing the proceeding when brought into the district court: *Gribble v. The State*, 3-217.

Discharge ordered: costs, etc. R. § 4457.

SEC. 4118. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding if the magistrate regards the complaint as unfounded and frivolous, and, unless when the proceeding is before a judge of the supreme, district, or circuit court, may issue execution therefor, and when the proceeding is before a judge of the supreme, district, or circuit court, he shall transmit the complaint, affidavits, warrant, and

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order, to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately.

Defendants bound over. R. § 4458.

SEC. 4119. If there be just reason to fear the commission of the offense the person complained of shall be required to enter into an undertaking in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the meantime to keep the peace towards the people of this state, and particularly towards the person against whom, or whose property, there is reason to fear the offense may be committed.

Committed to jail. R. § 4459.

SEC. 4120. If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison, specifying in the warrant the requirements to give security, the amount thereof, and the omission to give the same.

May be discharged. R. §§ 4460, 4464.

SEC. 4121. If the person complained of be committed for not giving an undertaking, he may be discharged by a magistrate upon giving the same.

Disposition of papers. R. § 4461.

SEC. 4122. The undertaking, together with the complaint, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof.

Assault in presence of court or magistrate. R. § 4462.

SEC. 4123. Any person who, in the presence of a court or magistrate, shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered, without the process, to enter into an undertaking to keep the peace for a period of time not exceeding beyond the next term of the district court of the county as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly.

IN DISTRICT COURT.

Undertaking to keep the peace. R. § 4463.

SEC. 4124. The district court may, on the conviction of any person for an offense against the person or property of another, when necessary for the public good, require the defendant to enter into an undertaking to keep the peace as hereinbefore provided, and on his omission to do so, may commit him accordingly.

Same. R. § 4465.

SEC. 4125. A person who has entered into an undertaking to keep the peace, when required by a magistrate as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking, and order the same to be prosecuted unless his default be excused.

Judgment. R. § 4466.

SEC. 4126. If the principal in the undertaking appear, and the complainant does not appear, or if neither of the parties appear, the court shall enter an order discharging the undertaking; but if both parties appear, the court shall hear their proofs, and may require a new undertaking in such sum as it shall prescribe for a period not exceeding one year; and may commit the defendant

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until the same be given. Judgment shall be entered against the party held to keep the peace for all the costs of the proceeding; but if it is made to appear to the court that the proceeding was instituted without probable cause, the court may render judgment against the complainant for such costs.

The plaintiff is not bound to appear, and a failure to appear and prosecute does not subject him to judgment for costs, under § 4292: *The State v. Holliday*, 22–397. But he may become liable if he does further prosecute and his complaint is found groundless: *The State v. Leathers*, 16–406.

If plaintiff does not appear, defendant is not entitled to a trial, but should be discharged. The decision of the justice is not to be called in question: *The State v. White*, 47–655.

A defendant is not a competent witness in his own behalf in such proceeding. (Decided before the amendment of § 4556): *The State v. Darrington*, 47–518.

That the evidence before the justice was not taken down in writing, as provided by § 4117, is not ground for dismissing the proceeding against defendant. On the hearing, other evidence may be received than that produced before the justice, and if defendant is discharged, the costs in the district court should not be taxed against him: *Gribble v. The State*, 3–217.

When undertaking broken. R. § 4467.

SEC. 4127. An undertaking to keep the peace is broken by the forfeiture of the same, by the court, as hereinbefore provided, or upon the conviction of the party bound by the undertaking of a breach of the peace.

District attorney to bring suit. R. § 4468.

SEC. 4128. Upon the district attorney producing evidence of such conviction to the district court to which the undertaking is returned, the court must order the undertaking to be prosecuted, and the district attorney must, thereat, commence an action upon it.

Record of conviction. R. § 4469.

SEC. 4129. In the action, the offense stated in the record of conviction must be alleged as the breach of the undertaking, and is conclusive evidence thereof.

CHAPTER 5.

OF VAGRANTS.

Who are. R. § 4470. C. '51, § 3310.

SECTION 4130. The following persons are vagrants: All persons who tell fortunes, or where lost or stolen goods may be found; all common prostitutes and keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamesters, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places, or from house to house, or procuring children so to do; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place, at, or with any table or instrument of gaming at any game or pretended game of chance.

Complaint, warrant, arrest. R. § 4471. C. '51, § 3311.

SEC. 4131. Upon complaint made on oath to any magistrate against any person as being such vagrant within his local juris-

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diction as defined in this code, he shall issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest shall be governed by the provisions of the last chapter, as nearly as practicable, except as hereinafter provided.

Duty of peace officer. R. § 4472.

SEC. 4132. All peace officers shall arrest any vagrant whom they may find at large and not in the care of some discreet person, and take him before some magistrate of the county, city or town in which the arrest was made.

Time of making arrest. R. § 4473.

SEC. 4133. If the arrests authorized in the last two sections are made during the night, the officer must keep the person arrested in confinement until the next morning, and if arrests are made within the local jurisdiction of a police or city court, the persons arrested must be taken before a judge or justice of such court, unless he be absent.

Security for good behavior. R. § 4474.

SEC. 4134. If it appear by the confession of such person, or by competent testimony, that such person is a vagrant, the magistrate before whom he is brought may require of such person an undertaking, with sufficient surety, for good behavior for the term of one year thereafter.

Committed in default of security. R. § 4475. C. '51, § 3312.

SEC. 4135. The magistrate shall make up, sign, and file with the clerk of the district court of the county, a record of conviction of such person as a vagrant, specifying, generally, the nature and circumstances of the charge, and shall, in default of such security being given, by warrant under his hand, commit such vagrant to the county jail of the county, city or town, as the case may be, until such security be found, or such vagrant discharged according to law.

Breach of undertaking. R. § 4476. C. '51, § 3313.

SEC. 4136. The committing of any of the acts which constitute such person so bound a vagrant, shall be deemed a breach of the condition of such undertaking.

New security. R. § 4477. C. '51, § 3314.

SEC. 4137. On a recovery upon any such undertaking, the court before which such recovery may be had, may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the common jail of the county for any time not exceeding six months.

Discharge of bail. R. § 4478. C. '51, § 3315.

SEC. 4138. Any person committed to jail for not finding sureties for good behavior, may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person.

TRIAL IN DISTRICT COURT.

Hearing in district court. R. § 4479. C. '51, § 3316.

SEC. 4139. The district court to which the papers are returned, shall, on demand of the defendant, empanel a jury to inquire into and determine the truth of the charge made against him; and the rules and regulations of law governing said court in the trials of misdemeanors shall be applicable to and govern it in the trial herein contemplated.

Judgment. R. § 4480. C. '51, § 3317.

SEC. 4140. If no jury be demanded, the district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion.

Imprisonment. R. § 4481. C. '51, § 3318.

SEC. 4141. Such district court may, in its discretion, order any such vagrant to be kept in the common jail for any time not exceeding six months at hard labor.

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Labor. R. § 4482. C. '51, § 3319.

SEC. 4142. If there be no means in such jail for employing offenders at hard labor, such court may direct the keeper thereof to furnish such employment as it shall specify to such vagrant as may be committed thereto, either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements, not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them.

Expenses. R. § 4483. C. '51, § 3320.

SEC. 4143. The expenses incurred in pursuance of such order shall be audited by the board of supervisors of the county, and paid out of the county treasury.

Proceeds of labor. R. § 4484. C. '51, § 3321.

SEC. 4144. One-half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury for the use of the county.

VAGRANCY AND COMMON BEGGARY.

[Sixteenth General Assembly, Chapter 69.]

Male vagrants to be kept at hard labor.

SEC. 1. If any male person, physically able to perform manual labor, shall be found in a state of vagrancy, or practicing common begging, he shall, on conviction thereof, be fined in any sum not exceeding fifty dollars, and sentenced to hard labor in the jail of the county, for which labor *they* [he] shall receive a credit at the rate of seventy-five cents per day until said fine and cost of prosecution, and accruing costs, shall be paid.

Duty of boards of supervisors.

SEC. 2. The board of supervisors of the several counties are hereby authorized to provide for carrying the provisions of the foregoing section into effect, for which purpose they may, by order entered upon their journals, declare that the jail shall extend to and include the lands of the proper county, and every form and kind of labor commonly performed therein by male persons.

CHAPTER 6.

OF RESISTANCE TO PROCESS AND SUPPRESSION OF RIOTS.

Calling out power of county. R. § 4489. C. '51, § 2793.

SECTION 4145. When the sheriff or other officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the resisters, and their aiders and abettors, to be punished by law.

Certify to court names of resisters. R. § 4490. C. '51, § 2794.

SEC. 4146. The officer shall certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be punished for a contempt.

SEC. 4147. Every person commanded by a public officer to

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Refusing to assist. R. § 4491. C. '51, § 2795.

assist him in the execution of process, as provided in section four thousand one hundred and forty-five of this chapter, who, without lawful cause, refuses or neglects to obey such command, is guilty of a misdemeanor.

When power of county not sufficient. R. § 4492. C. '51, § 2796.

SEC. 4148. If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may, on the application of the sheriff, order such posse or military force from any other county or counties as is necessary.

Unlawful assemblages. R. § 4493. C. '51, § 2797.

SEC. 4149. When persons to the number of twelve or more, armed with dangerous weapons, or persons to the number of thirty or more, whether armed or not, are unlawfully or riotously assembled in any city or town, the judges, sheriff, and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town, must go among the persons assembled, or as near them as may be safe, and command them, in the name of the state, immediately to disperse.

Arrest. R. § 4494. C. '51, § 2798.

SEC. 4150. If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.

Refusing to aid. R. § 4495. C. '51, § 2799.

SEC. 4151. If any person commanded to aid the magistrate or officer, without good cause neglect to do so, he is guilty of a misdemeanor.

Failure of duty. R. § 4496. C. '51, § 2800.

SEC. 4152. If a magistrate or officer having notice of an unlawful or riotous assembly as above provided in this chapter, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor.

Assembly will not disperse. R. § 4497. C. '51, § 2801.

SEC. 4153. If the persons so assembled and commanded to disperse, do not immediately disperse, any two of the magistrates or officers before mentioned, may command the aid of a sufficient number of persons, and may proceed in such manner as, in their judgment, is necessary to disperse the assembly and arrest the offenders.

When armed force is called out. R. § 4498. C. '51, § 2802.

SEC. 4154. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, it must obey such orders in relation thereto as have been made by the governor, or by a judge of the supreme, district, or circuit court, a sheriff, or magistrate, as the case may be.

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

Who liable to the laws of this State. R. § 4500. C. '51, § 2803.

SECTION 4155. Every person, whether an inhabitant of this or any other state or country, or of a territory, or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

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Of district court. R. § 4502.

SEC. 4156. The local jurisdiction of the district court, is of offenses committed within the county in which it is held, and of such other cases as are, or may be, provided by law.

Offenses commenced without but consummated within State. R. § 4505. C. '51, § 2804.

SEC. 4157. When the commission of a public offense commenced without this state is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this state, though he was without the state at the time of the commission of the offense charged; *provided* he consummated the offense through the intervention of an innocent or guilty agent within this state, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated.

Stealing property in another state and bringing it within this state is not an act contemplated by this section, but the thief is punishable in this state under the provisions as to larceny: *The State v. Bennett*, 14–479.

Fighting duel without the state. R. § 4506. C. '51, § 2805.

SEC. 4158. When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel, or is concerned as second therein without the jurisdiction of the state, and in such duel a wound is inflicted upon any person whereof he die within this state, the jurisdiction of the offense is in the county where the death may happen.

Offense part in one county. R. § 4507. C. '51, § 2806.

SEC. 4159. When a public offense is committed in part in one county and part within another, or when the acts or effects constituting, or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county.

This section does not apply to the crime of abortion. Where the drug, etc., is administered in one county and the miscarriage occurs in another, the crime is completed where the drug is administered: *The State v. Hollenbeck*, 36–12.

Near boundary of two counties. R. § 4508. C. '51, § 2807.

SEC. 4160. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

Where one county takes jurisdiction of a crime committed in an adjoining county, but within five hundred yards of the boundary, the former cannot recover the costs of prosecution from the latter: *Floyd Co. v. Cerro Gordo Co.*, 47–186.

On boats, rafts, etc. R. § 4509. C. '51, § 2808.

SEC. 4161. When an offense is committed within the jurisdiction of this state on board a boat, raft, or vessel navigating a river, lake, or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the boat, raft, or vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate.

Jurisdiction in any county in certain cases. R. § 4510. C. '51, § 2809.

SEC. 4162. The jurisdiction of an indictment for the crime of forcibly, and without lawful authority seizing and confining another, or kidnapping him with intent, against his will, to cause him to be confined or imprisoned within the state, or to be sent out of the state; or of taking or enticing away a child under the age of twelve years from the parents, guardian, or other person having the legal charge of the person, with the intent to detain or conceal such child; or of taking or enticing away an unmarried female of previously chaste character under the age of fif-

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teen years, for the purpose of prostitution; or of taking any woman unlawfully and against her will, or by force, menace, or duress, compelling her to marry against her will; or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed, or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to the commission of the offense, or in abetting the parties concerned therein.

Bigamy. R. § 4511. C. '51, § 2810.

SEC. 4163. When the offense of bigamy is committed in one county, and the defendant is apprehended in another, the jurisdiction is in either county.

When conviction a bar. R. § 4412.

SEC. 4164. When the offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to prosecution or indictment thereof in another.

CHAPTER 8.

THE TIME OF COMMENCING CRIMINAL ACTIONS.

Murder. R. § 4513. C. '51, § 2811.

SECTION 4165. A prosecution for murder may be commenced at any time after the death of the person killed.

Limitation: within eighteen months. R. § 4514. C. '51, § 2812.

SEC. 4166. An indictment for a public offense must be found within eighteen months after the commission thereof, in the following cases, and not after:

1. Taking or enticing away an unmarried female, under the age of fifteen years, for the purpose of marriage or prostitution;
2. Seducing or debauching an unmarried female, of previously chaste character;
3. For rape and adultery;
4. For an assault with intent to commit a rape.

Under the Code of 1851, *held*, that the limitation in a criminal action could not be raised by demurrer to the indictment, but such fact must be specially pleaded: *The State v. Hussey*, 7–409; *The State v. Groome*, 10–308.

It is not material that the time of the commission of the offense, as stated in the indictment, should be such as to bring it within the period of limitation: See note to § 4301.

Three years. R. § 4515. C. '51, § 2813.

SEC. 4167. In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterwards.

Misdemeanor triable before a justice.

SEC. 4168. A prosecution for a misdemeanor, triable before a justice of the peace, must be commenced within one year after the commission thereof, and not after.

Defendant out of the state. R. § 4516. C. '51, § 2814.

SEC. 4169. If, when the offense is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not usually and publicly resident within the state is a part of the limitation.

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SEC. 4170. An indictment is found within the meaning of this chapter, when it is duly presented by the grand jury in open court and there received and filed. When indictment is found. R. § 4517. C. '51, § 2815.

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

SECTION 4171. The governor of the state may, in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury. Agents appointed to apprehend: expense. R. § 4518. C. '51, § 3282.

The expenses to be allowed agents for returning fugitives from justice, shall be the fees paid the officers of the state upon whose governor the requisition is made; and the agent shall receive not exceeding ten cents per mile, each way, for all necessary travel of himself and for each fugitive, five cents per mile additional for the number of miles which such fugitive shall have been conveyed. Expenses to be allowed. Ten cents per mile mileage.

Bills for such expenses shall be made out in such manner as to show the actual route traveled, and the number of miles, and be verified by affidavit, and be accompanied by proof that the fugitive for whom requisition was made has been returned and delivered into the custody of the proper authority; *provided*, that the state shall, in no case, pay the costs of returning the fugitive where he has not been tried, unless it shall be shown to the satisfaction of the governor that the want of trial has not been owing to any fault or neglect on the part of the person or persons interested in the prosecution. Form of bills for expenses. Proviso: fugitive must have been tried.

[As amended by 17th G. A., ch. 65, which added all after the word "treasury" in the eighth line.]

To constitute the person a fugitive from justice, he must have been in the state where the crime is alleged to have been committed, must have there committed the crime, and must have fled therefrom to escape punishment. The state is not bound to surrender one of its citizens who has *constructively* committed a crime in another state, without having been there in person: *Jones v. Leonard*, 50–106.

SEC. 4172. No compensation, fee, or reward of any kind, can be paid to, or received by, a public officer of this state for a service rendered or expense incurred in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided by law. No compensation except as provided by law. R. § 4519.

SEC. 4173. A violation of the last section is a misdemeanor. Misdemeanor. R. § 4520.

SEC. 4174. No executive warrant for the arrest and surrender of any person demanded by the executive authority of any other

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Executive warrant: for fugitive: when to issue. R. § 4521.

state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of any other state or territory, for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same.

The fact that the governor considers the evidence submitted to him sufficient, and issues his warrant accordingly, does not preclude inquiry by the courts as to the sufficiency of such evidence, and his decision may be questioned in a *habeas corpus* proceeding: *Jones v. Leonard*, 50–106.

The sufficiency of evidence in a particular case, doubted: *Ibid.*

Requisition from another state. R. § 4522. C. '51, § 3283.

SEC. 4175. Whenever a demand is made upon the governor of this state by the executive of any other state or territory, in any case authorized by the constitution and laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant under the seal of the state, authorizing the agent who makes such demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also by such warrant require all peace officers to afford all needful assistance in the execution thereof.

EXAMINATION BY MAGISTRATE.

Warrant of magistrate: when to issue. R. § 4523. C. '51, § 3284.

SEC. 4176. If any person be found in this state charged with any crime committed in any other state or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law, issue a warrant for the arrest of such person.

This section and the following ones are only applicable where the party against whom the proceeding is brought is charged with a crime in some other state, etc., before some court, magistrate or other officer, by an indictment, information, or other accusation known to the law of such state. Unless such fact is made to appear, the magistrate has no jurisdiction: *The State v. Hufford*, 28–391.

Bail. R. § 4524. C. '51, § 3285.

SEC. 4177. If, upon examination, it appear that there is reasonable cause to believe the complaint true, and that such person may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking, with sufficient surety in a reasonable sum, to appear before such magistrate at a future day, allowing reasonable time to obtain the warrant from the governor, and abide the order of such magistrate in the premises.

Committed. R. § 4525. C. '51, § 3286.

SEC. 4178. If such person does not give bail, or if he is charged with the crime of murder, he must be committed to

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prison, and there detained until such day, in like manner as if the offense charged had been committed within this state.

If charged with murder *in the second degree*, he is entitled to be released on bail under Const. art. 1, § 12: *The State v. Hufford*, 23–579.

SEC. 4179. A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking, is a forfeiture thereof. Forfeiture of bail. R. § 4526. C. '51, § 3287.

Where bail has been taken without it being shown that the party was charged, etc., in some other state, as specified in note to § 4176, the proceedings are void, and a recovery cannot be had on the bond: *The State v. Hufford*, 28–391.

SEC. 4180. If such person appear before the magistrate upon the day ordered, he must be discharged unless he is demanded by some person authorized by the warrant of the governor to receive him, or unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor. Discharge. R. § 4527. C. '51, § 3288.

SEC. 4181. Whether the person so charged be bound to appear, be committed, or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking, if there be one. Re-arrest on governors warrant. R. § 4528. C. '51, § 3289.

SEC. 4182. The complainant in any such case is answerable for all the costs and charges, and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance. Costs. R. § 4529. C. '51, § 3290.

SEC. 4183. Upon the appointment of any agent for the arrest of a fugitive from justice under the provisions of this chapter, the governor is hereby authorized to make it a condition upon such appointment, and the issue of the writ, that the same shall be executed without expense to the state, if in his opinion justice and equity so require. Condition as to expense before appointing agent. 12 G. A. ch. 39, § 1.

SEC. 4184. When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, such expenses shall be made out by items in detail, and sworn to, and approved by him and at least two other members of the executive council, and when so approved shall be audited and paid out of the general revenue of the state, and this section shall be sufficient authority for the payment of the same. When expenses are paid by state. Same, § 2.

CHAPTER 10.

OF WARRANTS OF ARREST ON PRELIMINARY INFORMATION.

SECTION 4185. When complaint is made before a magistrate of the commission of some designated public offense, triable on indictment in the county in which such magistrate has local jurisdiction, and charging some person with the commission thereof, he may issue a warrant for the arrest of such person. The complaint may be in form substantially the same as provided in sec- Complaint.

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tion four thousand six hundred and sixty-three of chapter fifty-two of this title.

Warrant: form of. R. § 4534. C. '51, § 2827.

SEC. 4186. The warrant of arrest on a preliminary information, must be substantially in the following form:

COUNTY OF.....

THE STATE OF IOWA,

To any Peace Officer in the State:

Preliminary information upon oath having been this day laid before me that the crime of (designating it,) has been committed, and accusing A. B. thereof:

You are, therefore, commanded forthwith to arrest the said A. B. and bring him before me at (naming the place,) or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at....this....day of....A. D. 18..

C....D...., *Justice of the Peace,*
(or as the case may be.)

Subpœna as witnesses E....F....and G....H....

Same. R. § 4535. C. '51, § 2828.

SEC. 4187. The warrant must specify the name of the defendant, and if it be unknown to the magistrate, may designate him by any name. It must also state, by name or general description, an offense which authorizes the magistrate to issue the warrant, the time of issuing it, and the county, city, town, township, or village where it was issued, and must be signed by the magistrate with his name of office.

Directed. R. § 4536. C. '51, § 2829.

SEC. 4188. It must be directed to "any peace officer in the state."

If offense is a misdemeanor. R. § 4537.

SEC. 4189. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement on the warrant as follows: "Let the defendant, when arrested, be admitted to bail in the sum of....dollars, if he desires to give bail," and fix in the indorsement the amount in which bail may be taken.

How served. R. § 4538. 13 G. A. ch. 137.

SEC. 4190. The warrant of arrest may be delivered to any peace officer for execution, and executed in any county in the state.

If offense be felony. R. § 4539. C. '51, § 2831.

SEC. 4191. If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magistrate in the county in which it was issued.

In such case a bail bond taken before a magistrate in the county where the prisoner is arrested, would not be good as a statutory bond, and would not become a lien on the property of the obligors as provided in § 4656, but the bond having been accepted and the defendant discharged thereunder, it may be enforced: *The State v. Cannon*, 34-322.

Bail in case of misdemeanor. R. § 4540. C. '51, § 2832.

SEC. 4192. If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county, must take bail from him accordingly for his appearance at the district

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court of the county in which the warrant was issued, on the first day of the next term thereof.

Order for discharge of defendant. R. § 4541. C. '51, § 2833.

SEC. 4193. On taking bail in the case provided for in the preceding section, the magistrate or clerk taking such bail must make on the warrant an order, signed by him with his name of office, for the discharge of the defendant, substantially as follows:

COUNTY OF (here name the county,)

THE STATE OF IOWA.

To (here state the name of the officer who has the defendant in custody, with the addition of his name of office, thus, A. B. sheriff of ——— county, according to the truth.)

The defendant named in the warrant of arrest in your custody, under the authority thereof, for the offense therein designated, having given sufficient bail to answer the same, by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and without unnecessary delay deliver this order, together with the said undertaking of bail, to the clerk of the district court of ——— county, on or before the first day of the next term thereof.

Dated at ———, this ——— day of ———, A. D. (or as the case may be.)

———, Justice of the Peace,
(or as the case may be.)

And must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge the defendant from arrest and without unnecessary delay, and on or before the first day of the next term of the court at which the defendant is required to appear, deliver or transmit by mail or otherwise the warrant, with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office; and the magistrate who issued the warrant shall return to the clerk the affidavits of the informant and his witnesses, upon which the warrant was issued, on or before the first day of the next term of the court, and the clerk shall, when the affidavits are returned by the magistrate, file the same in his office, with the warrant and undertaking of bail.

If bail be not given. R. § 4542. C. '51, § 2834.

SEC. 4194. If bail be not forthwith given by the defendant as provided in the two preceding sections, the magistrate or clerk must re-deliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it, at the place mentioned in the command thereof, or, if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued.

Proceedings after arrest. R. § 4543. C. '51, § 2835.

SEC. 4195. In all cases when the defendant is arrested, he must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time deliver to the magistrate or clerk the warrant, with his return thereon, indorsed and subscribed by him in his name of office.

Same. R. § 4544. C. '51, § 2836.

SEC. 4196. If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it as hereinbefore provided, the affidavits on

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which the warrant was issued must be sent to such magistrate, or if they cannot be procured, the informant and his witnesses, must be subpœnaed to make new affidavits.

CHAPTER 11.

OF ARREST, AND BY WHOM AND HOW MADE.

What is. R. § 4545. C. '51, § 2837.

SECTION 4197. Arrest is the taking of a person in custody in a case, and in the manner authorized by law.

By whom. R. § 4546.

SEC. 4198. An arrest may be made by a peace officer, or by a private person.

With warrant. R. § 4547.

SEC. 4199. A peace officer may make an arrest in obedience to a warrant delivered to him.

Without by peace officer. R. § 4548. C. '51, § 2840.

SEC. 4200. A peace officer without a warrant may make an arrest:

1. For a public offense committed or attempted in his presence;

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

By private person. R. § 4549. C. '51, § 2846.

SEC. 4201. A private person may make an arrest:

1. For a public offense committed or attempted in his presence;

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

Magistrate may orally order arrest. R. § 4550. C. '51, § 2845.

SEC. 4202. A magistrate may orally order a peace officer, or a private person, to arrest any one committing, or attempting to commit, a public offense in the presence of such magistrate, which order shall authorize the arrest.

When made. R. § 4551. C. '51, § 2850.

SEC. 4203. An arrest may be made on any day, or at any time of the day or night.

How to be made. R. § 4552. C. '51, § § 2889. 2841, 2847.

SEC. 4204. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of, or attempt to commit, the offense, or flies immediately after its commission, and if acting under the authority of a warrant, he must give information thereof and show the warrant if required.

When resisted. R. § 4553. C. '51, § 2844.

SEC. 4205. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

May break and enter premises. R. § 4554. C. '51, § § 2843, 2848.

SEC. 4206. To make an arrest, if the offense be a felony, a private person, if any public offense, a peace officer acting under the authority of a warrant, or without a warrant, may break open

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a door or window of a house in which the person to be arrested may be, or in which they have reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired.

In order to get out. R. § 4555.

SEC. 4207. Any person who has lawfully entered a house for the purpose of making an arrest under the provisions of the preceding section, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself; and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, and by his command, lawfully entered for the purpose of making an arrest, and detained therein.

Refusing to assist in making arrest. R. § 4556.

SEC. 4208. Any person making an arrest may orally summon as many persons as he deems necessary to aid him in making the arrest, and all persons failing to obey such summons shall be guilty of a misdemeanor.

Arrest: how made. R. § 4557. C. '51, § 2838.

SEC. 4209. An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.

Force. R. § 4558.

SEC. 4210. No unnecessary force or violence shall be used in making an arrest.

Restraint. R. § 4559.

SEC. 4211. A person arrested is not to be subjected to any more restraint than is necessary for his detention.

May take weapons from persons arrested. R. § 4560.

SEC. 4212. He who makes an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law.

Escape. R. § 4561. C. '51, § 2851.

SEC. 4213. If a person, after being arrested, either by a peace officer without a warrant, or by a private person, escape, or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him in any part of the state, and for that purpose may, if necessary, break open the door or window of a house in which he may be, or in which he has reasonable ground to believe he is, after having stated his purpose and demanded admittance, and when the person escaping or rescued was in custody under a warrant or commitment, this may be done at any time under the original warrant or commitment.

Arrest by bystander. R. § 4562. C. '51, § 2842.

SEC. 4214. A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

When arrest is by private person. R. § 4563. C. '51, § 2849.

SEC. 4215. A private person who has arrested another for the commission of an offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.

Same. R. § 4564.

SEC. 4216. A private person who makes an arrest and delivers the person arrested to a peace officer, must also accompany the officer before the magistrate.

By officer with warrant. R. § 4565.

SEC. 4217. An officer making an arrest in obedience to a warrant, shall proceed with the person arrested as commanded by the warrant, or as provided by law.

When without warrant. R. § 4566

SEC. 4218. When an arrest is made without a warrant, whether by a peace officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made;

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and the grounds on which the arrest was made shall be stated to the magistrate by affidavit, subscribed and sworn to by the person making the statement before the magistrate, in the same manner as upon a preliminary information, as nearly as may be.

HEARING BEFORE MAGISTRATE.

Magistrate may order information to be filed. R. § 4567.

SEC. 4219. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest was made, and that there is sufficient ground for a trial or preliminary examination, as the case may require, and that it will not be inconvenient for the witnesses on the part of the state that such trial or preliminary examination should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and, if the case be one within his jurisdiction to try and determine, shall order an information to be filed against him.

May order hearing to take place before another magistrate. R. § 4568.

SEC. 4220. If the magistrate believes from the statements in the affidavit that the offense charged is triable in the county in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, and that it will be more convenient for the witnesses on the part of the state that such trial or examination should be had before some other magistrate, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before such magistrate in the same county who has jurisdiction to try or examine the charge as the case may require, and as shall be convenient for the witnesses on the part of the state, and deliver the affidavit and the order of commitment to the peace officer, who shall proceed with the person arrested as directed by the order; and such magistrate, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and, if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

When the offense is triable in another county. R. § 4560.

SEC. 4221. If the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, he shall, by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, who has jurisdiction to make either preliminary examination into the charges, or try and determine the same, as the case may require, and, if the offense be a misdemeanor only triable on indictment, shall fix in the order the amount of bail which the person arrested may give for his appearance at the district court of the county in which the offense is indictable, on the first day of the next term thereof, to answer an indictment.

Bail: commitment: discharge. R. § 4570.

SEC. 4222. If bail be given as provided in the preceding section, it may be either before the magistrate making the order, or the magistrate in the county in which the offense is triable before whom he is taken under the order, or a magistrate of any county through which he passes in going from the county in which the

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arrest was made to that in which the offense is triable, or the clerk of the district court of either of said counties; and, when given, the magistrate or clerk taking the same shall make on the order of commitment an order for the discharge of the person arrested from custody, who shall forthwith be discharged accordingly, and to transmit by mail, or otherwise, to the clerk of the district court of the county at which the person arrested is bound to appear, on or before the first day of the next term thereof, and as soon as it can be conveniently done after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of the bail, who shall file the same together in his office.

Same. R. § 4571.

SEC. 4223. If bail be not given as provided in the last two preceding sections, before the magistrate in the county in which the arrest was made, or if the offense charged is a felony, or a misdemeanor triable on information, the magistrate must deliver the affidavits and the order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order, or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

[The word "preceding" in the second line, as in the original, is omitted in the printed code.]

Officer having person in custody to take him before magistrate. R. § 4572.

SEC. 4224. In the cases contemplated in the last three sections, the officer having the person arrested in custody, under the order, shall take him before the proper magistrate in the county in which the offense is triable, which is most convenient for the witnesses on the part of the state, unless, in case of a misdemeanor triable on indictment as hereinbefore provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes in going from the county in which the arrest was made to the county in which the offense is triable, or before the clerk of the district court of either of said counties for the purpose of giving bail.

Officers return how made. R. § 4573.

SEC. 4225. In all cases, the peace officer, when he takes a person committed to him under an order as provided in this chapter before a magistrate, or clerk of the district court, either for the purpose of giving bail, if bail be taken, or for trial or preliminary examination, must make his return on such order, and sign such return with his name of office, and deliver the same to the magistrate or clerk.

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CHAPTER 12.

OF PRELIMINARY EXAMINATIONS.

Right of defendant to counsel. R. § 4575. C. '51, § 2852.

SECTION 4226. When the defendant is brought before the magistrate on arrest, either with or without a warrant, the magistrate must immediately inform him of the offense with which he is charged, and of his right to the aid of counsel in every stage of the proceedings.

Same. R. § 4576. C. '51, § 2853.

SEC. 4227. The magistrate must allow the defendant a reasonable time to send for counsel, and, if necessary, must adjourn the examination for that purpose.

Examination. R. § 4577. C. '51, § 2854.

SEC. 4228. The magistrate, immediately after the appearance of counsel, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, must proceed to examine the case; *provided*, however, that before said examination is commenced, said defendant may have a change of venue upon filing an affidavit that the magistrate is prejudiced against him, is a material witness for either party, or that the defendant cannot obtain justice before him, as affiant verily believes. On filing of such affidavit a change of venue must be allowed, and the magistrate must immediately transmit all original papers and a transcript of the record entire in the case, to the next nearest magistrate in the township against whom no objection exists, if there be any, if not, to the next nearest magistrate in the county against whom no such objections in the opinion of the justice exists, who shall proceed with said examination as hereinafter provided. Only one such change of venue shall be allowed.

Change of venue.

Same. R. § 4578. C. '51, § 2855.

SEC. 4229. The examination must be terminated at one session unless the magistrate, for good cause shown, adjourn it.

Adjournment. R. § 4579. C. '51, § 2856.

SEC. 4230. No examination can be adjourned for a longer period than thirty days.

Bail. R. § 4580. C. '51, § 2857.

SEC. 4231. If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, or require him to give ample security for his appearance at the time and place to which the examination is adjourned.

When no jail. R. § 4582. C. '51, § 2859.

SEC. 4232. If there is no jail in the county, the sheriff must retain the defendant in his custody until the examination.

Subpœnas. R. § 4583. C. '51, § 2860.

SEC. 4233. The magistrate must issue subpœnas for any witnesses required either by the state or by the defendant, and the witnesses who appear at the examination must be examined in the presence of the defendant.

Depositions.

SEC. 4234. The deposition of a witness who resides out of the county in which the examination is had, may be taken, on application of the defendant on the order of the magistrate, before any officer authorized to take depositions in civil cases; which order shall not be made until three days after the filing with the magistrate of the written interrogatories to be propounded to the witness; nor until three days after the service of notice on the state, or on the attorney who appears for the state, of the filing of such interrogatories.

Cross-interrogatories.

SEC. 4235. Before the order to take the deposition is made,

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the state may file cross-interrogatories to be propounded to the witness, which shall be answered by him in the deposition.

Read in evidence.

SEC. 4236. At the expiration of three days from the filing of the interrogatories, and the service of the notice thereof on the state as above provided, the magistrate may order the testimony of the witness to be taken in answer to the interrogatories and cross-interrogatories, if any, on file; and the deposition thus taken may be read as evidence on the examination; nor shall the same be excluded because of any irregularity in the taking of it, if the magistrate is satisfied that the irregularity complained of could work no substantial prejudice to the opposite party.

[Sec. 4237, which made defendant a competent witness in his own behalf in such cases, was repealed by 17th G. A., ch. 168, § 2, by which act that privilege was extended to defendant in all criminal proceedings; see § § 3636 and 4556.]

Before the amendment of § 4556, *held*, that it was only on preliminary examination that defendant in a criminal action might be a witness: *The State v. Taffer*, 38–422; and that defendant was not a competent witness for himself on the trial of an information for security to keep the peace. (§ 4126): *The State v. Darrington*, 47–518.

Cross-examination.

SEC. 4238. When the defendant testifies in his own behalf, he shall be subject to a cross-examination as an ordinary witness, *provided*, that, in the cross-examination, the state shall be strictly confined to the matters testified to in the examination-in-chief.

TRIAL.

Witnesses excluded. R. § 4591. C. '51, § 2867.

SEC. 4239. While a witness is under examination before the magistrate, he may exclude all others who have not been examined. He may also cause the witnesses to be kept separate, that they may not converse with each other until they are all examined.

Persons excluded. R. § 4592.

SEC. 4240. The magistrate must also, upon the request of the defendant, exclude from hearing the examination all persons except the magistrate, his clerk, the peace officer who has the custody of the defendant, the attorney or attorneys representing the state and the defendant and his counsel.

Minutes of examination. R. § 4593. C. '51, § 2868.

SEC. 4241. The magistrate shall, in the minutes of the examination, write out or cause to be written out, the substance of the testimony given on the examination by each witness examined before him, showing the name of the witness, his place of residence, and his business or profession, and the amount to which each witness is entitled for mileage and attendance.

The minutes so taken by the magistrate are not competent as evidence on the trial: *The State v. Collins*, 32–36; *The State v. Hull*, 26–292; nor are they admissible for the purpose of impeaching a witness: *The State v. Hayden*, 45–11.

The magistrate, or a person appointed by him to write out the minutes of the testimony, cannot recover compensation therefor from the county. The usual fees to the magistrate in such cases for conducting the examination are all that are contemplated by the statute: *Sanford v. Lee Co.*, 4–148.

These minutes may be used before grand jury: See § 4289.

Magistrate's certificate. R. § 4594. C. '51, § § 2869–70.

SEC. 4242. After the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions on

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file with him and used in the examination, and annex thereto his certificate, which must set forth in substance the time and place of examination, and that the minutes thereof are true, and the certificate must be signed by the magistrate, with his name of office.

Judgment. R. § 4595. C. '51, § 2871.

SEC. 4243. If, after hearing the testimony, it appear to the magistrate, either that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order the defendant to be discharged; and such order must be endorsed on the minutes of the examination or annexed thereto and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, or of any other offense, I order him to be discharged."

Same. R. § 4596. C. '51, § 2872.

SEC. 4244. If it appears from the examination that a public offense triable on indictment has been committed, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner endorse on or annex to the minutes of the examination, an order signed by him to the following effect: "It appearing to me by the within minutes that the offense therein mentioned, or any other offense triable on indictment, according to the fact, stating generally the nature thereof, has been committed, and there is sufficient cause for believing the defendant guilty thereof, I order that he be held to answer the same."

The fact that such finding was made by the justice will be presumed in an action on a bail bond given by the person bound over; but if not made, such fact is a proper matter of defense: *The State v. Patterson*, 23–575.

BAIL.

Order admitting. R. § 4598. C. '51, § 2874.

SEC. 4245. If bail be taken by the magistrate, the following words in substance must be added to the order mentioned in the preceding section, "and I have admitted him to bail to answer thereto by the undertaking hereto annexed,"—and the undertaking of bail must be annexed thereto.

Same. R. § 4599. C. '51, § 2874.

SEC. 4246. If bail be not given by the defendant, then the magistrate must add to the order mentioned in section forty-two hundred and forty-four the following words in substance: "and that he be admitted to bail in the sum of (here state the amount,) and that he be committed to the jail of the county of (here name the county,) until he give such bail."

Mittimus. R. § 4600 C. '51, § 2875.

SEC. 4247. If the magistrate order the defendant to be committed, he shall make out a warrant of commitment, signed by him with his name of office, and deliver it with the defendant to the officer to whom he is committed, or, if the officer be not present, to a peace officer who shall deliver the defendant into the proper custody, together with the warrant of commitment, which warrant may be in form following:

THE STATE OF IOWA:

To the sheriff of.....county.

An order having been this day made by me, that A....B...., (the name of the defendant,) be held to answer upon a charge of

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(state the offense,) you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at.....this.....day of.....A. D....

Witnesses must give undertaking. R. § 4601. C. '51, § 2876.

SEC. 4248. On holding the defendant to answer, the magistrate must take from each material witness examined by him on the part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, when required in the further progress of the cause, and that he will not evade or attempt to evade the service of a subpœna, or that he will forfeit the sum of one hundred dollars.

[As amended by 18th G. A., ch. 130, § 1, which inserted the words following "answer" in the fifth line, to and including "subpœna."]

When to give security. R. § 4602. C. '51, § 2877.

SEC. 4249. Whenever the magistrate is satisfied by oath, or otherwise, that there is reason to believe that any such witness will not fulfill his undertaking and appear and testify unless surety be required, he may order the witness to enter into a written undertaking with sureties, and in such sum as he may deem proper for his appearance.

Minors and married women. R. § 4603. C. '51, § 2878.

SEC. 4250. Minors and married women who are material witnesses against the defendant, may, in like manner, be required to procure sureties for their appearance as provided in the preceding section.

Witness committed. R. § 4604. C. '51, § 2879.

SEC. 4251. If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate must commit him until he comply or be legally discharged.

Papers returned to district court. R. § 4605. C. '51, § 2880.

SEC. 4252. When a magistrate has discharged a defendant, or held him to answer an indictment, he must return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers mentioned in section four thousand two hundred and forty-two of this chapter, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses, or for them, taken by him.

When magistrate to retain papers. R. § 4607.

SEC. 4253. If it appear from the examination that a public offense has been committed which is not triable on indictment, but on information only, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him. If he have not jurisdiction to try and determine the same, he shall indorse on, or annex to, the minutes of the examination an order, signed by him, to the following effect: "It appearing to me by the within minutes that the offense of (here state its name, or nature generally,) has been committed, and that there is sufficient reason for believing the defendant guilty thereof, I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, and who has jurisdiction, giving the name of office,) and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate before whom

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the defendant is to be taken, or that he will forfeit the sum of fifty dollars, and deliver the undertaking, with all the other papers to a peace officer, who shall forthwith proceed as directed by the order, and take the defendant before such magistrate, and deliver all the papers with the undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly.

Costs.

SEC. 4254. When the defendant is discharged, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the complainant and render judgment therefor; but the person against whom such judgment is rendered may appeal in the same manner, and with the same effect, as is provided for a prosecuting witness in section four thousand six hundred and ninety-one of this code, otherwise the costs shall be taxed against the state.

[As amended by 15th G. A., ch. 30, which substituted "ninety-one" in next to the last line for "eighty-nine," and added the words following "code."]

CHAPTER 13.

OF SELECTING, DRAWING, SUMMONING, AND EMPANELING OF THE GRAND JURY.

Selecting grand jury. R. § 4608. C. '51, § 2881.

SECTION 4255. The selecting, drawing, and summoning of the grand jury is as prescribed in the code of civil practice.

Grand jurors. R. § 4609. C. '51, § 2881.

SEC. 4256. At a term of court at which grand jurors are required to appear, the panel shall be called, and the names of the grand jurors who shall appear shall be entered on the record. If fifteen grand jurors do not appear, or if the number appearing be reduced from any cause, either then or afterwards, to less than fifteen, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel.

If a grand juror is discharged subsequently to the formation of the grand jury, the panel should be filled by the summoning of another juror: *Norris' House v. The State*, 3 Gr. 513. But this is not applicable to cases where a challenge by a defendant held to answer is sustained as to an individual juror: See § § 4261 and 4264, and note; *The State v. Ostrander*, 18–435. But if by the challenges of a defendant, the number of grand jurors is reduced below fifteen, the court should fill the panel as here provided: *The State v. Garhart*, 35–315.

Section 244, providing for the issuance of a new precept, applies only to a case where all the jurors fail to appear, or it is determined that the whole panel has been illegally selected or drawn. That provision has no reference to the case of the failure of a sufficient number of jurors to attend: *The State v. Pierce*, 8–231.

A grand jury having once been discharged may be re-summoned at the same term: *The State v. Reid*, 20–413, 423.

A defendant being held to answer subsequently to the organization of the grand jury, was allowed to exercise the right of challenge, and six jurors being excused, it was held not error for the court to re-organize the jury and fill up the panel: *The State v. Mooney*, 10–506.

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Same. R. § 4610. C. '51, § 2881.

SEC. 4257. Persons summoned by the sheriff to supply a deficiency in the requisite number of grand jurors, serve only during the term at which they are summoned.

Where a grand jury composed in part of jurors summoned to supply a deficiency were discharged, and again summoned at the same term, *held*, that such persons were properly summoned as members: *The State v. Reid*, 20-413, 422.

Challenge. R. § 4611. C. '51, § 2882.

SEC. 4258. A defendant held to answer to a public offense, may challenge the panel of the grand jury, and the state or defendant may challenge any individual juror.

A defendant should exercise his right of challenge at the proper time, or it will be held waived: *The State v. Harris*, 38-242.

Where a defendant was held to answer after the grand jury was organized, he was still allowed to exercise his right of challenge: *The State v. Mooney*, 10-506; and where an indictment was set aside for the reason that the defendant had not been allowed to exercise the right of challenge, he was allowed to exercise that right as to the same grand jury: *The State v. Gillick*, 7-287.

A defendant held to answer may waive his right to challenge the grand jury, and will not be in default if he do not appear for that purpose: *The State v. Klingman*, 14-404; and a failure to appear at the proper time for challenging will not operate to forfeit a bail bond: *Ringgold Co. v. Ross*, 40-176.

It seems that the right of challenging an individual juror may be exercised or waived by defendant's attorney in the absence of defendant, even on a trial for a felony. His presence at this proceeding is not made essential. At any rate, where it is not shown that there was any objection for which defendant could have challenged an individual juror, alleged error in forming the grand jury when defendant was not personally present would be error without prejudice: *The State v. Felter*, 25-67.

A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was excused and a person substituted, as to whom defendant did not have opportunity to exercise his right of challenge, it not appearing that the new juror was disqualified or the defendant prejudiced: *The State v. Fowler*, 52-103.

To an individual juror.

SEC. 4259. A challenge to an individual juror may be made by the state, for one or more of the following causes:

1. That he is related either by affinity or consanguinity nearer than in the fifth degree, or stands in the relation of agent, clerk, servant, or employe to any person held to answer for a public offense whose case may come before the grand jury;

2. That he is bail for any one held to answer for a public offense, whose case may come before the grand jury;

3. That he is defendant in a prosecution similar to any prosecution to be examined by the grand jury;

4. That he is, or within one year preceding has been, engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, and for which the juror may be indicted by the grand jury.

To the panel. R. § 4612. C. '51, § 2883.

SEC. 4260. A challenge to the panel can be interposed only for the reason that they were not appointed, drawn, or summoned as prescribed by law.

A challenge to the panel need not be demurred or pleaded to by the state. Defendant must introduce evidence in support of his challenge or it will be overruled: *The State v. Gillick*, 10-98.

That the grand jury was reorganized during the term, *held*, not a ground for challenge to the panel: *The State v. Mooney*, 10-506.

A defendant held to answer must interpose these grounds of objection at the time the grand jury is empaneled and not afterward: See § 4339 and notes.

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To individual juror. R. § 4613. C. '51, § 2884.

SEC. 4261. A challenge to an individual juror by the defendant, may be made for one or more of the following causes only:

1. That he is a minor, insane, or not competent by law to serve as such juror;

2. That he is a prosecutor upon a charge against the defendant;

3. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial.

Where an indictment found against a defendant held to answer, without allowing him the privilege of challenge, was set aside for that reason, and the grand jury called in to allow defendant to exercise that privilege, *held*, that it was a sufficient cause of challenge as to each juror that he had heard the evidence upon which the previous indictment was found and had concurred in finding it. It seems that the challenge to a grand juror may be allowed for the same cause that would constitute a good objection to a petit juror: *The State v. Gillick*, 7–287.

That a member of the grand jury is an alien is a ground of challenge, but not a ground for setting aside an indictment: *The State v. Gibbs*, 39–318.

The right of defendant may be exercised or waived by his attorney in his absence: See note to § 4258.

The provision of the Code of 1851 corresponding to ¶ 3 of this section, considered: *The State v. Hinkle*, 6–380.

Decided by the court. R. § 4615. C. '51, § 2886.

SEC. 4262. Challenges to the panel or to an individual juror, must be decided by the court.

When challenge allowed. R. § 4616. C. '51, § 2887.

SEC. 4263. If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed. If the jury does so and finds an indictment the court must set it aside.

Same. R. § 4617. C. '51, § 2888.

SEC. 4264. If a challenge to an individual juror be allowed, he shall not be present at, or take any part in, the consideration of the charge against the defendant.

In such case there is no provision for summoning another juror in place of one as to whom a challenge is sustained. He does not cease to be a member of the grand jury, and his place cannot be supplied under § 4256. An indictment against a defendant held to answer, found by grand jurors as to whom no challenge by defendant has been sustained (if sufficient in number), will be good (explaining *Norris' House v. The State*, 3 Gr. 513): *The State v. Ostrander*, 18–435; and see notes to § 4256.

Inform the court. R. § 4618. C. '51, § 2889.

SEC. 4265. The grand jury must inform the court of a violation of the last section, that it may be punished as a contempt.

Challenge to panel; no challenge after jury is sworn. R. § 4619. C. '51, § 2890.

SEC. 4266. When several persons are held to answer for one and the same offense, no challenge to the panel can be made unless they all join in such challenge, nor can any objection be interposed by a defendant to the grand jury or to any individual juror for any cause of challenge after they are sworn.

An objection to the grand jury, or an individual juror, cannot be interposed for any cause of challenge after the jury is sworn: *The State v. Ingalls*, 17–8; *Dixon v. the State*, 3–416; *The State v. Hinkle*, 6–380.

Section applied: *The State v. Gibbs*, 39–318.

Foreman. R. § 4620. C. '51, § 2891.

SEC. 4267. From the persons summoned to serve as grand jurors, the court must appoint a foreman; the court must also appoint a foreman when the person already appointed is discharged, excused, or from any cause becomes unable to act before the grand jury is finally discharged.

The foreman may be selected either from the grand jurors regularly drawn, or from those summoned to supply a deficiency: *The State v. Brandt*, 41–593, 605.

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Oath. R. § 4621. C. '51, § 2892.

SEC. 4268. The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire and true presentment make of all public offenses against the people of this state, committed or triable within this county, of which you have, or can obtain legal evidence; you shall present no person through malice, hatred, or ill will, nor leave any unpresented, through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments, you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding. So help you God."

Same. R. § 4622. C. '51, § 2893.

SEC. 4269. The following oath must thereupon be administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God."

Charged by the court. R. § 4623. C. '51, § 2894.

SEC. 4270. The grand jury being empaneled and sworn, may be charged by the court. In doing so, the court shall give them such information as it may deem proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before the grand jury. And it is hereby made the duty of the court to specially give in charge to the grand jury, the provisions of law regulating the accounting by public officers for fines and fees collected by them, and providing for the suppression of intemperance.

Discharge. R. § 4625. C. '51, § 2896.

SEC. 4271. The grand jury on the completion of its business shall be discharged by the court. But whether its business be completed or not, it is discharged by the final adjournment thereof.

CHAPTER 14.

OF THE POWERS AND DUTIES OF THE GRAND JURY.

Powers. R. § 4626. C. '51, § 2897.

SECTION 4272. The grand jury has power, and it is made its duty, to inquire into all indictable offenses committed, or which may be tried, within the county, and present them to the court by indictment.

Indictment how found. R. § 4627. C. '51, § 2899.

SEC. 4273. The indictment must in all cases be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence, or upon the minutes of evidence given by the witnesses before a committing magistrate.

[As amended by 18th G. A., ch. 130, § 2, which added the words following "evidence" in the third line.]

Administer oath. R. § 4628.

SEC. 4274. The grand jury has power, by its foreman, to administer the oath to all witnesses produced and examined before it.

Duty. R. § 4629.

SEC. 4275. It is the duty of the grand jury to appoint one of its number, who is not foreman, clerk thereof, who must take and preserve the minutes of the proceedings and of the evidence given

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before it, except the votes of the individual members thereof on finding an indictment.

Minutes of evidence taken before the grand jury are not admissible to impeach a witness on the trial: *The State v. Hayden*, 45–11.

Same. R. § 4630. C. '51, § 2900.

SEC. 4276. The grand jury is not bound to hear evidence for the defendant, but it is its duty to weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order such evidence to be produced.

Of a member. R. § 4631. C. '51, § 2901.

SEC. 4277. If a member of the grand jury knows, or has reason to believe that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors, and be sworn as a witness upon the investigation before them.

Special duty. R. § 4632. C. '51, § 2902.

SEC. 4278. It is made the special duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted;

2. Into the condition and management of the public prisons within the county;

3. Into the wilful and corrupt misconduct in office of all county officers;

4. Into the obstruction of highways.

The grand jury cannot report to the court the result of their inquiry into the conduct of county officers, otherwise than by indictment: *Rector v. Smith*, 11–302.

Issue subpœnas. R. § 4633. C. '51, § 2903.

SEC. 4279. The clerk of the court must, whenever required by the foreman of the grand jury or district attorney, issue subpœnas for witnesses to appear before the grand jury.

Access to county jails and public records. R. § 4634. C. '51, § 2904.

SEC. 4280. The jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge, of all public records within the county.

Ask advice of district attorney. R. § 4635. C. '51, § 2905.

SEC. 4281. The grand jury may, at all reasonable times, ask the advice of the district attorney, or the court; and the district attorney may attend before it for the purpose of examining witnesses when the grand jury deems it necessary.

District attorney give information. R. § 4636. C. '51, § 2906.

SEC. 4282. Such attorney shall be allowed at all times to appear before the grand jury on his own request, for the purpose of giving information relative to any matter cognizable by it; but no such attorney, nor any other officer or person, except the grand jury, must be present when the question is taken upon the finding of an indictment.

Should find indictment when. R. § 4637.

SEC. 4283. The grand jury should find an indictment when all the evidence before it, taken together, is such as in its own judgment would, if unexplained, warrant a conviction by the trial jury. When the evidence is not such, it should not.

Proceedings secret. R. § 4638. C. '51, § 2907.

SEC. 4284. Every member of the grand jury must keep secret the proceedings of that body and the testimony given before them, except as hereinafter required. Nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against any person not in custody or under bail, otherwise than by presenting the same in court, or issuing or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor.

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A grand juror is not allowed to make affidavit for the purpose of showing that an indictment was not found by the concurrence of twelve grand jurors: *The State v. Gibbs*, 39–318, 322; and see *The State v. Meicherter*, 46–88.

Exception. R. § 4639. C. '51, § 2908.

SEC. 4285. A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before court, or to disclose the testimony given before them by any witness upon a charge against him of perjury.

This may be done for the purpose of impeaching a witness who testified before the grand jury: *The State v. Hayden*, 45–11.

Jurors not to be questioned. R. § 4640. C. '51, § 2909.

SEC. 4286. No grand juror shall be questioned for anything he may say, or any vote he may give, in the grand jury, relative to a matter legally pending before them, except for perjury of which he may have been guilty in making an accusation, or in giving testimony to his fellow jurors.

When witness refuses to testify. R. § 4641.

SEC. 4287. When a witness under examination before the grand jury, refuses to testify or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court, and the foreman shall then distinctly state to the court the refusal of the witness, and if the court, upon hearing the witness, shall decide that he is bound to testify, or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court.

Or fails to obey subpœna. R. § 4642.

SEC. 4288. If a witness fail to attend before the grand jury, in obedience to a subpœna issued for that purpose and duly served, the court shall, upon the application of the district attorney, or foreman of the grand jury, proceed and coerce the attendance of the witness, and may punish his disobedience as in the case of a witness failing to attend on the trial.

Papers and minutes of preliminary examination laid before grand jury. R. § 4643.

SEC. 4289. All the papers and other matters of evidence relating to the arrest and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and shall be competent evidence upon which an indictment may be found if the grand jury are satisfied that such evidence alone, or with other evidence, if unexplained, would warrant a conviction by the trial jury; and the grand jury need not have before them for examination any witness who was examined before the committing magistrate and a minute of whose evidence has been returned by said magistrate, unless requested by the district attorney, and if an indictment is found in whole or in part upon the minutes of evidence taken before a committing magistrate, the clerk of the grand jury shall write out a brief minute of the substance of such evidence, and the same shall be returned to the court with the indictment. If upon investigation the grand jury refuses to find an indictment, it shall return all of said papers to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail, if bail be given, unless the court should, upon

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good cause shown, be of opinion that the charge should be again submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court.

[A substitute for the original section; 18th G. A., ch. 120, § 3. The change consists, substantially, in the insertion of that part of the section between "grand jury" in the fourth line and "If upon investigation," in the sixteenth line.]

Dismissal of charge. R. § 4644.

SEC. 4290. Such dismissal of the charge, does not prevent the same from being again submitted to a grand jury as often as the court may direct; but without such direction, it cannot again be submitted.

CHAPTER 15.

OF THE FINDING AND PRESENTMENT OF INDICTMENT.

Concurrence of twelve jurors. R. § 4645. C. '51, § 2910.

SECTION 4291. An indictment cannot be found without the concurrence of twelve grand jurors; and when so found, it must be endorsed "A true bill," and the endorsement must be signed by the foreman of the grand jury.

While the panel should contain fifteen jurors, and be kept full if any are discharged, yet the statute does not require that all be present at the finding of an indictment; and if any are absent by reason of a challenge having been interposed and sustained as to them at the instance of a defendant held to answer, provided twelve concur in finding the indictment, it will be good (§ 4264 and notes): *The State v. Ostrander*, 18–435; and see notes to § 4256.

Where the record showed that the name of the foreman of the grand jury was James T. T———, and the name indorsed on the indictment as foreman was J. T. T———, *held*, that the indorsement was sufficient: *The State v. Groome*, 10–308.

Affidavits of grand jurors are not competent for the purpose of proving that an indictment duly returned was not concurred in by twelve grand jurors: *The State v. Gibbs*, 39–318; *The State v. Mewherter*, 46–88.

Private prosecutor. R. § 4646.

SEC. 4292. When an indictment is found at the instance of a private prosecutor, the following must be added to the endorsement required by the preceding section, "found at the instance of," (here state the name of the person,) and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all the circumstances, that the prosecution was malicious or without probable cause.

The mere failure of a private prosecutor to appear and prosecute a defendant put under bonds to keep the peace, as contemplated in §§ 4125 and 4126, will not warrant a judgment against such prosecutor for costs: *The State v. Holliday*, 22–397.

Names of witnesses indorsed on indictment. R. § 4647. C. '51, § 2913.

SEC. 4293. When an indictment is found, the names of all witnesses on whose evidence it is found must be endorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record; but the minutes of evidence shall not be open

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for the inspection of any person except the judge of the court, the district attorney or his clerk, the defendant and his counsel, or the clerk of such counsel, and the clerk of the court must within two days after demand made, furnish the defendant or his counsel a copy thereof without charge, or permit the defendant's counsel or the clerk of such counsel to take a copy.

[A substitute for the original section; 18th G. A., ch. 130, § 4. The change consists, substantially, in the substitution of the words "on whose evidence it is found." in the second line, for the words "examined before the grand jury in that case," and of the words "such witness," in the fourth line, for the words "each witness examined before the grand jury, taken by the clerk of the grand jury."]

The minutes need not be attached to, or made a part of the, indictment, and a mere failure to file the same should not deprive the state of its evidence: *The State v. Postlewait*, 14–446; it is sufficient that they be returned into court and filed with the clerk: *The State v. Hamilton*, 42–655; and that they are handed to the clerk and deposited with him, sufficiently constitutes a filing: *The State v. Guisenhouse*, 20–227.

That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

The minutes, when returned, become a part of the record and cannot be impeached by affidavits: *The State v. Little*, 42–1.

The names of witnesses who do not give any material testimony before the grand jury, and the minutes of whose testimony is not returned with the indictment, need not be indorsed: *Ibid.*

The minutes of testimony so returned cannot be introduced as independent evidence on the trial. If it is sought by them to impeach a witness, the foundation for such impeachment must be laid in the usual way: *The State v. Ostrander*, 18–435, 455.

Minutes of evidence to be taken: See § 4275.

Failure to indorse names of witnesses, a ground for setting aside indictment: See § 4337.

Witnesses whose names are not so indorsed, not allowed to testify: See § 4421.

[Eighteenth General Assembly, Chapter 130.]

[Sec's 1, 2, 3 and 4 amend, respectively, § § 4248, 4273, 4289 and 4293, which see.]

Minutes of evidence may be used on submission of cause to another grand jury.

SEC. 5. When, on demurrer, motion to set aside, or otherwise, an indictment is held insufficient, and an order is made to re-submit the case to the same or other grand jury, or where the grand jury have ignored a bill and the same has been ordered back to the same or other grand jury for further investigation, it shall be unnecessary to summon the witnesses again before such jury in such cases, but the minutes of the testimony returned with the defective indictment, or ignored bill, or information, shall be detached and returned to the grand jury, and thereupon, without more, such grand jury may find a bill and attach said minutes of the evidence thereto and return said indictment therewith into court in the usual manner; and the grand jury may also, in either case, take additional testimony.

Repealing clause.

SEC. 6. All acts and parts of acts inconsistent with this act are hereby repealed.

Presented to the court. R. § 4648. C. '51, § 2914.

SEC. 4294. The indictment, when found and endorsed, as prescribed by this chapter, must be presented by the foreman, in the presence of the grand jury, to the court, and marked "filed" by the clerk of the court, and remain in his office as a record.

It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *The State v. Jolly*, 7–15.

A mistake in the indorsement on

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the indictment as to the *county* in which it was filed, *held*, not a fatal error, where it appeared that it was presented and filed in the proper county: *The State v. Smouse*, 50–43.

The requirement that the indictment must be presented, etc., is directory only, and a failure of the clerk to make the indorsement on the indictment will not invalidate the proceedings (explaining, *The State v. Glover*, 3 Gr., 249): *The State v. Axt*, 6–511; *The State v. Shepard*, 10–126.

Indorsements in particular cases, *held*, to be in substantial compliance with the provisions of the statute as to presenting and filing: *Dixon v. The State*, 4 Gr. 381; *Wau-Kon-Chaw-Neek-Kow v. The United States*, Mor. 332; *Wrockledge v. The State*, 1–167.

No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrockledge v. The State*, 1–167; *Herring v. The State*, 1–205.

CHAPTER 16.

OF INDICTMENT; ITS FORM AND REQUISITES.

Indictment defined. R. § 6449. C. '51, § 2915.

SECTION 4295. An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is empaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense punishable on indictment.

SEC. 4296. The indictment must contain:

Must contain. R. § 4650.

1. The title of the action, specifying the name of the court to which it is presented, and the name of the parties;

2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

An indictment describing the offense in the language of the statute will be sufficient, without naming it; but naming the offense without stating the facts constituting it, will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but will be mere surplusage: *The State v. Shaw*, 35–575; *The State v. Davis*, 41–311; and see notes to § 4305, ¶ 5; also § 4306, ¶ 4.

A matter of local description, though it need not have been stated, must be proved as laid; a variance will be fatal. So, *held*, in *The State v. Crogan*, 8–523; but, in *The State v. Verden*, 24–126, the same point was raised, and the supreme court was equally divided.

The facts constituting a public offense must be charged in the indictment, and when a statute creating such offense describes it in general terms, constituting a legal conclusion, the indictment must specifically describe the offense so as to bring it within the legal conclusion: *The State v. Brandt*, 41–593, 607.

An indictment cannot be aided by intendment, or an omission supplied by construction. The facts necessary to constitute the offense must be in the manner indicated, set out and averred: *The State v. Potter*, 28–554.

Form. R. § 4651.

SEC. 4297. It may be substantially in the following form:

District court of the county of.....

The state of Iowa,
against
A. B.

The grand jury of the county of....., in the name and by

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the authority of the state of Iowa, accuse A. B. of the crime of (here insert the name of the offense, if it have one, such as treason, murder, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it as given by law, such as "mingling poison with food, with intent to kill a human being,") committed as follows:

The said A. B., on the first day of January, A. D. 18.., in the county as aforesaid, (here insert the act or omission constituting the offense.)

.....District Attorney,
of the....judicial district.

A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment. These defects are not such as to prejudice the substantial rights of the defendant: *The State v. Gurlock*, 14-444.

An indictment signed A. B., "Pros. Atty. *pro tem*," etc., *held*, sufficient: *Wrock'edge v. The State*, 1-167.

The name of the offense charged need not be stated: See notes to preceding section.

SEC. 4298. The indictment must be direct and certain as regards: Must be direct and certain. R. § 4652.

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

In a prosecution under § 3908 for loaning public money, *held*, that an indictment stating that defendant "loaned" a certain sum of money "without authority of law," etc., was too general and should have stated the person to whom the money was loaned. So, also, in another count, charging the conversion, etc., of public money, *held*, that the manner of conversion should have been specified: *The State v. Brandt*, 41-593, 609, 611.

SEC. 4299. When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings before execution, his true name is discovered, an entry shall be made in the record of the proceedings, of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially as follows: Defendant's name. R. § 4653.

The state of Iowa,
against
A. B., indicted by the name of C. D.

SEC. 4300. The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative; *provided*, that in case of compound offenses, where, in the same transaction, more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein; *provided further*, that this section shall in no manner affect any provision of this code providing for the suppression of intemperance. Must charge but one offense. R. § 4654. C. '51, § 2917.

An indictment charging two distinct offenses is bad: *The State v. McPherson*, 9-53; and if not otherwise assailed, the prosecutor ought to be required to elect upon which charge he will proceed: *The State v. Fidment*, 35-541.

In charging the same offense in different forms, the pleader is not compelled to use alternative forms of

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expression: *The State v. Watrous*, 13–489; and such an indictment is not bad for duplicity: *The State v. Brannon*, 50–372.

Where a statute contains several things in the alternative, an indictment charging all of them will not be considered as charging more than one offense: *The State v. Cooster*, 10–453; *The State v. Myers*, 10–448. So an indictment charging uttering, passing, and tendering, etc., of a counterfeit bill (§ 3922) charges but one offense: *The State v. Barrett*, 8–536; and so *held*, in case of an indictment for a nuisance, charging the commission of all the acts prohibited in § § 1543 and 4091: *The State v. Dean*, 44–648; and so, *held*, also, where all the acts enumerated in § 4091 were charged: *The State v. Spurbeck*, 44–667.

When the same act or transaction at the same point of time constitutes two or more offenses, it is a compound offense, as here contemplated; but the two offenses, of breaking and entering with intent to commit larceny and the crime of larceny alone, cannot be so committed by the same act as to constitute such compound offense: *The State v. Ridley*, 48–370; *The State v. Rhodes*, 48–702; so also, *held*, that burglary is not a compound offense, including larceny, as here contemplated, and that an indictment charging both is as bad as charging two offenses: *The State v. McFarland*, 49–99; but an indictment charging an assault and battery does not charge two offenses; every battery includes an assault: *The State v. Twogood*, 7–252. So, also, an indictment charging an "assault and battery with intent to commit great bodily injury," etc., does not charge more than one offense: *Cokely v. The State*, 4–477.

An indictment charging that defendant feloniously broke and entered a store, with intent, etc.; and that he stole, carried away, etc., *held*, not objectionable as charging two offenses, the charge as to stealing, etc., being merely surplusage: *The State v. Hayden*, 45–11. And so where two counts of an indictment charged two distinct offenses, one committed in the county where the indictment was found, and the other in another county, *held*, that the latter count was mere surplusage, and did not render the indictment bad: *The State v. Smouse*, 50–43; and see *same v. same*, 49–634.

See § § 4465, 4466, and notes.

Precise time need not be stated. R. § 4655.

SEC. 4301. The precise time at which the offense was committed need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except where the time is a material ingredient in the offense.

It is not material that the time at which the offense is alleged to have been committed should be charged, so as to bring it within the period of limitation provided in § 4166. The precise time need only be stated in indictments for acts which are made criminal at some particular time: *The State v. Deitrick*, 51–467; and see notes to § 4166. See, also, § 4305, ¶ 4, and note.

Erroneous allegation not material: when. R. § 4656.

SEC. 4302. When an offense involves the commission of, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured, or attempted to be injured, is not material.

Under this section, *held*, that an indictment under § 3905 for stealing from the person certain property, in which the property was charged to be that of the party from whose person it was stolen, while the proof showed it to belong to him and another jointly, was sufficient: *The State v. Cunningham*, 21–433.

Section applied: *The State v. Flynn*, 42–164; *The State v. Carr*, 43–418.

Construction. R. § 4657.

SEC. 4303. The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

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Same. R. § 4658. C. '51, § 2919.

SEC. 4304. Words used in a statute to define a public offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

Ordinary language, if a person of good understanding may know thereby what is intended, is sufficient: *The State v. Stanley*, 33–526.

Indictment: when sufficient. R. § 4659. C. '51, § 2916.

SEC. 4305. The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county empaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or, if his true name is unknown to the grand jury, that fact be stated, and that he be described by a fictitious name;

3. That the offense was committed within the jurisdiction of the court, or is triable therein;

4. That the offense was committed at some time prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case;

6. That when material, the name of the person injured, or attempted to be injured, be set forth when known to the grand jury, or if not known to it, that it be so stated in the indictment.

An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on that ground: *The State v. Schill*, 27–263.

An indictment against "a man in Turner Hall, whose name to the grand jurors is unknown," *held*, insufficient: *Geiger v. The State*, 5–484.

An indictment commencing "The grand jury of the county of Dubuque, in the name, etc., of the state of Iowa," charging the burglarious entering, etc., of a house "*there situate*," *held*, to sufficiently lay the venue in Dubuque county: *The State v. Reid*, 20–413.

An indictment charging a nuisance as committed "on or about" a day specified, is sufficient as to time: *Cokely v. The State*, 4–477; and see § 4301 and notes.

Where an indictment sufficiently describes an offense, it will be good, although the offense is not named: *The State v. Baldy*, 17–39; *The State v. Hessenkamp*, 17–25; and see notes to § 4296.

The sufficiency of indictments in particular cases, as to the statement of the offense, considered: *Nash v. The State*, 2 Gr. 286; *The State v. Johnson*, 26–407; *The State v. King*, 37–462; *The State v. Close*, 35–570.

As to what is sufficient in an indictment to charge murder in the first degree, see notes to § 3849, and in the second degree, notes to § 3850.

As to whether variance between allegation and proof of matter of local description is fatal, see note to § 4296, ¶ 2.

An indictment cannot be aided by intendment, or an omission supplied by construction: See notes to § 4296.

Paragraph 5 applied: *The State v. Hockenberry*, 30–504.

As to mistake in the name of state or county, see notes to § 4297.

Under ¶ 6, *held*, that the name of the owner of the building should be set out in an indictment charging the breaking and entering thereof with intent to commit a felony (§ 3894), or if the name of the owner is unknown, it should be so stated: *The State v. Morrissey*, 22–158; and that in an indictment for malicious injury to a church building, an averment of ownership in the trustees, as such, was sufficient, without setting out the nature of their ownership: *The State v. Brant*, 14–180.

SEC. 4306. No indictment is insufficient, nor can the trial,

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When not insufficient.
R. § 4660.
C. '51, § 2920.

judgment, or other proceedings thereon be affected by reason of any of the following matters, which were formerly deemed defects or imperfections:

1. For the want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "with force and arms," "contrary to the form of the statute, or of the statutes," or "against the peace and dignity of the state;"

3. For the omission to allege that the grand jury was empaneled, sworn, or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor,

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

The leading requisites of an indictment are not dispensed with by the statute: *The State v. Callendine*, 8–288.

Where the facts charged constitute an offense, the fact that the wrong name is given thereto will not invalidate it. The name will be considered surplusage: *The State v. Shaw*, 35–575; and see notes to § 4296.

Paragraph 5 of this section applied: *The State v. Gurlock*, 14–444; *The State v. White*, 32–17.

What need not be stated.
R. § 4661.
C. '51, § 2921.

SEC. 4307. Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment.

In a prosecution for illegal voting, the indictment need not state the date on which the general election was held, nor what officers were to be voted for at such election: *The State v. Minnick*, 15–123.

Pleading judicial proceedings.
R. § 4662.
C. '51, § 2922.

SEC. 4308. In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment, but it is sufficient to state that the judgment or determination was duly made, or the proceedings duly had before such court or officer; but the facts constituting the jurisdiction must be established on the trial.

Same: private statute.
R. § 4663.
C. '51, § 2923.

SEC. 4309. In pleading a private statute, or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof.

Indictment for libel.
R. § 4664.
C. '51, § 2924.

SEC. 4310. An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on trial.

For similar provisions in regard to civil actions for libel, see § 2681.

Instrument destroyed or withheld.
R. § 4665.
C. '51, § 2925.

SEC. 4311. When an instrument which is subject of an indictment, has been destroyed or withheld by the act of procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial.

Indictment for perjury.
R. § 4666.
C. '51, § 2926.

SEC. 4312. In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the contro-

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versy, or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or the authority of the court or person before whom the perjury was committed.

It is not sufficient to charge that defendant was "duly sworn," without setting out before whom he was sworn: *The State v. O'Hagan*, 38–594.

An indictment not averring that the court or person before whom the oath was taken had authority to administer the same, *held*, bad: *The State v. Nickerson*, 46–447.

Intent to defraud. R. § 4667. C. '51, § 2927.

SEC. 4313. In any case where an intent to defraud is required to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud without naming the particular person or body corporate intended to be defrauded; and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States, or any state, county, city, or township, or any body corporate, or any officer in his official capacity, or any copartnership, or member thereof, or any particular person.

The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *The State v. Maxwell*, 47–454.

In an indictment for having in possession counterfeit bank bills with intent to defraud, *held*, not necessary to state the name of the person intended to be defrauded: *The State v. Callendine*, 8–288. Nor in such case is it necessary to charge an intent to defraud any particular person: *The State v. Barrett*, 8–536.

Distinction between principal and accessory abrogated. R. § 4668. C. '51, § 2928.

SEC. 4314. The distinction between an accessory before the fact and a principal, is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried, and punished as principals.

Two or more may thus be indicted jointly for the commission of a crime which in its nature is several, and can only be committed by one alone: *The State v. Comstock*, 46–265.

Section applied: *The State v. Brown*, 25,561; *The State v. Thornton*, 26–79; *The State v. Stanley*, 48–221.

Accessory after the fact. R. § 4669. C. '51, § 2929.

SEC. 4315. An accessory after the fact to the commission of a public offense, may be indicted, tried and punished, though the principal be neither tried nor convicted.

Compounding offense. R. § 4670. C. '51, § 2930.

SEC. 4316. A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another, or a gratuity or reward, or engagement or promise therefor, upon agreement or understanding, express or implied, to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof, though the person guilty of the original offense has not been indicted or tried.

Indictment for embezzlement. R. § 4671.

SEC. 4317. In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the em-

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bezzlement or fraudulent conversion to have been of money generally, without designating its particular species; and proof that the defendant embezzled, or fraudulently converted any money or bank note, will be sufficient to support the averment, although the particular species be not proved.

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

By bench warrant. R. § 4672.

SECTION 4318. The process upon an indictment for the arrest of an individual, shall be a bench warrant.

The issuance of a bench warrant is not essential to give the court jurisdiction of the person of the defendant. If he appear and submit to the jurisdiction, a warrant is unnecessary: *The State v. Ray*, 50–520.

Court or judge may order. R. § 4673.

SEC. 4319. When an indictment is filed by the clerk of the court against a defendant, not in custody, or under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him, with his name of office, that a bench warrant issue for the arrest of the defendant, and, if the offense charged in the indictment be bailable, fix the amount in which bail may be taken.

Clerk to issue warrant. R. § 4674.

SEC. 4320. The clerk, on the application of the district attorney, shall accordingly, at any time after the making of the order of the judge, whether the court be in session or not, issue a bench warrant into one or more counties.

Form, in case of felony. R. § 4675.

SEC. 4321. A bench warrant, if the offense be a felony, may be, substantially, in the following form:

County of .....,
The State of Iowa.

To any peace officer in the state:

An indictment having been found in the district court of said county, on the....day of....., A. D. 18.., (the day on which the indictment is marked filed by the clerk of the court,) charging A. B. with the crime of (here designate the offense by the name, if it have one, or by a brief general description of it, as given by law, substantially, as in the indictment.)

You are, therefore, hereby commanded to arrest the said A. B., and bring him before said court to answer said indictment, if the said court be then in session in said county, or if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand, and the seal of said court, at my office [SEAL] in....., in the county aforesaid, this....day of...., A. D. 18..

By order of the judge of the court.

....., clerk.

If misdemeanor. R. § 4676.

SEC. 4322. If the offense be a misdemeanor, the bench war-

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rant may be in a similar form, adding to the body thereof a direction, substantially, to the following effect:

"Or, if the said A. B. require it, that you take him before a magistrate, or the clerk of the district court in said county, or in the county in which you arrest him, that he may give bail to answer the said indictment."

If bailable. R. § 4677.

SEC. 4323. If the offense charged be bailable, the clerk must make an indorsement on the bench warrant, to the following effect: "The defendant is to be admitted to bail in the sum of ....dollars." (The amount fixed by the judge and indorsed on the indictment.)

Where served R. § 4678. C. '51, § 2935.

SEC. 4324. The bench warrant may be served in any county in the state.

Proceedings. R. § 4679.

SEC. 4325. If the defendant, when arrested, be brought before a magistrate, or the clerk of the district court of the same county in which it was issued, or another county, for the purpose of giving bail, the same proceedings must be had, in all respects, as if he had been arrested on a warrant of arrest, issued by a magistrate on a preliminary information, as nearly as may be.

Indictment against a corporation: service of and return. 14 G. A. ch. 111 § 3.

SEC. 4326. The process upon an indictment against a corporation shall be a notice; which shall be issued by the clerk at any time after the filing of the indictment in his office, on the application of the district attorney. The notice shall be under the seal of the court, and shall, substantially, notify the defendant of the finding of the indictment, of the nature of the offense charged, and that he must forthwith appear and answer the same. It may be served by any peace officer in any county in the state on any officer or agent of the defendant, by reading the same to him and leaving with him a copy thereof. It shall be returned to the clerk's office without delay, with proper evidence of its service; and, from and after two days from the time of the making of such service, the defendant shall be considered in court, and thereafter shall be considered to be present to all proceedings had on the indictment.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

Defendant arraigned. R. § 4680. C. '51, § 2931. 14 G. A. ch. 111, § 8.

SECTION 4327. As soon as practicable after an indictment is found, the defendant must be arraigned thereon, unless he waive the same; but where a corporation is defendant, arraignment shall not be required.

If the record is silent as to the arraignment, it will be presumed that defendant was duly arraigned, or waived arraignment: *The State v. Winstrand*, 37–110.

Voluntarily appearing and pleading to an indictment is a waiver of arraignment: *Ibid.*

Arraignment is for the benefit of defendant, and after a waiver thereof he cannot object that he is not indicted in his own name: *Ibid.*

If for felony or misdemeanor. R. § 4681. C. '51, § 2932.

SEC. 4328. If the indictment be for a felony, the defendant must be personally present, but if for a misdemeanor only, his

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personal appearance is unnecessary, and he may appear upon arraignment by counsel.

If in custody. R. § 4682.

SEC. 4329. When he is in custody, the court must direct the officer in whose custody he is to bring him before it to be arraigned, and the officer must do so accordingly.

If on bail. R. § 4683. C. '51, § 2933.

SEC. 4330. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for arraignment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may, on motion of the district attorney, make an order directing the clerk to issue a bench warrant for his arrest, and fix the amount in which bail will be taken if the offense be bailable.

Clerk issue bench warrant: When. R. § 4684. C. '51, § 2934.

SEC. 4331. The clerk, on the application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties of this state for the arrest of the defendant.

Defendant's right to counsel. R. § 4685. C. '51, § 2936.

SEC. 4332. If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel, and if he does, and is unable to employ any, must allow him to select, or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.

Arraignment: by whom made and what consists. R. § 4686. C. '51, §§ 2937–8.

SEC. 4333. The arraignment may be made by the court, or by the clerk or district attorney under its direction, and consists in reading the indictment to the defendant, and unless previously done, delivering to him a copy of the indictment and the indorsements thereon, and informing him that if the name by which he is indicted is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment.

Where defendant answers that he is indicted in his right name, he cannot, after trial, object that he is not properly named. So *held*, where in the same indictment the defendant was designated by different names: *The State v. White*, 32–17.

Precluded from objecting: when. R. § 4687. C. '51, § 2939.

SEC. 4334. If he gives no other name, or gives his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named.

If defendant waive arraignment, he cannot afterwards object that he is not indicted in his right name: *The State v. Winstrand*, 37–110.

Same. R. § 4688. C. '51, § 2940.

SEC. 4335. If he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.

Answer: time. R. §§ 4689, 4690. C. '51, §§ 2941–2.

SEC. 4336. In answer to the arraignment, the defendant may move to set aside the indictment, or he may demur or plead to it, and is entitled to one day after arraignment in which to answer thereto if he demand it.

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CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

Motion must be sustained. R. § 4691. C. '51, § 2943.

SECTION 4337. The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:

1. When it is not indorsed "a true bill," and the indorsement signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith;

3. When it has not been presented and marked "filed" as prescribed by this code;

4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, empaneled, or sworn as prescribed by law.

That the evidence of an incompetent witness was received by the grand jury, is no reason for setting aside an indictment: *The State v. Tucker*, 20–508.

Where, in endorsing the name of the witness on the back of an indictment, his title, instead of his christian name, was used, *held*, that if the witness was as unmistakably described as he would have been by the use of his christian name, the object of the endorsement was accomplished and no prejudice could result to defendant: *The State v. McComb*, 18–43.

It is not error to allow the name of a witness examined before the grand jury to be endorsed on the back of the indictment after a trial jury is called: *The State v. Robinson*, 47–489.

The minutes need not be attached to or made a part of the indictment, and a mere failure to file them, if they are properly returned, should not deprive the state of its evidence: *The State v. Postlewait*, 14–446.

For other provisions on this subject, see § § 4293 and 4421, and notes.

The objection under ¶ 4, if not taken as here contemplated, cannot be raised after verdict. The fact that a bailiff was present with the grand jury during the investigation of the charges, though not when the final vote was taken, will not affect an indictment: *The State v. Hart*, 29–268.

The objection under ¶ 5 should be made at least before pleading to the indictment: *The State v. Reid*, 20–413.

The impaneling is the final formation by the court of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *The State v. Ostrander*, 18–435, 446.

It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *The State v. Carney*, 20–82.

And generally, see *The State v. Brandt*, 41–593, 600.

When not sustained. R. § 4692.

SEC. 4338. A motion to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury are not endorsed thereon; or that the name of any other witness than those so examined is endorsed thereon as prescribed in the second subdivision of section four thousand three hundred and thirty-seven hereof, shall not be sustained if the endorsement

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is corrected by the insertion or striking out of such names or name by the district attorney or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury and returned and preserved with the indictment to the court.

It is not competent in support of a motion to set aside an indictment under ¶ 2 of the preceding section, to show by affidavits that witnesses were summoned before the grand jury whose names are not endorsed on the indictment, and minutes of whose evidence were not returned. Such minutes are part of the record, and cannot be thus impeached: *The State v. Little*, 42–51; and as applicable to this section generally, see notes to preceding section.

What ground of motion not allowed. R. § 4698.

SEC. 4339. The ground of the motion to set aside the indictment mentioned in the fifth subdivision of section four thousand three hundred and thirty-seven hereof, is not allowed to a defendant who has been held to answer before indictment.

The proper method of taking advantage of such irregularity, where the defendant had been held to answer, would be by challenge to the panel under §§ 4258 and 4260: *The State v. Hart*, 29–268; and the objection in such case should be made before the grand jury is sworn, (§ 4266): *The State v. Ostrander*, 18–435.

In order to support the ruling of the court below, where it does not appear whether defendant was held to answer before indictment, it will be presumed that he was: *The State v. Gibbs*, 39–319.

Section applied: *Norris' House v. The State*, 3 Gr. 513; *Dixon v. The State*, 3–416; *The State v. Hinkle*, 6–380.

Hearing. R. § 4695. C. '51, § 2945.

SEC. 4340. The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time.

If denied. R. § 4696. C. '51, § 2946.

SEC. 4341. If the motion be denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto.

If granted. R. § 4697. C. '51, § 2947.

SEC. 4342. If the motion be granted, the court must order the defendant, if in custody, to be discharged, or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury.

A judgment in a criminal case being reversed on appeal for a defect in the indictment, the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *The State v. Morrissey*, 22–158.

If re-submitted. R. § 4698. C. '51, § 2948.

SEC. 4343. If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

Order to set aside, no bar. R. § 4699. C. '51, § 2949.

SEC. 4344. An order to set aside the indictment as provided in this chapter, shall be no bar to a future prosecution for the same offense.

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CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

SECTION 4345. The only pleading on the part of the defendant is a demurrer or plea. Demurrer or plea. R. § 4700. C. '51, § 2950.

SEC. 4346. The demurrer and plea must be put in in open court, and may be oral; but an entry thereof must be made on the record. Where put in. R. § 4701. C. '51, § 2951.

CHAPTER 21.

OF THE MODE OF TRIAL.

SECTION 4347. Issues of law shall be tried by the court. Issues of fact shall be tried by a jury. Issues: by whom tried. R. § 4702.

SEC. 4348. An issue of law arises upon a demurrer to the indictment. No joinder in demurrer is necessary. Issues of law. R. § 4703.

SEC. 4349. An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense. No replication or further pleading is necessary. Issues of fact. R. § 4704.

SEC. 4350. An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded. Same. R. § 4705.

SEC. 4351. If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if for a felony, he must be personally present. Presence of defendant. R. § 4706.

If defendant is shown to have been present at the beginning and conclusion of the trial, his presence at other times will be presumed, unless the contrary is shown: *The State v. Wood*, 17–18.

It would seem that the *trial* at which defendant accused of a felony is required to be present, ends with the verdict, and that his presence at the argument and determination of a motion for new trial is not essential: *The State v. Decklotts*, 19–447.

Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. The State*, 4–554; *The State v. Shepard*, 10–126.

That the court, in the absence of defendant, sustained a motion for the correction of the record, *held*, not error: *The State v. Westfall*, 49–328.

CHAPTER 22.

OF DEMURRER.

SECTION 4352. The defendant may demur to the indictment when it appears upon its face, either: Ground of. R. § 4707. C. 51, § 2952.

1. That it does not substantially conform to the requirements of this code;

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2. That the indictment contains any matter, which, if true, would constitute a legal defense or bar to the prosecution.

Under Code of 1851, § 2953 (which is not retained), *held*, that the demurrer must be specific, and that a statement that "the matters and things * * * charged did not constitute a public offense" was not sufficient: *Benham v. The State*, 1-542; *The State v. Maurer*, 7-406. And to the same effect, see *The State v. Groome*, 10-308.

Under the Code of 1851, also *held*, that the question whether an offense is barred by the statute of limitations cannot be properly raised by demurrer, but that such fact should be specially pleaded: *The State v. Hussey*, 7-409; *The State v. Groome*, 10-308.

Where the plea of former conviction or acquittal, only, was interposed, and defendant was found guilty thereof and did not ask to plead over, *held*, that judgment of conviction was properly entered without further trial as to his guilt: *The State v. Green*, 16-239.

If it is proved that the former conviction or acquittal was obtained by fraud or collusion, it may be disregarded: *Ibid.*

Entry: form. R. § 4708.

SEC. 4353. The entry on the record of a demurrer, may be substantially in the following form: "The defendant demurs to the indictment."

Objection: when heard. R. § 4709. C. '51, § 2954.

SEC. 4354. When the demurrer is put in, the objection thereby presented must be heard immediately, or at such time as the court may appoint.

If sustained. R. § 4710.

SEC. 4355. If the demurrer is sustained on the ground that the offense charged was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had as provided in sections four thousand four hundred and forty-six to four thousand four hundred and forty-nine, inclusive, of this code.

Same. R. § 4711.

SEC. 4356. If the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment, the judgment shall be final, and the defendant must be discharged.

Same. R. § 4712.

SEC. 4357. If the demurrer is sustained on any other ground than that mentioned in the last two sections, the defendant must be dealt with as provided in section four thousand three hundred and forty-one of this code, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided in another indictment; in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be dealt with as provided in section four thousand three hundred and forty-two of this code.

If overruled. R. § 4713. C. '51, § 2955.

SEC. 4358. If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, final judgment may be rendered against him on the demurrer, and, if necessary, a jury may be empaneled to inquire and ascertain the degree of the offense.

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CHAPTER 23.

OF PLEAS TO THE INDICTMENT.

SECTION 4359. There are but three pleas to an indictment. A plea of:

Number of. R. § 4714. C. '51, § 2957.

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.

SEC. 4360. The plea may be entered on the record, substantially, in the following form:

Entry: form R. § 4715.

1. A plea of guilty. "The defendant pleads that he is guilty of the offense charged in the indictment."
2. A plea of not guilty. "The defendant pleads that he is not guilty of the offense charged in the indictment."
3. A plea of former conviction or acquittal. "The defendant pleads that he has formerly been convicted or acquitted, (as the case may be,) of the offense charged in the indictment, by the judgment of the court of....., (naming it,) rendered on the .....day of....., A. D. 18.., (naming the time.)"

SEC. 4361. The plea of guilty can only be put in by the defendant himself in open court.

Plea of guilty. R. § 4716.

SEC. 4362. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

Same. R. § 4717. C. '51, § 2961.

Under this section a defendant has a *right* to withdraw a plea of guilty, and substitute therefor a different one: *The State v. Ochlshlager*, 38–297. Thus, where a plea of guilty was put in on a trial before a justice of the peace, and sentence thereon passed by such justice, *held*, that the plea might be withdrawn on appeal being taken to the district court: *The State v. Kraft*, 10–330. *Held*, also, that it was error to refuse to allow defendant to withdraw his plea, and file a motion to set aside the indictment on the ground that the grand jury was not properly selected (§ 4337, ¶ 5): *The State v. Hale*, 44–96.

SEC. 4363. The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact may be given in evidence under it, except a former conviction or acquittal.

Plea of not guilty. R. § 4718.

SEC. 4364. A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place.

Conviction or acquittal a bar R. § 4719.

SEC. 4365. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein.

Same. R. § 4720.

A conviction or acquittal of a minor offense will not bar a prosecution for a greater one, or a higher degree of the same offense, except that an acquittal for manslaughter will bar an indictment for murder. Therefore, *held*, that a conviction for assault and battery would not bar a prosecution for assault with intent to do great bodily injury: *The State v. Foster*, 33–525.

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When judgment shall not bar. R. § 4721.

SEC. 4366. The judgment for the defendant on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.

Plea by court: when. R. § 4722. C. '51, § 2963.

SEC. 4367. If the defendant fail or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court.

CHAPTER 24.

OF CHANGE OF VENUE IN CRIMINAL CASES.

Defendant may petition for. R. § 4727. C. '51, § 3270.

SECTION 4368. In all criminal cases which may be pending in any of the district courts of this state, any defendant therein may petition the court for a change of venue to another county.

Petition may set forth. R. § 4728. C. '51, § 3271.

SEC. 4369. Such petition must set forth the nature of the prosecution, the court where the same is pending, and that such defendant cannot receive a fair and impartial trial owing to the prejudice of the judge, or to excitement or prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes.

Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *The State v. Mewherter*, 46–88; and see notes to § 4374.

Verified: when. R. § 4729.

SEC. 4370. When the ground alleged in the petition is excitement and prejudice against him in the county, it must be verified by three disinterested persons, residents of the county from which the change is sought, in addition to the petitioner himself.

Need not state facts. R. § 4730.

SEC. 4371. The petition need not state the facts upon which the belief of the petitioner, or other person verifying the same, is founded, but may allege the belief of the particular ground thereof in general terms.

Additional testimony. R. § 4731.

SEC. 4372. The court may receive additional testimony, by affidavits only, either on the part of the defendant or the state, when the alleged ground in the petition is excitement and prejudice in the county against the petitioner.

Same: filed with clerk. R. § 4932.

SEC. 4373. The petition and affidavits, if any, must be filed with the clerk, and are parts of the record.

Court must decide. R. § 4733. C. '51, § 3272.

SEC. 4374. The court, in the exercise of a sound discretion, must decide the matter of the petition, when fully advised, according to the very right of it.

[By 17th G. A., ch. 171, this section was amended by adding a proviso that when a change was applied for on the ground of prejudice of the judge, by a defendant who had once been tried before such judge, or whose co-defendant had been so tried, the change should be granted, but this amendment was repealed by 18th G. A., ch. 9.]

The question of allowing the change rests in the sound discretion of the court, and unless such discretion has been abused, the supreme court, on ap-

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peal, will not interfere with the decision: *The State v. Os'rander*, 18–435, 447; *The State v. Ross*, 21–467; *The State v. Collins*, 32–36; *The State v. Felter*, 32–49.

But this discretion is not absolute, nor an arbitrary discretion: *The State v. Hutchinson*, 27–212; and if it appear to have been improperly exercised, the action of the court will be reviewed and reversed; and in a particular case the refusal to grant a change was held error: *The State v. Canada*, 48–448.

The rule that the court is to pass upon the question of granting a change of venue in the exercise of a sound discretion, applies to cases where the change is asked on the ground of prejudice of the judge, or excitement and prejudice of the people of the county, and although these grounds may be averred in the very language of the statute, they do not entitle the prisoner to a change as a matter of right (explaining *The State v. Nash*, 7–347; *The State v. Mooney*, 10–506): *The State v. Arnold*, 12–479: *Gordon v. The State*, 3–410; *The State v. Barrett*, 8–536.

Abuse of discretion in denying a change of venue must be made to appear, or the decision of the court will not be interfered with, even when the ground alleged is the prejudice of the judge: *The State v. Ray*, 50–520; *The State v. Knight*, 19–94; *The State v. Ingles*, 17–8; *The State v. Freeman*, 27–333; *The State v. Meicherter*, 46–88.

The court is not granted the same discretion in regard to change of venue in civil, that it is in criminal cases: See § 2590, and notes.

Same. R. § 4734. C. '51, § 3272.

SEC. 4375. If sustained, the court must, if the ground alleged be the prejudice of the judge, order the change of venue to the most convenient county in an adjoining district to which no objection exists.

Same. R. § 4735. C. '51, § 3272.

SEC. 4376. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district in which no such objection exists.

Duty of clerk. R. § 4736. C. '51, § 3273.

SEC. 4377. Upon the making of the order, if there be but one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office; and a certified copy of all record entries, and all the original papers on file must be, without unnecessary delay, transmitted to the clerk of the court to which the change of venue is ordered.

Same. R. § 4737.

SEC. 4378. If there be more than one defendant in the case, and all the defendants have not joined in the petition, the clerk, upon the making of such order, must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the transcript so certified to the clerk of the court to which the change of venue is ordered, retaining the originals.

Duty of sheriff. R. § 4738. C. '51, § 3274.

SEC. 4379. If a defendant who has applied for a change of venue, which has been ordered, be in custody, the sheriff of the county from which the venue is changed, must, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which such change is allowed, and upon such transfer and delivery, with a certified copy of such order, the sheriff last mentioned must receive and detain the defendant in his custody until legally discharged therefrom, and give a certificate of such delivery.

Court to which changed. R. § 4739. C. '51, § 3275.

SEC. 4380. The court to which such change of venue is granted must take cognizance of the cause, and proceed therein to trial, judgment, and execution, in all respects as if the indictment had been found by the grand jury empaneled in such court.

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The clerk of the court to which the change is granted, has power to take recognizance for the appearance of the prisoner: *The State v. Merrihew*, 47–112, 120.

Cost of change: by whom paid. R. § 4740. C. '51, § 3276.

SEC. 4381. In all changes of venue under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering, and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant, which shall be audited and allowed by the court trying such case.

Sheriff's fees. R. § 4741. C. '51, § 3277.

SEC. 4382. Sheriffs, for delivering prisoners under the provisions of this chapter, are entitled to the same fees therefor as are allowed for the conveyance of convicts to the penitentiary.

District judge may transfer prosecutions from one county to another. R. § 4742.

SEC. 4383. When any district judge in this state is satisfied from his own knowledge or otherwise, that any organized county in his district does not contain a sufficient number of inhabitants possessing the qualifications of jurors to compose grand and trial jurors for the presentment and trial of any person or persons charged with the commission of an offense in said county requiring the intervention of a grand jury, said judge shall make an order transferring all prosecutions for such offenses committed in said county to the next nearest county in the same judicial district possessing the requisite number of inhabitants qualified to serve as jurors.

Order may be made in vacation. R. § 4743.

SEC. 4384. Said order may be made by the judge in vacation, or by the court, and the district court of the county to which said prosecution may be transferred, shall have full and complete jurisdiction of the offense, and the person or persons charged with committing the offense may be indicted and tried in the county to which the prosecution is so transferred, in the same manner as though the offense had been committed in said county.

Person charged required to appear and give bond. R. § 4744.

SEC. 4385. When any prosecution has been transferred by the court or judge under the provisions of this chapter, the person charged with committing the offense shall be required to appear at the next succeeding term of the district court of the county to which the prosecution is transferred, and shall give bond accordingly, and the court or judge may require all material witnesses in behalf of the prosecution to enter into cognizance for their appearance at the district court of the county to which the prosecution is transferred.

The form of bond required under this section is substantially the same as that prescribed by § 4585: *The State v. Merrihew*, 47–112, 119.

The requirement that in case of a change of venue the accused shall give a new bond to appear, etc., is directory, and does not operate to release the sureties on the original bail bond, who are still responsible for his appearance: *The State v. Brown*, 16–314.

Costs. R. § 4745.

SEC. 4386. The county in which the offense was committed, and from which the prosecution was transferred, shall pay all the costs attending the prosecution.

No appeal from order. R. § 4746.

SEC. 4387. No appeal or writ of error shall lie from any order for the transfer of prosecutions made under the provisions of this chapter.

This chapter: to what applicable. R. § 4747.

SEC. 4388. The provisions of this chapter apply to prosecutions or charges now pending, or that may hereafter be instituted for offenses heretofore or hereafter committed.

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CHAPTER 25.

OF THE FORMATION OF TRIAL JURY.

How formed. R. § 4751.

SECTION 4389. The jury for the trial of criminal actions is selected, drawn, and summoned as provided in the code of civil practice.

Ballots prepared by clerk. R. § 4752. C. '51, § 2964.

SEC. 4390. At the opening of the court, the clerk shall prepare separate ballots, containing the names of the persons returned as jurors, which shall be folded each in the same manner, as near as may be, and so that the name thereon shall not be visible, and must deposit them in a box to be kept for that purpose.

These provisions are directory, and a failure of the clerk to comply with them will not amount to error sufficient to reverse a judgment, unless it be shown that the court, on application, refused to require the instructions to be carried out, or unless it is otherwise shown that some substantial prejudice has resulted to defendant: *The State v. Gilick*, 7-287.

Party may require names of jurors called. R. § 4753. C. '51, § 2965.

SEC. 4391. When the indictment is called for trial and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attachment issue against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

Drawing jurors. R. § 4754. C. '51, § 2966.

SEC. 4392. Before the name of any juror is drawn the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots without seeing the names written on them, from the box, through the top or lid thereof.

Disposition of ballots. R. § 4755. C. '51, § 2967.

SEC. 4393. When the jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors, until the jury so sworn is discharged.

Same. R. § 4756. C. '51, § 2968.

SEC. 4394. After the jury is so discharged, the ballots containing their names must be again folded and returned to the box, and so on, as often as a trial is had.

Juror absent. R. § 4757. C. '51, § 2969.

SEC. 4395. If a juror be absent when his name is drawn or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.

Talesmen. R. § 4758. C. '51, § 2970.

SEC. 4396. If by reason of there being one or more juries empaneled, or for any other reason, there should not remain any ballots undrawn, or if in consequence of jurors being set aside no jury can be obtained from the list of those returned by the sheriff for the trial of issues, the court may order the sheriff, or if he be a party to or interested in the cause, some other person, to summon jurors from the bystanders, or other persons, who shall be returned for the trial of the indictment.

When special jurors are summoned on a special *venire*, to fill up a jury for the trial of a particular case, it is not error to call them successively in the order in which they are summoned, but it is better to place their names on ballots and draw as in selecting regular jurors, and this is the proper practice when they are summoned for the entire term: *The State v. Green*, 20-424.

The disqualifying interest of the sheriff here referred to, need not be a pecuniary interest; § 350 applies in criminal cases: *The State v. Hardin*, 46-623.

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Jury: consists of.
R. § 4759.
C. '51, § 2971.

SEC. 4397. The jury consists of twelve men accepted and sworn to try the issue.

The right to trial by jury of twelve men may be waived, and if by consent of defendant, as well as of the court and state, a trial is had by a less number, the verdict will be binding: *The State v. Kaufman*, 51-578.

CHAPTER 26.

OF CHALLENGING THE JURY.

Challenge.
R. § 4760.
C. '51, § 2972.

SECTION 4398. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel;
2. To an individual juror.

No severance of.
R. § 4761.
C. '51, § 2973.

SEC. 4399. When several defendants are tried together, they are not allowed to sever their challenges, but must join therein.

To panel.
R. § 4762.
C. '51, § 2974.

SEC. 4400. A challenge to the panel can be interposed only on the ground that they were not selected, drawn, or summoned as prescribed by law.

It is not a ground for a challenge to the panel that the jurors may have heard the evidence in a preliminary inquiry, under § 4620, as to the prisoner's sanity: *The State v. Arnold*, 12-479.

When and how taken.
R. § 4763.
C. '51, § 2975.

SEC. 4401. A challenge to the panel must be taken before a challenge to any individual juror, and must be in writing, specifying distinctly and plainly the facts constituting the ground of challenge.

Trial of challenge.
R. § 4764.
C. '51, § 2976.

SEC. 4402. A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Challenge allowed: jury discharged.
R. § 4765.
C. '51, § 2977.

SEC. 4403. If the facts of the challenge be allowed by the court, the jury must be discharged so far as the trial of the indictment in question is concerned. If it be disallowed, the court shall direct the jury to be empaneled.

To individual juror.
R. § 4766.
C. '51, § 2978.

SEC. 4404. A challenge to an individual juror may be taken orally, and is either:

1. For cause;
2. Peremptory.

For cause.
R. §§ 4767-71.
C. '51, §§ 2982-6.

SEC. 4405. A challenge for cause may be made, either by the state or by the defendant; it must distinctly specify the facts constituting the causes of challenge, and may be made for any of the following causes:

1. A previous conviction of the juror of a felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body, as render him incapable of performing the duties of a juror;

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4. Affinity or consanguinity, within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law;

5. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance the prosecution was instituted, or in his employ on wages;

6. Being a party adverse to the defendant in a civil action, or having been the prosecutor against, or accused by him, in a criminal prosecution;

7. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

8. Having served on a trial jury, which has tried another defendant for the offense charged in the indictment;

9. Having been on a jury formerly sworn to try the same indictment and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it;

10. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense;

11. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial;

12. Because of his being bail for any defendant in the indictment;

13. Because he is defendant in a similar indictment, or complainant or private prosecutor against the defendant or any other person indicted for a similar offense;

14. Because he is, or, within a year preceding, has been engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, and when the defendant is indicted for a like offense.

15. Because he has been a witness, either for or against the defendant, on the preliminary trial or before the grand jury.

[The word "indicted" in the last line of ¶13 is not in the original, but is retained as in the printed code as having probably been inserted by the editor.]

The fact that a juror is a resident of the city does not disqualify him to sit on a jury for the trial of a person for violation of a city ordinance: *The State v. Wells*, 46–662.

While an objection to the competency of a juror should be interposed by the defendant at the time the jury is sworn, if then known to him, yet, if not then known, it may be interposed by motion for new trial: *The State v. Groome*, 10–308.

The provision of ¶ 8 evidently refers to cases when two or more have been jointly indicted for the same offense, and have severed in their trial, and not to cases where two defendants are separately indicted, although the offenses may be of the same kind: *The State v. Sheeley*, 15–405; *The State v. Leicht*, 17–28.

Having formed a hypothetical opinion, based upon rumors, but which would not prevent the juror from rendering a true verdict upon the evidence, will not disqualify him: *The State v. Ostrander*, 18–435, 451.

Where a juror stated that he had not formed an unqualified opinion, that if what he had heard should be proved, he had an opinion made up, but that he thought he had no pre-

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judice and bias, etc. *held*, that he was not disqualified: *The State v. Sater*, 8-420.

Where a juror stated that he had read an account of the matter (a murder) in the papers, at the time it occurred, and came to the conclusion that defendant shot the deceased, and that it was a criminal thing for him to do, etc., but also stated that he had no bias against the defendant, and believed he could fairly, and without prejudice, determine upon the testimony the guilt or innocence of defendant, irrespective of what he had read, *held*, that it was not error to refuse to sustain a challenge for cause: *The State v. Bruce*, 48-530; and to the same effect, see *The State v. Bryan*, 40-379; *The State v. Lawrence*, 38-51.

It is an opinion as to the guilt or innocence of the prisoner, only, which will disqualify a juror. Having formed and expressed an opinion as to the *killing* is not sufficient: *The State v. Thompson*, 9-188.

The juror having testified that he has formed and expressed an unqualified opinion, etc., should not be required to state whether it is for or against the prisoner in order to render him subject to challenge for cause: *The State v. Shelledy*, 8-477.

Exemption.
R. § 4772.
C. '51, § 2987.

SEC. 4406. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

Sec. 2777 is identical with this section.

Juror examined.
R. § 4773.
C. '51, § 2988.

SEC. 4407. Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon, but his answers shall not afterwards be testimony against him.

It is not proper for counsel to ask a juror whether he has formed or expressed any opinion as to a certain supposed defense: *The State v. Arnold*, 12-479.

Other witnesses examined.
R. § 4774.
C. '51, § 2989.

SEC. 4408. Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge.

Court shall determine.
R. § 4775.
C. '51, § 2990.

SEC. 4409. In all challenges the court shall determine the law and the fact, and must either allow or disallow the challenge.

Challenges by state.
R. § 4776.

SEC. 4410. The state shall first complete its challenges for cause, and the defendant afterwards.

Peremptory challenges.
R. § 4777.

SEC. 4411. After twelve jurors have been obtained, against whom no cause of challenge has been found to exist, peremptory challenges may be made.

Same.
R. § 4778.
C. '51, § 2980.

SEC. 4412. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

Same.
10 G. A. ch. 10, § 1.

SEC. 4413. If the offense charged in the indictment is punishable with imprisonment in the penitentiary for life, or may be so punishable in the discretion of the court, the state is entitled to ten peremptory challenges and the defendant twenty; if any other felony, the state is entitled to six and the defendant to twelve; and if a misdemeanor, the state to three and the defendant to six challenges.

Order of challenge.
Same.
§ 2.

SEC. 4414. The state shall be entitled to the first challenge and shall challenge one juror; the defendant shall be entitled to the second challenge, and shall challenge two jurors; the state shall be entitled to the third challenge, and shall challenge one juror; the defendant shall be entitled to the fourth challenge, and shall challenge two jurors; and so on, alternately, until all the challenges are exhausted.

See § 2771, and note.

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Same. R. § 4781.

SEC. 4415. The challenges of either party need not be all taken at once, but separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;
2. To an individual juror, for cause;
3. To an individual juror, peremptorily.

Vacancy filled. R. § 4782.

SEC. 4416. After each challenge which is allowed, the vacancy occasioned thereby shall, if required, be filled before any further challenge is made, and any new juror thus introduced may be challenged for cause, as well as peremptorily, if the peremptory challenges are not exhausted.

Jurors: when sworn. R. § 4783.

SEC. 4417. No juror shall be sworn to try the issue until twelve jurors are accepted.

Bias. R. § 4784.

SEC. 4418. Bias in a juror against either party is no cause of challenge by the other. It may be waived by the party against whom it exists.

CHAPTER 27.

OF THE TRIAL OF AN ISSUE OF FACT IN AN INDICTMENT.

Continuances.

SECTION 4419. The provisions of the code of civil practice, relative to the continuances of the trial of civil causes, shall apply to the continuance of criminal actions, except that no judgment for costs shall be rendered against a defendant in a criminal action on account of such continuance, and except as in this code otherwise provided; and except that the defendant shall, if he, upon entering his plea demand it, be entitled to three days in which to prepare for trial.

See § § 2748 to 2760.

Order of trial. R. § 4785. C. '51, § 2991.

SEC. 4420. The jury having been empaneled and sworn, the court must proceed in the following order:

1. The clerk or district attorney must read the indictment and state the defendant's plea to the jury, and the district attorney may briefly state the evidence by which he expects to sustain the indictment.
2. The attorney for the defendants may then briefly state his defense, and the evidence by which he expects to sustain it.
3. The state may then offer the evidence in support of the indictment.
4. The defendant or his counsel may then offer his evidence in support of his defense.
5. The parties may then respectively offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case.
6. When the evidence is concluded, unless the case is submitted to the jury on both sides without argument, the district attorney must commence, the defendant follow by one or two counsel at his option, unless the court shall permit him to be heard by a

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larger number, and the district attorney conclude, confining himself to a response to the arguments of the defendant's counsel; *provided*, that where two or more defendants are on trial for the same offense, they may be heard by one counsel each; *and, provided further*, that the court, when the affirmative of the issue is with the defendant, may, in its discretion, award to the defendant the last argument.

7. The court shall then charge the jury in writing, without oral explanation or qualification.

[A substitute for the original section; 17th G. A., ch. 19. The original section provided in ¶ 1 that the reading of the indictment and stating of defendant's plea to the jury might be dispensed with, except in cases of felony; and it did not contain the latter part of ¶ 1 nor ¶ 2.]

While § 2799 does not apply to criminal cases, yet under some circumstances, and for some purposes, a witness may be allowed to be recalled after the evidence is closed, and, in the absence of a contrary showing, it will be presumed, on appeal, that proper circumstances existed: *The State v. Shean*, 32–88.

The order here specified may be varied by the court in the exercise of lawful discretion: *The State v. Flynn*, 42–164, 166.

As to the form of oath for jury, see *The State v. Ostrander*, 18–435, 452; *Wrockledge v. The State*, 1–167.

Before the enactment of the amendment, the court might, in its discretion, allow the district attorney to make a statement of the case to the jury (as provided in ¶ 2), and the only effect of the amendment is to secure, as a matter of right, what the court might, in its own discretion, have granted or refused: *The State v. Bateman*, 52–604.

A witness for the state, *held*, to have been properly admitted, after the state had rested, although his testimony was not rebutting: *The State v. Curran*, 51–112.

The question as to what is rebutting testimony, discussed: *The State v. Parish*, 22–284.

In a trial for forgery, *held*, that a failure by the court to give instructions respecting the law applicable to the offense, and to a certain line of defense of which there was sufficient evidence to require it to be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that although the court below is not bound to give instructions on its own motion where those asked by counsel are sufficient, yet, when they are defective or insufficient, the law complicated, and the offense of a high criminal character, the court should point out the controverted questions of fact, and state the law applicable thereto: *The State v. Brainard*, 25–572 (cited in *The State v. Hamilton*, 32–572, 574).

District attorney; offering evidence: notice. R. § 4786.

SEC. 4421. The district attorney in offering the evidence in support of the indictment, in pursuance of the order prescribed in the last section, under the second subdivision thereof, shall not be permitted to introduce any witness who was not examined before the grand jury, and the minutes of whose testimony was not taken by the clerk of the grand jury, and presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial.

Proviso.

Provided, that whenever the district attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice, because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the name, place of residence, and occupation of the witnesses he desires to introduce, and the substance of what he expects to

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prove by said witnesses, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustain said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the district attorney may examine said witness in the same manner, and with same effect as though four days' notice thereof had been given defendant as hereinbefore provided, except that the district attorney, in the examination of said witnesses, shall be strictly confined to the matters set out in his motion.

[As amended by 17th G. A., ch. 168, § 3, which added the proviso. The words "four days" in the tenth line are "three clear days" in the original, but the former are retained here, as in the printed code, the change having probably been made by the editor. See note to § 4484 as to similar change.]

That the name of a witness examined before the grand jury, and the minutes of whose evidence are returned, is not indorsed on the back of the indictment, is not a ground for excluding his testimony; such defect can only be reached by motion to set aside the indictment under § 4337: *The State v. Fowler*, 52–103; *The State v. Flynn*, 42–164.

That witnesses are examined whose names are not on the indictment, cannot be raised as an objection for the first time after conviction: *Ray v. The State*, 1 Gr., 316; *The State v. Houston*, 50–512.

In the examination of a witness, the minutes of whose testimony were taken by the grand jury, and returned with the indictment, the prosecuting attorney is not limited to the testimony given by the witness before the grand jury, but may examine him as to other matters not therein referred to: *The State v. Bowers*, 17–46; *The State v. Ostrander*, 18–435; *The State v. McCoy*, 20–262.

The mere brevity of the minutes of the witness's testimony taken by the grand jury, will not justify the entire exclusion of the testimony of such witness: *The State v. Van Vleet*, 23–27.

The state may call, in rebuttal, witnesses whose names are not indorsed on the indictment, and who were not examined before the grand jury: *The State v. Parish* 22–284; *The State v. Gillick*, 10–98.

This section applies to evidence in support of an indictment, and does not preclude the testimony of witnesses who were not before the grand jury, and whose evidence is not returned with the indictment, as to the fact that a certain witness testified before the grand jury: *The State v. Fowler*, 52–103.

The mere failure to file the minutes returned by the grand jury should not prevent the state from introducing its evidence: *The State v. Postlewait*, 14–446.

Failure of the state to call any of the witnesses whose names are indorsed on the indictment, is no ground for presuming that the testimony of such witnesses would be in favor of defendant: *The State v. Ostrander*, 18–435, 457.

It is sufficient that the notice here required be served upon the defendant personally. The mode of service, or of authenticating such service is not prescribed. If authenticated by the person making it, that is sufficient: *Ibid.*, 452.

A variance in the name of a witness as indorsed on the indictment, is not a valid objection, unless the party was misled thereby: *Ibid.*, 459.

Failure to indorse names of witnesses on the indictment is ground for setting it aside: See § 4337, ¶ 2.

The minutes of evidence before the grand jury are to be written out and filed: See § 4293.

SEC. 4422. When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second and third subdivisions of the section immediately preceding the last, shall be reversed, and the defendant shall first offer his evidence in support of his defense. Defendant's plea. R. § 4787.

SEC. 4423. The court shall not restrict counsel as to time in their arguments. Counsel: time R. § 4788.

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Tried separately. R. § 4789. C. '51, § 2992.

SEC. 4424. When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court.

When defendants jointly indicted for a felony elect to be tried separately, the order in which they shall be tried rests with the district attorney, under the direction of the court: *The State v. Hudson*, 50–157; *The State v. Nash*, 7–347, 373.

Where defendants are jointly indicted for a misdemeanor, they may be tried jointly or separately in the discretion of the court: *The State v. Gigher*, 23–318. And the state, as well as defendants, in such case, may ask for a separate trial: *The State v. Marvin*, 12–499.

Whether tried separately or jointly, either one of the co-defendants is a competent witness for the other: *The State v. Nash*, 10–81; *The State v. Gigher*, 23–318, the jury being properly cautioned, in case of a joint trial, that the evidence is not to be considered in behalf of the defendant so testifying: *The State v. Stewart*, 51–312.

Whether defendants be jointly or separately tried, a separate judgment is to be entered up as to each, and the clerk is entitled to a fee for the entry of each separate judgment, but where tried jointly, he is entitled to but one trial fee: *The State v. Hunter*, 33–361.

Trial for conspiracy. R. § 4790. C. '51, § 2996.

SEC. 4425. Upon a trial for a conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts not alleged in the indictment may be given in evidence.

Rules of evidence. R. § 4805.

SEC. 4426. The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided.

See § § 3636 and 4556, and notes.

Confession of defendant. R. § 4806.

SEC. 4427. The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed.

The word "confession" here used does not refer to admissions or declarations: *The State v. Shaunhurst*, 34–547, 551.

As to what is a confession, see *The State v. Jones*, 33–9.

The corroboration, *held*, sufficient in a particular case: *The State v. Lewis*, 45–20. 22.

Section referred to: *The State v. Turner*, 19–144.

A confession alone will not be sufficient proof, in a civil action, of the commission of a crime: *Georgia v. Kepford*, 45–48, 52.

Doubt. R. § 4807.

SEC. 4428. Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.

As to definition of reasonable doubt, see *The State v. Ostrander*, 18–435. 458; and instructions defining a reasonable doubt criticised, see, *The State v. Stewart*, 52–284.

Where insanity is sought to be established as an excuse for a crime, the presumption of sanity must be overcome by a preponderence of evidence. It is not sufficient for defendant to produce such evidence as to raise a reasonable doubt of sanity, nor is he on the other hand required to prove the insanity beyond a reasonable doubt: *The State v. Felter*, 32–49; *The State v. Bruce*, 48–530. And the same is true as to the presumption of chastity when defendant charged with seduction relies on previous unchaste character as a defense: *The State v. Wells*, 48–671.

Where defendant relies upon the proof of an alibi, a bare preponderance of proof in favor of defendant on that issue is sufficient: *The State v. Vincent*, 24–570; *The State v. Henry*, 48–403; *The State v. Northrup*, 48–583.

It is error in such case to charge the jury that they must be *fully satisfied* of the alibi: *The State v. Hardin*, 46–623.

It is not a reasonable doubt of any one proposition of fact which entitles to an acquittal, but a reasonable doubt

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of guilt arising upon the consideration of all the evidence in the case: *The State v. Hayden*, 45–11, 17.

The court is not required to charge that the jury should acquit if they have a reasonable doubt as to a specified element of the crime. It is sufficient to instruct them generally that they should acquit, if upon the whole case, they have such a doubt of the guilt of defendant: *The State v. Curran*, 51–112; *The State v. Stewart*, 52–284.

If a reasonable doubt of the guilt of the defendant is raised by proof of good character, he should be acquitted: *The State v. Northrup*, 48–583; *The State v. Horning*, 49–158; *The State v. Lindley*, 51–343; *The State v. Jones*, 52–150.

The same degree of proof is required in a civil action to recover damages for a criminal act, as in a prosecution for the crime itself: *Barton v. Thomson*, 46–30; or in an action for slander in speaking words imputing a crime, where the truth is relied upon as a defense: *Mott v. Dawson*, 46–533; *Fountain v. West*, 23–9.

SEC. 4429. Where there is a reasonable doubt of the degree of the offense of which the defendant is proven to be guilty, he shall only be convicted of the lower degree. Same R. § 4808.

The jury should be instructed as to their duty under this section: *The State v. Walters*, 45–389; and where the crime consists of two or more degrees, all the degrees should be explained and submitted to the jury. *The State v. Vinsant*, 49–241; *The State v. Clemons*, 51–274.

Evidence of good character should be considered upon the question as to the degree of the offense, as well as upon the question of guilt or innocence: *The State v. Jones*, 52–150.

To warrant a conviction of grand larceny, the fact that the value of the property exceeded twenty dollars, as well as the fact of the stealing, should be proved beyond a reasonable doubt: *The State v. Wood*, 46–116.

The defendant may be convicted of a lower degree than that charged: See § 4465.

SEC. 4430. If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense. Higher offense proved. R. § 4791. C. '51, § 3000.

SEC. 4431. If the indictment for the higher offense be submitted by the grand jury, or be not found at the next term, the court must proceed to try the defendant on the original indictment. Same. R. § 4792. C. '51, § 3001.

[By reference to corresponding section of Revision (§ 47 2) it is apparent that "submitted," in this section, should be "dismissed." The Code Com'rs' Report shows that no change from the Revision was intended.]

SEC. 4432. Whenever, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay at a specified time. Jury view premises. R. § 4800. C. '51, § 3009.

Similar provision in civil cases: See ¡ § 2790.

SEC. 4433. If a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and, if during the retirement of the jury, a juror declare any fact which could be evidence in the cause, as of Juror as a Witness. R. § 4801. C. '51, § 3010.

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his own knowledge, the jury must return into court and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible.

SEPARATION OF JURY.

Jury permitted to separate. R. § 4802. C. '51, § 3011.

SEC. 4434. The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns.

As to the propriety of not allowing the jury to separate when the defendant objects thereto, see *The State v. Felter*, 25–67.

Not to communicate or converse. R. § 4803. C. '51, § 3012.

SEC. 4435. The jury, whether permitted to separate, or kept together in charge of sworn officers, must be admonished by the court that it is their duty not to permit any person to speak to or communicate with them on any subject connected with the trial, and that any and all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to them. This admonition must be given or referred to by the court at each adjournment, during the progress of the trial, previous to the final submission of the cause to the jury.

It need not appear of record that the jury were properly admonished prior to each adjournment; it will be presumed that the court did its duty in this respect: *The State v. Shelledy*, 8–477.

TRIAL.

Minutes of testimony kept. R. § 4809.

SEC. 4436. The court shall, on the trial of every indictment, when requested by either party, keep, or cause to be kept, by some person for that purpose by it appointed, full and accurate minutes of the testimony of each witness examined on the trial, showing the name of the witness, the place of residence, and his occupation, as well as of any oral evidence introduced, either by the state or defendant, after a plea or verdict of guilty, to be considered by the court in aggravation or alleviation of the punishment in pronouncing sentence against the defendant, which shall be certified to be full and accurate by the judge, and signed by him, and filed with the clerk, and so marked by him, which shall be deemed a part of the record of the cause. The person who acts under such an appointment shall be entitled to such compensation for his services as may be allowed by the court, which shall be paid by the proper county, and shall be taxed as costs.

When several defendants. R. § 4810. C. '51, § 3014.

SEC. 4437. Upon an indictment against several defendants, any one or more may be convicted or acquitted.

Trial of libel. R. § 4811. C. '51, § 3015.

SEC. 4438. On the trial of an indictment for a libel, the jury have the right to determine the law and the fact.

Similar provision: See § 4102.

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Of offenses other than libel. R. § 4812. C. '51, § 3016.

SEC. 4439. On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court; saving the right of the defendant and the state to except. Questions of fact are to be tried by jury. And although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

INSTRUCTIONS.

Court instruct jury. R. § 4813. C. '51, § 3017.

SEC. 4440. The court shall, on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualification thereof shall be permitted.

The requirement that the judge shall sign the instructions given by him, is directory, and a failure to do so will not be ground for reversal, when no prejudice resulted therefrom to defendant: *The State v. Stanley*, 48–221.

The giving of instructions in regard to an offense of a higher degree than that for which defendant is properly on trial, will be sufficient error to warrant a reversal, although he be only found guilty of an offense for which he was properly on trial: *The State v. Tweedy*, 11–350.

The court may direct an acquittal when there is no testimony sustaining the charge, or when it is so slight that a verdict of guilty would be instantly set aside, but not when there is a conflict in the testimony: *The State v. Smith*, 28–565.

Generally, as to instructions, see notes to § 2789.

Same. R. § 4814. C. '51, § 3018.

SEC. 4441. Any instruction asked by either party to be given by the court must be in writing, and must be either given or refused, and so marked and signed by the judge, and filed with the clerk, and so marked by him, and is to be deemed a part of the record. It may be qualified in writing by the court, but not orally, and the qualification must be distinguished, intelligibly, from the instruction as originally asked by the party, and signed by the judge.

The supreme court, on appeal, will not pass upon instructions which have not been made part of the record, either by being signed as here required, or embodied in a bill of exceptions: *The State v. Gebhardt*, 13–473; *The State v. Watrous*, 13–489.

But if they were properly passed upon by the court and embodied in a bill of exceptions, the failure to sign the instructions will not be ground of reversal: *The State v. McCombs*, 13–426.

It is the better practice, as a rule, for the judge to put aside the instructions asked by counsel, and cover the whole ground in a methodical charge of his own: *The State v. Collins*, 20–85; and see notes to preceding section.

Deliberation: duty of officer in charge. R. § 4815. C. '51, § 3019.

SEC. 4442. After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place without meat or drink, water excepted, and not to suffer any person to speak to or communicate with them, nor speak to or communicate with them themselves unless it be to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they

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shall have so agreed upon their verdict, unless by permission or order of the court, or they be sooner discharged.

It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *The State v. Pitts*, 11-343.

DISCHARGE OF JURY.

When juror becomes sick. R. § 4484. C. '51, § 3013.

SEC. 4443. If before the conclusion of a trial a juror become sick so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards be empaneled.

Want of jurisdiction. R. § 4793. C. '51, § 3002.

SEC. 4444. The court may also discharge the jury where it appears that it has not jurisdiction of the offense, or that the facts as charged in the indictment do not constitute an offense punishable by law.

Same. R. § 4794. C. '51, § 3003.

SEC. 4445. If the jury be discharged because the court has not jurisdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged or ordered to be retained in custody a reasonable time, until the district attorney shall have a reasonable opportunity to inform the chief executive of the state in which the offense was committed of the facts, and for said officer to require the delivery of the offender.

When offense committed in another county. R. § 4795. C. '51, § 3004.

SEC. 4446. If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be deemed reasonable to await a warrant from the proper county for his arrest; or, if the offense be bailable, he may be admitted to bail in an undertaking with sufficient sureties that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking.

Papers transmitted by clerk. R. § 4796. C. '51, § 3005.

SEC. 4447. In the case provided for in the last section, the clerk must transmit, forthwith, a certified copy of the indictment and all the papers in the action filed with him, except the undertaking mentioned in the last section, to the district attorney of the proper county.

Defendant discharged: when. R. § 4797. C. '51, § 3006.

SEC. 4448. If the defendant be not arrested on a warrant from the proper county he shall be discharged from custody, or his bail in the action shall be exonerated, or money deposited instead of bail shall be refunded, as the case may be, and the sureties in the undertaking must be discharged.

When arrested. R. § 4798. C. '51, § 3007.

SEC. 4449. If he be arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

Discharged when facts do not constitute offense. R. § 4799. C. '51, § 3008.

SEC. 4450. If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged there-

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from, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury.

When defendant under bail appears for trial. R. § 4816. C. '51, § 3020.

SEC. 4451. When a defendant, having given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to abide the judgment or further order of the court; and he shall be committed and held in custody accordingly.

CHAPTER 28.

OF THE CONDUCT OF JURY AFTER THE CAUSE IS SUBMITTED TO IT.

Jury may take papers. R. § 4817. C. '51, § 3021.

SECTION 4452. Upon retiring for deliberation, the jury may take with it all papers which have been received as evidence in the case, except depositions and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

As applicable under this section, I see notes to § 2797.

And notes of testimony. R. § 4818. C. '51, § 3022.

SEC. 4453. The jury may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

Disagreement: information desired. R. § 4819. C. '51, § 3023.

SEC. 4454. After the jury have retired for deliberation, if there be any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court, and upon their being brought in, the information required must be given in the presence of, or after oral notice to, the district attorney, and the defendant or his counsel.

Juror sick. R. § 4820. C. '51, § 3024.

SEC. 4455. If, after the retirement of the jury, one of them be taken sick so as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the court may discharge them.

When discharged. R. § 4821. C. '51, § 3025.

SEC. 4456. Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties entered upon the record, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

The fact that, in the exercise of sound discretion, the jury is thus discharged, does not entitle the defendant to be released, as having been once in jeopardy: *The State v. Vaughan*, 29-286.

New trial. R. § 4822. C. '51, § 3026.

SEC. 4457. In all cases where a jury is discharged or prevented from giving a verdict by reason of any accident or other cause, except where the defendant is discharged from the indictment

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during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term of the court.

Court may adjourn. R. § 4823. C. '51, § 3027.

SEC. 4458. While the jury is absent the court may adjourn from time to time as to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury until a verdict be rendered or the jury is discharged.

Same. R. § 4824. C. '51, § 3028.

SEC. 4459. A final adjournment of the court discharges the jury.

CHAPTER 29.

OF THE VERDICT.

When jury have agreed. R. § 4825. C. '51, § 3029.

SECTION 4460. When the jury has agreed upon its verdict, it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict. In such case the cause may again be tried at the same or another term.

The provision as to calling the names of the jurors is directory only, and a failure to observe it will not be error sufficient to reverse the judgment unless prejudice is shown: *The State v. Burge*, 7–255.

Defendant present: when. R. § 4826. C. '51, § 3030.

SEC. 4461. If the indictment be for a felony, the defendant must be present at the rendition of the verdict. If it be for a misdemeanor, the verdict may be rendered in his absence.

Verdict rendered. R. § 4827. C. '51, § 3031.

SEC. 4462. When the jury have answered to their names, the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

No particular form of words is prescribed to be used by the court in requiring the jury to declare their verdict: *The State v. Collins*, 32–36.

General or special. R. § 4828. C. '51, § 3032.

SEC. 4463. The jury may either render a general verdict, or, where they are in doubt as to the legal effect of the facts proven, they may, except upon an indictment for libel, find a special verdict.

There is no provision for a submission to the jury of particular questions of fact, on the trial of criminal actions: *The State v. Ridley*, 48–370. As to special verdict in civil cases, see § 2808.

General. R. § 4829. C. '51, § 3033.

SEC. 4464. A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment. Upon a plea of a former conviction or acquittal of the same offense it is either "for the state" or "for the defendant."

A verdict expressly reciting that the jury find the defendant "guilty of aiding and concealing," etc., thus specifying the crime charged in the indictment, is a general and not a special verdict: *The State v. Turner*, 19–144.

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SEC. 4465. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.

Finding an offense of different degree. R. § 4835. C. '51, § 2918.

Although the offense consists of different degrees, and defendant is not found guilty of any one of the degrees, he may still be convicted of an offense necessarily included in that for which he is indicted, as provided in the following section: *Gordon v. The State*, 3–410. Thus, *held*, that though manslaughter is not a degree of murder, but a distinct offense, it is necessarily included in the crime of murder: *The State v. Clemons*, 51–274.

It seems that the last clause of the section, "if punishable by indictment," relates alone to the preceding clause, "an attempt to commit the offense:" *The State v. Jarvis*, 21–41.

Although the inferior degree of the offense be not indictable, but triable on information only, a defendant put on trial for a degree which is indictable may be convicted in such lower degree: *Ibid.*; and see notes to Const. art. 1, § 11.

Where defendant is put on trial for the higher degree of an offense, and is convicted of a lower, and judgment thereon is reversed on appeal, he cannot again be put on trial for a higher degree than that of which he was convicted: *The State v. Tweedy*, 11–350; *The State v. Clemons*, 51–274; and see notes to Const. art. 1, § 12.

In case of reasonable doubt as to the degree of the offense, defendant is to be convicted of the lower degree: See § 4429.

SEC. 4466. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment.

Other offense than charged. R. § 4836. C. '51, § 3039.

If an indictment charge an offense under a section of the law claimed to have been violated, whatever offense is necessarily included in that charge may be punished, though the indictment contain no words specifically designating the offense so included: *Benham v. The State*, 1–542.

Therefore, *held*, that as every intentional maiming and disfiguring includes an assault and battery, a defendant indicted for the former offense might be convicted of the latter, although no assault was charged: *Ibid.* *Held*, also, that a simple assault is necessarily included in a charge of an assault with intent to commit a bodily injury: *Orton v. The State*, 4 Gr. 140; and that, on an indictment for murder, defendant may be found guilty of manslaughter: *Gordon v. The State*, 3–410; and that a person indicted for an assault with intent to commit murder, may be convicted of assault and battery: *Dixon v. The State*, 3–416; or of a simple assault: *The State v. Shepard*, 10–126; *The State v. White*, 45–325; and that, under an indictment for burglary, a defendant may be convicted of the offense of entering, etc., defined in § 3894: *The State v. Maxwell*, 42–208.

Manslaughter is included in murder, and an assault with intent to commit the one is included in an assault with intent to commit the other: *The State v. White*, 45–325. And, *held*, not error upon a conviction of assault with intent to commit great bodily injury, obtained under an indictment for assault with intent to murder, to sentence for a simple assault: *The State v. Schele*, 52–608.

The crime of rape necessarily includes the crime of an assault with intent to commit rape: *The State v. McLaughlin*, 44–32; and also a simple assault: *The State v. Vinsant*, 49–241.

Though an indictment charging merely an *assault* with intent to commit murder, might not include the commission of an assault and battery, yet, where an indictment charging the former crime charged the commission thereof by assault and battery, *held*, that a conviction for assault and battery was warranted: *The State v. Graham*, 51–72.

Under an information charging defendant with the second offense and prior conviction under § 1540 (for the unlawful sale of intoxicating liquors) he may be found guilty of the first offense: *The State v. Ensley*, 10–149.

The jury should be instructed that they may find the defendant guilty of any lower offense included in the one

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charged: *The State v. Walters*, 45–389; and it will be error not to so instruct them: *The State v. Clemons*, 51–274; *The State v. Vinsant*, 49–241.

A defendant put on trial for an indictable offense may be punished for an offense necessarily included therein, although the latter be of such a character that it is not indictable, but only triable on information: *The State v. Jarris*, 21–44; *The State v. Shepard*, 10–126; and see notes to Const. art. 1, § 11.

If defendant is found guilty of a lesser offense included in the one for which he is put on trial, such conviction operates as an acquittal of the offense for which he was indicted, and if on appeal judgment is reversed, he can only be tried a second time for the offense of which he was convicted: *The State v. Tweedy*, 11–350; *The State v. Clemons*, 51–274.

Compound offenses may be included in one indictment: See § 4300.

Indictment against several: finding of jury. R. § 4837. C. '51, § 3040.

SEC. 4467. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly, and the case as to the rest may be tried by another jury.

Verdict insufficient. R. § 4838. C. '51, § 3041.

SEC. 4468. If the jury render a verdict which is neither a general nor special verdict, the court may direct them to reconsider it, and it shall not be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specia ly and leave the judgment to the court.

Section applied: *The State v. Maxwell*, 42–208, 214.

Informal verdict. R. § 4839. C. '51, § 3042.

SEC. 4469. If the jury persists in finding an informal verdict, from which, however, it can be understood that their intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him upon a special verdict.

Verdict rendered: jury polled. R. § 4840. C. '51, § 3043.

SEC. 4470. When a verdict is rendered, and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

If any juror disagrees. R. § 4841.

SEC. 4471. When the verdict is given, and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the record, and the jury again sent out. But if no disagreement be expressed, the verdict is complete and the jury must be discharged from the case.

If defense be insanity: jury instructed. R. § 4842. C. '51, § 3044.

SEC. 4472. If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict. The court may thereupon, if the defendant be in custody, and his discharge is deemed dangerous to the public peace and safety, order him to be committed to the Iowa insane hospital, or retained in custody until he becomes sane.

Defendant discharged. R. § 4843. C. '51, § 3045.

SEC. 4473. If judgment of acquittal be given on a general verdict, and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given.

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SPECIAL VERDICT.

Special verdict defined. R. § 4830. C. '51, § 3034.

SEC. 4474. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

For similar provision in civil cases, | see § 2807.

Same. R. § 4831. C. '51, § 3035.

SEC. 4475. The special verdict must be reduced to writing by the jury or in their presence, entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged.

Same. R. § 4832. C. '51, § 3036.

SEC. 4476. The special verdict need not be in any particular form, but shall be sufficient if it present intelligibly the facts found by the jury.

Judgment upon. R. § 4833. C. '51, § 3037.

SEC. 4477. The court must give judgment upon the special verdict as follows:

1. If the plea be not guilty and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted in law under that indictment, judgment shall be given accordingly. But if the facts found do not prove the defendant guilty of the offense charged, or of any offense of which he could be so convicted under the indictment, judgment of acquittal must be rendered;

2. If the plea be of a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal.

Pleas of not guilty, and former conviction or acquittal, may be pleaded together (see § 4359, ¶ 3), and where only the latter plea was interposed, and found against the defendant, and he did not ask leave to plead over, *held*, that a judgment of conviction was proper without further trial as to his guilt: *The State v. Green*, 16–239.

Verdict insufficient. R. § 4834. C. '51, § 3038.

SEC. 4478. If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence as established to their satisfaction, the court may order them to retire for further deliberation.

CHAPTER 30.

OF BILLS OF EXCEPTION.

Exceptions. R. § 4844. C. '51, § 3046.

SECTION 4479. On the trial of an indictment, exceptions may be taken by the state, or by the defendant, to any decision of the court upon matters of law, in any of the following cases:

1. In disallowing a challenge to an individual juror;

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2. In admitting or rejecting witnesses or evidence on the trial of any challenge;

3. In admitting or rejecting witnesses or evidence, or in deciding any matter of law, not purely discretionary, on the trial of the issue.

As to exceptions in civil cases, see I § § 2831 to 2836.

How to be construed. R. § 4845.

SEC. 4480. Nothing herein contained is to be construed so as to deprive either party of the right of excepting to any action or decision of the court which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on such trial.

Office of bill of exceptions. R. § 4846.

SEC. 4481. The office of a bill of exceptions is to make a part of the proceedings or evidence appear of record which would not otherwise so appear.

Applied: *The State v. Fay*, 43–651.

Papers deemed part of record. R. § 4847.

SEC. 4482. All papers pertaining to the cause and filed with the clerk, and all entries made by the clerk in the record book pertaining to them, and showing the action or decision of the court upon them, or any part of them, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court so appearing of record.

Either party may except to ... on R. § [illegible] C. '51, § 3047.

SEC. 4483. Either party may allege an exception to any decision or action of the court, on any application of either party, which may be, and is made orally to the court, in any stage of the proceedings upon which the decision or action of the court is not required to be, and is not, entered in the record book, and reduce the same to writing, and tender the same to the judge, whose duty it is to sign it; and if he sign the same, it shall be filed with the clerk and thereupon become a part of the record of the cause; but if the judge refuse to sign it, such refusal must be stated at the end thereof; and it may then be signed by two or more attorneys or officers of the court, or disinterested bystanders, and sworn to by the persons so signing the same, and filed with the clerk, and it shall thereupon become a part of the record of the cause.

Time allowed to examine. R. § 4849.

SEC. 4484. The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter to procure the signatures and file the same.

[The word "clear" in the first and also in the third line, as in the original, is omitted in the printed code. In § 4421, "four days" is substituted in the printed code for "three clear days" in the original, and the former expression is retained in this work as probably synonymous, but here the omission in the printed code of the word "clear," without change in the number of days, is certainly a material alteration. See similar change in § 4496.]

May be modified. R. § 4850.

SEC. 4485. If the judge and the party excepting can agree in modifying the bill of exceptions, it shall be modified accordingly.

Time allowed to prepare. R. § 4851.

SEC. 4486. Time must be given to prepare the bill of exceptions when it is necessary. When it can reasonably be done, it shall be settled at the time of taking the exception.

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CHAPTER 31.

OF NEW TRIAL.

SECTION 4487. A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given. Definition. R. § 4852 C. '51, § 3050.

SEC. 4488. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to either in the evidence or in argument. Effect. R. § 4853. C. '51, § 3051.

SEC. 4489. The court may grant a new trial for the following causes, or any of them: Causes for. R. § 4854. C. '51, § 3052.

1. When the trial has been had in the absence of the defendant, if the indictment be for a felony;
2. When the jury has received any evidence, paper, or document out of court not authorized by the court;
3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case;
4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;
5. When the court has misdirected the jury in a material matter of law;
6. When the verdict is contrary to law or evidence. But no more than two new trials shall be granted for this cause alone;
7. When the court has refused properly to instruct the jury;
8. When from any other cause the defendant has not received a fair and impartial trial.

Newly discovered evidence is not a ground for new trial in criminal cases: *The State v. Bowman*, 45–418, 421.

That a juror left the jury-room and was temporarily absent for a proper purpose, in charge of a deputy sheriff, *held*, not sufficient ground for granting a new trial: *Ibid.*

The drinking of spirituous liquors during the time when a jury is out for the purpose of deliberating upon their verdict, is sufficient misconduct to reverse a judgment on such verdict on appeal: *The State v. Baldy*, 17–39. And see other cases under § 2837, ¶ 2.

Greater latitude is allowed a party claiming a new trial in the supreme court, in a criminal, than in a civil action: *The State v. Tomlinson*, 11–401.

The supreme court will but cautiously interfere with verdicts, when it is claimed that they are against the evidence: *The State v. Collins*, 20–85; but where a conviction is clearly contrary to the weight of evidence, it should be set aside: *The State v. Wolsey*, 3[illegible]–251; and in a particular case the action of the court below in overruling a motion for a new trial on the ground of insufficiency of evidence was reversed: *The State v. Hilton*, 22–241.

A new trial was granted on appeal, on the ground that it appeared that under the peculiar circumstances of the case the prisoner had not had a full, fair, and impartial trial (as provided in ¶ 8), although no error of law was sufficiently shown: *Trulock v. The State*, 1–515.

SEC. 4490. The application for a new trial can be made only by the defendant, and must be made before judgment. Application: when made. R. § 4855. C. '51, § 3053.

Section applied: *The State v. Bixby*, 39–465.

It would seem that the presence of defendant, accused of a felony, is not necessary at the argument and determination of a motion for new trial (§ 4351): *The State v. Dickletts*: 19–447.

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CHAPTER 32.

OF ARREST OF JUDGMENT.

Grounds of. R. § 4856. C. '51, § 3054.

SECTION 4491. A motion in arrest of judgment, is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:

1. Upon any ground which would have been ground of demurrer;

2. When upon the whole record no legal judgment can be pronounced.

That it does not appear from the indictment that it was found within eighteen months after the commission of the offense, is not a ground of demurrer. (See § 4166, and notes.) Such objection cannot be urged in arrest of judgment: *The State v. Deitrick*, 51–467.

On motion of court. R. § 4857. C. '51, § 3055.

SEC. 4492. The court may also, upon its own observation of any of these grounds, arrest the judgment on its own motion.

Defendant held to answer. R. § 4858. C. '51, § 3057.

SEC. 4493. If the court is of opinion from the evidence on the trial that the defendant is guilty of a public offense, of which no legal conviction can be had on the indictment, he may be held to answer the offense in like manner as upon a preliminary examination.

When motion made. R. § 4859.

SEC. 4494. The motion may be made at any time before judgment, or after judgment, during the same term.

CHAPTER 33

OF JUDGMENT.

When rendered. R. § 4860.

SECTION 4495. Upon a verdict of not guilty for the defendant, or special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately.

Time when judgment may be pronounced. R. §§ 4861-2. C. '51, § 3058.

SEC. 4496. Upon a plea of guilty, upon a verdict of guilty, or a special verdict, upon which a judgment of conviction must be rendered, the court must fix a time for pronouncing judgment. The time appointed for pronouncing judgment must be at least three clear days after the verdict is rendered, if the court remain in session so long, or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be pronounced in less than six hours after the verdict is rendered.

[The word "clear" in the fifth line, as in the original, is omitted in the printed code. See note to § 4484 as to similar omissions.]

Where the defendant appears to have been sentenced before the expiration of the three days here provided, it will be presumed, in the absence of any showing to the contrary, that the court deferred its judgment to as remote a period as it reasonably could: *The State v. Wood*, 17–18; *The State v. Marvin*, 12–499; but where the record showed that the court was in session more than three days after the verdict was found, *held*,

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that the statute is imperative, and unless the record quite clearly rebuts the presumption of prejudice, it cannot be disregarded, and the judgment was reversed and cause remanded, not for new trial, but for judgment upon the verdict, with leave to defendant to show any cause against the same which had not been already passed upon: *The State v. Watrous*, 13–489.

It is not error to render a judgment at the next term after a conviction is had: *The State v. Ray*, 50–520. And, *held*, where the record did not show whether six hours intervened between the filing of a plea of guilty and the final adjournment of the term, and a continuance was made without objection, the presumption would be that the court adjourned in less than six hours, and the case was continued for judgment by consent, and that there was no error in failing to pronounce judgment at the term at which the plea was filed: *The State v. Stevens*, 47–276.

SEC. 4497. For the purpose of judgment, if the conviction be for a felony, the defendant must be personally present; if it be for misdemeanor, judgment may be pronounced in his absence. For felony: defendant present. R. § 4863.

SEC. 4498. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or money deposited, may make an order directing the clerk to issue a bench warrant for his arrest. When defendant is out on bail. R. § 4865. C. '51, § 3061.

SEC. 4499. The clerk, on the application of the district attorney, may, accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties for his arrest. Bench warrant. R. § 4866. C. '51, § 3062.

SEC. 4500. The bench warrant may be substantially in the following form: Form of. R. § 4867.

COUNTY OF .....

THE STATE OF IOWA.

To any Peace Officer in the State:

A. B. having been duly convicted on the .... day of ....., A. D. 18.., in the district court of ..... county, of the crime of (here designate it generally, as in the indictment.)

You are, therefore, hereby commanded to arrest the said A. B. and bring him before said court for judgment, if it be then in session, or if it be not then in session, you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court, at my [SEAL] office in ———, in said county, this —— day of ———, A. D. 18—.

By order of the court.

——— ———, Clerk.

SEC. 4501. The bench warrant may be served in any county in the state. Service. R. § 4868. C. '51, § 3063.

SEC. 4502. Whether the bench warrant be served in the county where it was issued, or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant according to the command thereof. Same. R. § 4869. C. '51, § 3064.

SEC. 4503. When the defendant appears for judgment, he shall be informed by the court, or by the clerk under its direction, of the nature of the indictment and of his plea, and the ver- Judgment. R. § 4870. C. '51, § 3065.

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dict, if any thereon, and must be asked whether he have any legal cause to show why judgment should not be pronounced against him.

This section but declares the common law. The action of the court as here directed is not required to be made matter of record, although it may properly be done, but no presumption of its omission will arise from the failure to note it of record: *The State v. Wood*, 17–18; *The State v. Stiefle*, 13–603. Unless it otherwise appears, it will be presumed that these steps were properly taken: *The State v. Wells*, 46–662, 666.

Same. R. § 4871.

SEC. 4504. He may show for cause against the judgment, that he is insane, or any sufficient ground for a new trial, or in arrest of judgment.

Insanity: how determined. R. § 4872.

SEC. 4505. If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in this code, and if he is found to be insane, such proceedings shall be had as are herein directed.

New trial. R. § 4873.

SEC. 4506. If he move for a new trial, or in arrest of judgment, the court shall defer the judgment, and proceed to hear and decide the motions.

Rendition of judgment. R. § 4874. C. '51, § 3066.

SEC. 4507. If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered.

When convicted of two or more offenses. R. § 4880. C. '51, § 3070.

SEC. 4508. If the defendant is convicted of two or more offenses, before judgment on either, the punishment of each of which is, or may be, imprisonment, the judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses.

Where two judgments of imprisonment against a defendant were rendered on the same day, but no provision was made as to the commencement of either term as here contemplated, *held*, that the prisoner should be held in confinement until both were served out, and that the term of imprisonment on the judgment last rendered would commence on the expiration of that under the first. Two terms of imprisonment cannot be concurrent: *Mier v. McMillan*, 51–240.

Fine: how satisfied. R. § 4881. C. '51, § 3071.

SEC. 4509. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.

This section is applicable, whether the statute under which the fine is imposed provides that punishment be by fine only, or by both fine and imprisonment. The judgment should specify the extent of the imprisonment: *The State v. Myers*, 44–580, 584.

This provision applies only to the fine, and not to the costs: *The State v. Erwin*, 44–637.

Payment of the fine does not satisfy the costs: *The State v. Gray*, 35–503; *Grey v. Ferreby*, 36–146.

Imprisonment under this section does not operate to pay the fine. (See §§ 4611, 4736): *The State v. Jordan*, 39–37; *The State v. Anwerda*, 40–151.

Under §§ 4736 and 4741, the judgment may be that defendant shall be confined at hard labor and credited with $1.50 per day upon the judgment against him, but the duration of his imprisonment cannot exceed that here specified: *The City of Keokuk v. Dressell*, 47–597.

A prisoner, having been confined until liberated under § 4611, is entitled to have the judgment against him satisfied: *The State v. Van Vleet*, 23–168.

Committed to jail of another county. R. § 4884. C. '51, § 3073.

SEC. 4510. When a person is, in any event, to be committed to jail, if there be no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of

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law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be the one which is most convenient and safe, and the county to which the cause originally belonged shall be holden for all the expenses thereof.

Appeal. R. § 4885.

SEC. 4511. In all cases, except murder in the first degree, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order be made.

CHAPTER 34.

OF EXECUTION.

Copy of judgment furnished officer. R. § 4886. C. '51, § 3074.

SECTION 4512. When a judgment of imprisonment, either in the penitentiary or county jail is pronounced, a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution.

Commitment of defendant. R. § 4897. C. '51, § 3075.

SEC. 4513. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment be complied with, or the defendant discharged by due course of law.

As to the order in which two or more terms of imprisonment are to be served out, see § 4508, and note.

By whom executed. R. § 4898. C. '51, § 3076.

SEC. 4514. When the judgment is imprisonment in the county jail of the county in which the trial is had, or a fine and that the defendant be imprisoned in such county jail until it be satisfied, the judgment must be executed by the sheriff of that county. In all other cases, when the judgment is imprisonment, the sheriff of the county in which the trial was had, must deliver the defendant to the proper officer in execution of the judgment.

Same. R. § 4899. C. '51, § 3077.

SEC. 4515. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, in the county jail of the county in which the trial was had, the sheriff of the county in which the trial was had, shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail or prison in which the defendant is to be imprisoned, and take his receipt therefor on a duplicate copy of such entry, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon.

Officer's authority in committing. R. § 4900. C. '51, § 3078.

SEC. 4516. The sheriff, or his deputy, while conveying the defendant to the proper prison, has the same authority to require the assistance of any citizen of the state in securing the defendant, and retaking him if he escape, as if the sheriff were in his own county; and every person who neglects or refuses to assist the sheriff when so required shall be punishable as if the sheriff were in his own county.

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Return. R. § 4901.

SEC. 4517. An officer executing a judgment of imprisonment shall make a written return of the execution of such judgment forthwith after such execution, and file the same with the clerk of the court, by which the judgment was rendered.

Execution for fine. R. § 4902.

SEC. 4518. Upon a judgment for a fine, a writ of execution may be issued as upon a judgment in a civil case.

How judgment for abatement of nuisance enforced. R. § 4903.

SEC. 4519. When the judgment is for the abatement or removal of a nuisance, or for anything other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize and require him to execute such judgment, and he shall return the same with his doings under the same thereon indorsed to the clerk of the court in which the judgment was rendered within seventy days after the date of the certificate of such certified copy, unless it be a judgment of imprisonment, which is hereinbefore provided for.

CHAPTER 35.

OF APPEALS.

In criminal cases. R. § 4904.

SECTION 4520. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by an appeal.

Who may. R. § 4905.

SEC. 4521. Either the defendant or the state may take an appeal.

When taken. R. § 4906.

SEC. 4522. No appeal can be taken until after judgment, and then only within one year thereafter.

The judgment here contemplated is final judgment. No appeal lies in a criminal case from an intermediate order or decision (overruling *The State v. Brandt*, 41–593): *The State v. Swearengen*, 43–336; and the same rule is applicable to appeals by the state, as well as by defendant: *The State v. Davis*, 47–634.

A criminal case cannot be brought to the supreme court by agreement of parties, before a final judgment is rendered in the court below: *Rutter v The State*, 1–99. Nor can the supreme court entertain jurisdiction, by consent of parties, of a case appealed after the time for taking an appeal has run out: *The State v. Fleming*, 1[illegible]–443.

After payment of the fine or serving out the imprisonment according to the sentence, the criminal cannot appeal from the judgment: *The State v. Westfall*, 37–575.

How taken. R. § 4907.

SEC. 4523. An appeal is taken by the party taking it, or the attorney of such party, serving on the adverse party, or the attorney of the adverse party who acted as attorney of record in the district court at the time of the rendition of the judgment, and also on the clerk of the district court by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment.

When deemed taken. R. § 4908.

SEC. 4524. The appeal is deemed to be taken when the notices thereof, required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, or annexed thereto.

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Transcript: duty of clerk. R. § 4909.

SEC. 4525. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, and certify the same under his hand and the seal of the court, and transmit the same to the clerk of the supreme court.

Several defendants may join. R. § 4917.

SEC. 4526. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards.

Effect: by state. R. § 4911.

SEC. 4527. An appeal taken by the state, in no case stays the operation of a judgment in favor of the defendant.

By defendant. R. § 4914.

SEC. 4528. An appeal taken by the defendant does not stay the execution of the judgment, unless bail be put in, except as provided in the next section.

Defendant detained in custody. R. § 4915.

SEC. 4529. Where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may, in its discretion, order the sheriff or officer having the defendant in custody, to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it.

Bail: proceedings when given. R. § 4916.

SEC. 4530. When an appeal is taken by the defendant, and bail is put in, it is the duty of the clerk to give forthwith to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken and bail put in, and the sheriff or other officer having the defendant in custody, must, upon the delivery of such certificate to him, discharge the defendant from custody where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court who issued it, the execution or certified copy of the entry of judgment under which he acted, with his return thereon, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment on the appeal.

Appellant: appellee. R. § 4918.

SEC. 4531. The party taking the appeal is known as the appellant, the adverse party as the appellee, but the title of action shall not be changed in consequence of the appeal; it shall be docketed in the supreme court as it was in the district court.

How docketed have precedence over other cases. R. § 4919.

SEC. 4532. Appeals, in criminal cases, shall be docketed in the supreme court for trial at the commencement of that portion of the term which has been assigned for trying causes from the judicial district from which the appeal comes. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term.

TRIAL OF THE APPEAL.

SEC. 4533. The personal appearance of the defendant in the

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Appearance of defendant. R. § 4920.

supreme court on the trial of an appeal, is in no case necessary.

Not dismissed for informality. R. § 4921.

SEC. 4534. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected in a reasonable time, and the supreme court must direct how it shall be corrected.

Assignment of error. R. § 4922.

SEC. 4535. No assignment of error, or joinder in error, shall be necessary.

Section applied: *The State v. Pratt*, 20–267.

Argument. R. § 4923.

SEC. 4536. The defendant shall be entitled to close the argument.

Opinion. R. § 4924.

SEC. 4537. The opinion of the supreme court must be in writing, filed with its clerk and recorded.

When appeal is taken by defendant. R. § 4925. C. '51, § § 3097–8.

SEC. 4538. If the appeal was taken by the defendant from a judgment against him, the supreme court must examine the record, and without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper, order a new trial. It may reduce the punishment, but cannot increase it.

Upon reversal of a judgment of conviction, the cause may be remanded for a new trial. Jeopardy is not considered as having attached if the defendant is erroneously convicted and obtains a reversal of the judgment: *The State v. Knouse*, 33–365.

A failure to assign errors and press them in argument, does not authorize the supreme court to dispose of the case without examination. It will inspect the record and determine whether the law has been correctly administered, without any objection being formally made to the proceedings: *The State v. Lundermilk*, 50–695; and the rule that objections not raised in the court below will not be considered in the supreme court, does not apply in criminal cases: *The State v. Potter*, 28–554.

Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record, and render such judgment as the law demands: *The State v. Pratt*, 20–267.

Where the evidence is all before the court, and it is apparent that an alleged error in the instructions could not have been prejudicial to defendant, the case will not be reversed: *The State v. Guisenhause*, 20–227.

Where the error urged was the overruling of a motion to set aside the judgment, based upon slight irregularities in the selection of the grand jury, the court held that they did not affect the substantial rights of the party and affirmed the judgment: *The State v. Carney*, 20–82.

The supreme court may, on appeal in criminal cases, render such judgment as the district court should have rendered: *The State v. Thompson*, 31–393.

Where the sentence is too severe, the court will reduce the punishment, but will not reverse the case on that account: *The State v. Madden*, 35–511; *The State v. Little*, 42–51.

The supreme court will not reduce the punishment imposed by the lower court, unless all the evidence is before it: *The State v. Harris*, 36–268; *The State v. Durston*, 52–635. *The State v. Baughman*, 20–497. They will not reduce the sentence merely on an abstract of the evidence: *The State v. Freeman*, 27–333. Such power will be exercised only when the court below has manifestly visited too severe a penalty, one disproportionate to the degree of guilt as shown by the proof: *Ibid.* The court must have some legal data upon which to base its action: *The State v. Baughman*, 20–497. And it will not modify a sentence, when it is not in any way advised of all the circumstances attending the commission of the offense: *The State v. Patton*, 19–458.

In case of manslaughter, the term of sentence reduced, as being too great under the circumstances: *The State v. Sullivan*, 51–142.

Section considered: *The State v. Brandt*, 41–593, 634.

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SEC 4539. If the appeal was taken by the state, the supreme court cannot reverse the judgment, or modify it so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory on the district court, as the correct exposition of the law. By state. R. § 4926.

Upon such an appeal, the supreme court cannot interfere with the judgment of the district court, whether the appeal be from a judgment upon the trial on the merits, or upon demurrer or motion. The decision of the district court ends the proceeding as against the defendant: *The State v. Kinney*, 44–444. Having given an exposition of the law, no further order of the supreme court is necessary or allowable: *The State v. Keeler*, 28–551.

SEC. 4540. If a judgment against the defendant be reversed without ordering a new trial, the supreme court must direct, if the defendant be in custody, that he be discharged, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to him. When judgment against defendant reversed. R. § 4927. C. '51, § 3099.

SEC. 4541. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as hereinafter provided. If affirmed. R. § 4928. C. '51, § 3100.

SEC. 4542. When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment must be forthwith remitted to the clerk of the district court in which the judgment appealed from was rendered, with proper instructions and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe. Recorded and transmitted to court below. R. § 4929. C. '51, § 3101.

The *procedendo* from the supreme court is not necessary to the jurisdiction of the district court on a new trial. The defendant may waive the objection. While consent cannot confer jurisdiction over the subject matter, it may over the parties: *The State v. Knouse*, 33–365; and see, *Becker v. Becker*, 50–159.

SEC. 4543. After the certified copy of the entry of the judgment of the supreme court, and its instructions have been remitted as provided in the preceding section, the supreme court has no farther jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the supreme court into effect, must be had in the court to which it is remitted, or by the clerk thereof, except as provided in the next two sections. Same. R. § 4930. C. '51, § 3102.

SEC. 4544. Unless where some proceedings in the district court are directed by the supreme court, a copy of the certified copy of the judgment of the supreme court, with its directions, certified by the clerk of the district court to whom the same has been transmitted, delivered to the sheriff, or other proper officer, shall authorize him to execute the judgment of the supreme court, or take any steps to bring the proceedings to a conclusion, except as provided in the next section. Same. R. § 4931.

SEC. 4545. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court shall be again convicted, the period of his former imprisonment shall be deducted by the district court from the period of imprisonment to be fixed on the last verdict of conviction. Time deducted. R. §

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CHAPTER 36.

OF IMPEACHMENT.

Form of. R. § 4937.

SECTION 4546. An impeachment is the written accusation of a state officer by the house of representatives before the senate, of any misdemeanor or malfeasance in office.

By whom found. R. § 4938. C. '51, § 3157.

SEC. 4547. A majority of all the members of the house of representatives elected must concur in an impeachment.

Requisites. R. § 4939. C. '51, § 3158.

SEC. 4548. The impeachment must specify the offenses charged with the same precision as is requisite in an indictment, and the accused must be allowed counsel as in cases of other prosecution.

How stated. R. § 4940.

SEC. 4549. If the impeachment charge more than one misdemeanor or act of malfeasance, they shall be stated separately and distinctly.

Senate. R. § 4941. C. '51, § 3159.

SEC. 4550. When possessed of an impeachment, the senate must forthwith cause the person accused to be brought before it.

Process. R. § 4942. C. '51, § 3160.

SEC. 4551. All writs and process must be issued by the secretary of the senate, and tested in his name, and may be served by any person thereto authorized by the senate or president.

Answer. R. § 4943. C. '51, § 3161.

SEC. 4552. Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same.

Oath. R. § 4944. C. '51, § 3162.

SEC. 4553. Before proceeding to the trial, an oath, truly and impartially to try and determine the charge in question according to the evidence, shall be administered by the secretary of the senate to the president, and by him to each of the members of that body.

Suspended. R. § 4948. C. '51, § 3165.

SEC. 4554. Every officer impeached shall be suspended from the exercise of his official duties until his acquittal.

President of senate. R. § 4949. C. '51, § 3167.

SEC. 4555. If the president of the senate be impeached, notice thereof must be immediately given to the senate, which shall thereupon choose another president, to hold his office until the result of the trial is determined.

CHAPTER 37.

OF EVIDENCE.

Same as in civil cases. R. § 4805.

SECTION 4556. The rules of evidence prescribed in the civil part of this code, shall apply to criminal proceedings as far as applicable, and as they are not inconsistent with the provisions of this chapter.

[As amended by 17th G. A., ch. 168, § 2, repealing the latter part of the original, which was as follows: "But nothing contained in this title shall render any person who, in any criminal proceeding, is charged with the commission of any public offense, competent or compellable to give evidence thereon for or against himself."]

Before the amendment of this section, *held*, that defendant in a criminal action was not a competent witness: See notes to § 3636. (But he

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was a competent witness on his own behalf on preliminary examination: See § 4237, and notes.)

The protest of a notary public (admissible in civil cases, § 3665) is not admissible in criminal proceedings, where the defendant has the right to be confronted with the witnesses against him (Const. art. 1, § 10): *The State v. Reidel*, 26–430.

Where two or more defendants are indicted jointly, but separately put upon trial, either one is a competent witness for the other: *The State v. Nash*, 10–81; and the same is equally true when they are tried jointly: *The State v. Gigher*, 23–318; the jury being properly cautioned not to consider such evidence in behalf of the party testifying: *The State v. Stewart*, 51–312.

A witness in a criminal trial may be impeached, as provided in § 3649: *The State v. Hardin*, 46–623; and when one of two co-defendants is called as a witness for the other, he may be impeached as any other witness: *Ibid.*

The first part of this section is almost identical with § 4426.

SEC. 4557. In a prosecution against a railway company for obstructing a highway or any private way, proof that any such way is in an unsafe condition, or that it is inconvenient for travel at the place of its intersection with such railway, shall be presumptive evidence that such company has obstructed such way. In prosecutions against railways. 14 G. A. ch. 111 § 6.

SEC. 4558. Proof of actual penetration into the body is sufficient to sustain an indictment for rape. Rape. R. § 4101. C. '51, § 2997.

SEC. 4559. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof. Accomplice. R. § 4102. C. '51, § 2998.

It is not a ground of rejecting the testimony of an accomplice that it has not been shown that he is less guilty than the defendant, or that no order of court has been made that he should be received, etc. (overruling *Ray v. The State*, 1 Gr. 316); nor that evidence connecting defendant with the crime has not been introduced, the order of introduction of testimony being in the discretion of the state under the approval of the court: *The State v. Hudson*, 50–157.

The fact that witnesses who might have been called to contradict the accomplice, if his testimony were false, were not called, should not be considered as corroborating such testimony: *The State v. Hull*, 26–292.

One who receives the goods stolen, is not thereby rendered an accomplice in the crime of burglary committed when they were taken: *The State v. Hayden*, 45–11.

The section applied: *The State v. Thornton*, 26–79; *The State v. Pepper*, 11–347; *The State v. Graff*, 47–384; *The State v. Willis*, 9–582; *The State v. Moran*, 34–453; *The State v. Clemens*, 38–257.

The corroboration need not be by the testimony of one credible witness; it may be circumstantial: *The State v. Stanley*, 48–221.

Apparently without reference to any statutory provision, *held*, that the testimony of one accomplice would not constitute a sufficient corroboration of that of another, to warrant conviction without other evidence: *Johnson v. The State*, 4 Gr. 65.

SEC. 4560. The defendant in a prosecution for a rape, or for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried woman of previously chaste character, cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense. Of female in rape or seduction. R. § 4103. C. '51, § 2999.

The corroborating evidence must tend to connect defendant with the commission of the crime: *The State v. Willis*, 9–582; *Upton v. The State*, 5–405; *The State v. Tulley*, 18–98.

In a case of rape, the fact that the crime was committed may be established by the testimony of the injured

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party alone. It is only the connection of the accused with the crime that requires corroboration: *The State v. McLaughlin*, 44–82.

In a prosecution for seduction, the corroborating evidence should not be confined to the act of illicit intercourse alone, but facts showing intimacy, opportunity and inducement may be shown for that purpose: *Andre v. The State*, 5–389; but proof of mere opportunity to have sexual intercourse, *held*, not sufficient corroboration: *The State v. Painter*, 50–317; however, proof of courtship and attendant circumstances may amount to sufficient corroboration: *The State v. Wells*, 48–671; *The State v. Curran*, 51–112.

It is erroneous in a prosecution for seduction to admit a child, claimed to be the result of such seduction, to be shown to the jury, and instruct them that they may consider a resemblance between the child and the defendant as evidence in corroboration of the testimony of the prosecutrix (explaining *Stumm v. Hummell*, 39–478): *The State v. Danforth*, 48–43.

Corroboration, *held*, sufficient under particular circumstances: *The State v. Shean*, 32–88; *The State v. Comstock*, 46–265.

Subpœnas. R. § 4950. C. '51, § 3168.

SEC. 4561. A magistrate, in any criminal proceeding before him, may issue subpœnas subscribed by him with his name of office for witnesses within the state in behalf of either party thereto.

Same. R. § 4951. C. '51, § 3170.

SEC. 4562. The clerk of the court in which any criminal case is pending must, at all times, upon the application of the defendant or his attorney, issue as many blank subpœnas under the seal of the court, subscribed by him, for witnesses within the state, as may be required by the defendant. He must also issue subpœnas, on the part of the state, when required.

Who to serve. R. § 4952. C. '51, § 3171.

SEC. 4563. A peace officer must serve within his town or county, as the case may be, any subpœna delivered to him for service on the part of either the state or defendant, and must make a written return of the service subscribed by him and state the time and place of service, without delay. A subpœna may, however, be served by any other person.

How. R. § 4953. C. '51, § 3172.

SEC. 4564. The service of a subpœna must be by delivering a copy and showing the original to the witness personally.

May break door. R. § 4954. C. '51, § 3176.

SEC. 4565. If a witness conceal himself to avoid the service of a subpœna, the officer may break open doors or windows for the purpose of making service.

Disobedience. R. § 4955. C. '51, § 3174.

SEC. 4566. Disobedience to a subpœna, or refusal to be sworn, or to answer as a witness, may be punished by the court or magistrate as a contempt.

Witness when liable. R. § 4956. C. '51, § 3175.

SEC. 4567. A witness wilfully disobeying a subpœna in a criminal case without good cause, shall be liable to the party injured for the amount of the damages sustained by such party.

Forfeiture of bond. R. § 4957.

SEC. 4568. The undertakings of witnesses in criminal cases, may be forfeited and enforced like the undertaking of bail.

Subpœna. R. § 4958.

SEC. 4569. A subpœna in a criminal case, runs into any part of the state.

Impeachment. R. § 4959.

SEC. 4570. In cases of impeachment, subpœnas may be issued on behalf of either party by the secretary of the senate.

Deposition. R. § 4960.

SEC. 4571. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on commission, in the same manner and with like effect as in civil actions.

Depositions may be used on behalf of defendant in criminal trials, but not on behalf of the state (Const. art. 1, § 10): *The State v. Collins*, 32–36.

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SEC. 4572. A person apprehensive of a criminal prosecution, may perpetuate testimony in his favor, in the same manner, and with like effect, as it may be done in apprehension of any civil action. Perpetuating testimony. R. § 4961.

CHAPTER 38.

OF BAIL, UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

SECTION 4573. When the defendant has been held to answer for any bailable offense, bail must be taken by the magistrate who held him to answer, or by any judge of the supreme, district, or circuit courts, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk of such court, or by any magistrate of the county in which the offense is triable. Who may admit. R. § 4967. C. '51, § § 3216–18.

SEC. 4574. Bail is put in by a written undertaking, executed by one or more sufficient sureties, (with or without the defendant,) in the discretion of the court, clerk, or magistrate,) acknowledged before, and accepted by, the court, clerk, or magistrate taking the same, and may be, substantially, in the following form: How given. R. § 4968. C. '51, § 3219.

County of.....

An order having been made on the.....day of.....A. D. 18.., by A. B., a justice of the peace of the township of...., (or as the case may be,) that C. D. be held to answer upon a charge of (stating briefly the nature of the offense,) upon which he has been duly admitted to bail, in the sum of.....dollars.

We, E. F., (stating his place of residence and occupation,) and G. H., of (stating his place of residence and occupation,) hereby undertake that the said C. D. shall appear at the district court of the county of....., at the next term thereof, and answer said charge, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of.....dollars, (inserting the sum in which the defendant is admitted to bail.)

E. F.
G. H.

Acknowledged before, and accepted by me as ....., in the township of....., in the county of....., this .....day of....., A. D. 18..

I. J., justice of the peace,
(or as the case may be.)

A failure by the clerk to indorse the bond as "accepted," will not affect the right of the state to recover thereon: *The State v. Emily*, 24–24. And where a prisoner has been discharged upon the filing of a bond, the acceptance by the officer will be conclusively presumed; no written approval thereon is necessary to its validity: *The State v. Wright*, 37–522.

Before the recognizance can have any force, it must appear that it was accepted as a valid undertaking by a court or magistrate of competent authority: *The State v. Carr*, 4–289.

The bond is *prima facie* evidence that the justice made a finding that a public offense had been committed (§ 4244), and the execution of the bond and its acceptance by the jus-

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tice are presumptive evidence that it was taken and received in place of the body of the accused: *The State v. Patterson*, 23–575.

It is not essential to the validity of the bond that the defendant should sign it: *Ibid.* And in a particular case the insertion of the word "he" for "we" in the last clause of the bond, *held*, manifestly a clerical error, and disregarded: *Ibid.*

The sureties of the bond are not only bound for the appearance of accused at the time and place mentioned, but also that he shall abide the order and judgment of the court, and not depart without leave. So, where a change of venue is granted, the sureties remain liable; the provision of § 4385 requiring the giving of a new bond is directory, and does not release the original bail: *The State v. Brown*, 16–314.

A failure to hold the term at which defendant is held to appear, will not release his sureties from their obligation to have him at the next term, although no order is made in the case at the term mentioned in the bond (see § 170): *Ibid.; The State v. Ryan*, 23–406.

That defendant's person is placed in the custody of the sheriff, does not release the sureties unless the method prescribed in § 4593 is pursued: *The State v. Tieman*, 33–474.

The judge of the court has power to certify to the acknowledgment of the sureties to the bond, made in open court: *The State v. Elgin*, 11–216.

See, as applicable to this section, notes to § 4584.

Qualifications of bail. R. § 4969. C. '51, § 3220.

SEC. 4575. The qualifications of bail are as follows:

1. Such bail must be a resident and householder, or freeholder, within the state;

2. Such bail must be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court, clerk, or magistrate taking the bail, may allow more than one bail to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail.

Justification. R. § 4970. C. '51, § 3221.

SEC. 4576. The bail must in all cases justify, by affidavit taken before the court, clerk, or magistrate, as the case may be, taking such bail, and the affidavit must state that they each possess the qualifications prescribed in the last section.

Before an accused held to bail can demand a discharge upon tendering bond and surety, his bail must justify as here required; but a failure to require such justification will not render the bond void, nor discharge the sureties: *The State v. Emily*, 24–21; *The State v. Wells*, 36–238.

Same. R. § 4971. C. '51, § 3222.

SEC. 4577. The district attorney, or the court, clerk, or magistrate, as the case may be, may thereupon further examine the bail upon oath, concerning their sufficiency, in such manner as may be deemed proper.

Same. R. § 4972. C. '51, § 3223.

SEC. 4578. The court, clerk, or magistrate, may also receive other testimony, either for or against the sufficiency of the bail.

Order. R. § 4073. C. '51, § 3224.

SEC. 4579. When the examination is closed, the court, clerk, or magistrate, must make an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits of justification, and the undertaking of bail, to be filed with the clerk of the court to which the papers on the preliminary examination are required to be sent.

Until the bail bond is before the court, the forfeiture thereof cannot be entered: *The State v. Klingman*, 14–404.

Order of discharge. R. § 4974. C. '51, § 3225.

SEC. 4580. Upon the allowance of the bail and the execution of the undertaking, the court, clerk, or magistrate, must make an order, signed with his name of office, for the discharge of the defendant, to the following effect:

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THE STATE OF IOWA:

To the sheriff of the county of.....

C. D., who is detained by you on commitment, to answer a charge for the offense of, (here designate it generally,) having given sufficient bail to answer the same, you are commanded forthwith to discharge him from custody.

Dated at....., in the township of....., in the county of....., this....day of....., A. D. 18..

K. L., justice of the peace,
(or as the case may be.)

SEC. 4581. If the bail be disallowed, the defendant must be detained in custody until other bail be put in and justify. Disallowed. R. § 4975. C. '51, § 3225.

CHAPTER 39.

OF BAIL UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 4582. When the offense charged in the indictment is a misdemeanor, the officer serving the bench warrant, if therein required, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district court of either of such counties, for the purpose of giving bail. For misdemeanor. R. § 4976. C. '51, § 3227.

SEC. 4583. If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant. Felony. R. § 4977. C. '51, § 3228.

SEC. 4584. When the defendant is so delivered into custody, if the felony charged be bailable, bail must be taken by that court, or the clerk of that court, or by any magistrate in the same county. By whom taken. R. § 4978. C. '51, § 3229.

The clerk has no power to take bail under this section in vacation: *The State v. Carothers*, 11-2 3.

The bond, under the statute, should be executed and acknowledged before the clerk of the district court, and the sureties should justify before him, but these are directory matters, and where the bond has been accepted, it will be valid though it was executed and the sureties qualified before the clerk of the court in another county, and though it was not acknowledged at all. The execution, its acceptance, the discharge of the prisoner thereon, and his failure to appear according to its terms, are the essential matters. It is not necessary to call the sureties, and have their default entered at the time the defendant fails to appear: *The State v. Wells*, 36-238.

SEC. 4585. The bail must be put in by a written undertaking, executed by one sufficient surety, with or without the defendant, in the discretion of the court, clerk, or magistrate, acknowledged before and accepted by the court, clerk, or magistrate taking the same, and may be substantially in the following form: Form of undertaking. R. § 4979.

COUNTY OF .....

An indictment having been found in the district court of the county of ....., on the ..... day of ....., A. D. 18.., charging A. B. with the crime of (designating it as in the bench

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warrant,) and he having been duly admitted to bail in the sum of ..... dollars:

We, A. B., of (stating his place of residence and occupation,) and C. D., of (stating his place of residence and occupation,) and E. F., of (stating his place of residence and occupation,) hereby undertake that the said A. B. shall appear and answer the said indictment, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that he will pay to the state of Iowa the sum of ..... dollars (inserting the sum in which the defendant is admitted to bail.)

A. B.,
C. D.,
E. F.

Acknowledged before and accepted by me, at.....in the township of ...., in the county of....., this ..... day of....., A. D. 18..

G. H., justice of the peace,
(or as the case may be.)

If the appeal bond is deposited with the clerk of the proper county as a record, the fact that it is not marked filed is not material: *The State v. Merrihew*, 47–112, 120.

This form of bond is substantially sufficient in case of a bond upon change of venue as provided in § 4385: *Ibid.*, 119, 121.

The description of the crime in the bail bond need not be so particular as in an indictment; where it was specified merely as "seduction" it was held sufficient: *The State v. Marshall*, 21–143.

Provisions of previous chapter apply. R. § 4980.

SEC. 4586. The provisions of the preceding chapter, subsequent to the form of the undertaking, relative to the qualifications of bail, the justification, the examination, receiving other testimony against the sufficiency, and the order of allowance or disallowance thereof, and the filing of the undertaking with the affidavits, and all proceedings incidental thereto, in the cases therein provided for, apply also to the cases provided for in this chapter.

CHAPTER 40.

OF BAIL UPON AN APPEAL TO THE SUPREME COURT, AFTER CONVICTION.

When bail taken. R. §§ 4966, 4981.

SECTION 4587. After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows:

1. If the appeal be from a judgment imposing a fine, upon the undertaking of bail that will pay the same, or such part of it as the supreme court may direct, and in all respects abide the orders and the judgment of the supreme court upon the appeal;

2. If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal. The bail may be taken, either by the court

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where the judgment was rendered, or the judge thereof, or the district court of the county in which he is imprisoned, or the judge thereof, or the judge of the circuit court of either of such counties, or by the supreme court, or a judge thereof, or by the clerk of either of such courts.

Qualifications of. R. § 4982.

SEC. 4588. The bail must possess the qualifications, must justify, and must be put in and taken in the manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, varying to suit the case, and the undertaking of the bail must be, in effect, as prescribed by the preceding section.

CHAPTER 41.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

With whom and effect. R. § 4983. C. '51, § 3232.

SECTION 4589. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court to which the undertaking, in case of bail, is required to be sent, the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody.

After giving bail. R. § 4984. C. '51, § 3233.

SEC. 4590. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking, and upon the deposit being made the bail shall be exonerated.

Bail after deposit of money. R. § 4985. C. '51, § 3234.

SEC. 4591. If money be deposited as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct in the order of allowance, that the money deposited be refunded by the clerk to the defendant, and it shall be refunded accordingly.

Money; how applied. R. § 4986. C. '51, § 3235.

SEC. 4592. When money has been deposited, if it remain on deposit at the time of a judgment against the defendant, the clerk shall, under the direction of the court, apply the money in satisfaction of so much of the judgment as requires the payment of money, and after paying the same shall refund the surplus, if any, to the defendant, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant.

CHAPTER 42.

OF SURRENDER OF THE DEFENDANT.

When and how done. R. § 4987. C. '51, § 3236.

SECTION 4593. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exon-

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eration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail must be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and must, by a certificate in writing, acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the district court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during term time, at the same term, and upon three clear days' notice thereof to the district attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated.

A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner here pointed out: *The State v. Tieman*, 39–474.

That the bail presented to the sheriff a certified copy of the bond, and in writing directed him to arrest defendant, *held*, not to impose any duty upon the sheriff, or be a surrender of defendant as here contemplated: *The State v. Kraner*, 50–582.

As to the effect of surrender of defendant by bail, after forfeiture and before judgment, see § 4600, and notes.

Arrest by bail. R. § 4968. C. '51, § 3237.

SEC. 4594. For the purpose of surrendering the defendant, the bail, at any time before they are finally charged, and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

On surrender, money returned. R. § 4989. C. '51, § 3238.

SEC. 4595. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made, or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or, if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon three clear days' notice to the district attorney, with a copy of the certificate.

CHAPTER 43.

OF FORFEITURE OF THE UNDERTAKING OF BAIL, OR DEPOSIT OF MONEY.

How forfeited. R. § 4990.

SECTION 4596. If the defendant fail to appear for arraignment, trial, or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited.

A forfeiture of the bail bond cannot be entered until the bond is before the court: *The State v. Klingman*, 14–404.

The forfeiture need not be taken on the very day on which accused was required to appear, but may be taken on any subsequent day of that or a

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succeeding term, unless defendant has been surrendered or discharged. It is not necessary that the accused or his bail have notice of the time when forfeiture will be claimed: *The State v. Brown*, 16–314.

If a forfeiture of bail is not entered at the first term, it will be presumed that the cause was continued by operation of law: *The State v. Merrihew*, 47–112, 119.

In a case where defendant was bound to appear before a justice, it was held that a default should not have been entered against him until he was formally called, and that the entry of default by the justice not showing that defendant was called, no breach of the bond was shown; but the record of the justice was held conclusive as to the appearance or non-appearance of defendant, and not to be contradicted by extrinsic evidence: *The State v. Gorley*, 2–52.

Failure of defendant to appear to challenge the grand jury does not constitute default: See § 4258, and notes.

As applicable to this section, see notes to § 4574.

SEC. 4597. If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record, that the forfeiture of the undertaking or deposit be discharged. Discharge of R. § 4991.

Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged: *The State v. Emily*, 24–24.

SEC. 4598. If the forfeiture is not discharged, the district attorney may, at any time after the adjournment of the court for the term, proceed by civil action only upon the undertaking of the bail. When not. R. § 4992.

SEC. 4599. The action on the undertaking must be in the court in which the defendant was or would have been required to appear by the undertaking; *provided*, that when the undertaking requires the defendant to appear before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, it shall be the duty of said justice, or court, or examining magistrate, upon the forfeiture of the undertaking, and within thirty days thereafter, to file the same, together with a copy of all his official entries in relation thereto, in the office of the clerk of the district court of the county; and thereupon it shall be the duty of the district attorney to proceed to collect the same by a civil action in the district court of said county, or any other court of said county having jurisdiction equal to the penalty of said bond. Action on undertaking. R. § 4993. 11 G. A., ch. 12.

Action upon a bail bond given for appearance upon a change of venue, should be brought in the county to which the venue is changed: *Decatur Co. v. Maxwell*, 26–398.

Suit for the penalty on the bail bond may be brought in the name of the county: *Shelby Co. v. Simmonds*, 33–345.

Under Rev. § 4993 (which did not contain the provisos of this section) *held*, that a bond for the appearance of a defendant before a magistrate might be sued on in the district court, and that the section was intended to apply only to actions on bail bonds given in that court: *The State v. Emerson*, 16–206.

The forfeiture, when recovered, goes to the school fund of the county where collected: See § 5370.

SEC. 4600. If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking. Surrender before judgment: effect. R. § 4994.

The arrest and detention in another county of a prisoner who is under bond for appearance, does not have the effect to release his sureties, in absence of a showing by them that proper steps were taken to secure his

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production by the state at the proper time: *The State v. Merrihew*, 47–112, 115.

Relief to the sureties upon the surrender or arrest of the defendant, is in the discretion of the court; but if there is no surrender or arrest, the court has no authority to grant relief; and, *held*, that the fact that accused was in the military service of the United States or another state, would not warrant such relief: *The State v. Scott*. 20–63.

The discretion here confered upon the court will not be interfered with upon appeal, unless an abuse of discretion is shown: *The State v. Kraner*, 50–575; *same v. same*, 50–582; and it would require a very strong showing of abuse to justify the supreme court in interfering with the discretion here conferred upon the lower court: *The State v. Horronemus*, 50–545.

CHAPTER 44.

OF THE RE-COMMITMENT OF THE DEFENDANT AFTER GIVING BAIL OR DEPOSITING MONEY.

Re-committed.
R. § 4995.
C. '51, § 3243.

SECTION 4601. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment in such action, or in which a judgment is to be carried into effect, may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof in the following cases:

1. When by reason of his failure to appear, he has incurred a forfeiture of his bail, or money deposited instead thereof;

2. When it satisfactorily appears to the court that his bail, either by reason of the death of one or more of them, or from any other cause, is insufficient, or have removed from the state;

3. When upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient.

Where an accused, who is out on bail, is re-arrested by the state, under the provisions of this section, he is completely in the custody of the state, and his sureties having no further control over him, are released from responsibility: *The State v. Holmes*, 23–458.

When the defendant is ordered arrested, on the ground that the bail taken by the committing magistrate is insufficient, and is so arrested, such bail is discharged: *The State v. Orsler*, 48–343.

Order: its requisites.
R. § 4996.
C. '51, § 3244.

SEC. 4602. The order for re-commitment of the defendant must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged.

Arrest.
R. § 4997.
C. '51, § 3245.

SEC. 4603. The defendant may be arrested pursuant to the order upon a certified copy thereof, in any county in the state.

Committal.
R. § 4998.
C. '51, § 3246.

SEC. 4604. If the order recite as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirements of the order.

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SEC. 4605. If the order be made for any other cause and the offense be bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order. New bail. R. § 4999. C. '51, § 3247.

CHAPTER 45.

OF UNDERTAKINGS OF BAIL, WHEN LIENS.

SECTION 4606. Undertakings of bail, from the time of filing the same in the office of the clerk of the district court in which they are required to be filed, shall be, and may be made, liens upon real estate of the persons acknowledging the same, in the same manner, to the same extent, and with like effect, as in judgments in civil actions. On real estate. R. § 5000.

SEC. 4607. They shall, when filed, be immediately docketed and indexed by the clerk of the court in which they are filed, as judgments in civil actions are required to be docketed and indexed. Same. R. § 5001.

SEC. 4608. Attested copies of such undertakings may be filed in the office of the clerk of the district court of the county in which the real estate is situated, in the same manner, and with like effect, as attested copies of judgments, and shall be immediately docketed and indexed, in the same manner. Same. R. § 5002.

CHAPTER 46.

OF JUDGMENTS FOR FINES, WHEN LIENS, AND HOW EXECUTIONS THEREON STAYED.

SECTION 4609. Judgments for fines, in all criminal actions rendered, are, and may be made, liens upon the real estate of the defendant, in the same manner, and with like effect, as judgment in civil actions. On real estate. R. § 5003.

SEC. 4610. The defendant may have a stay of execution for the same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein. Stay of execution. R. § 5004.

CHAPTER 47.

OF THE LIBERATION OF POOR CONVICTS.

SECTION 4611. When any person convicted of a criminal offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not com- When and on what conditions. R. § 5005. C. '51, § 3268.

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plied with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison if committed for no other cause, and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due, payable to the treasurer of the county where he was committed, on demand with interest, accompanied with a written schedule containing a true account of all his property, of every kind, by him signed and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county.

Actual imprisonment for thirty days is a prerequisite to the right to be liberated under this section: *In re Curley*, 34–184, 189.

When a prisoner is liberated under this section, upon giving note and schedule, he is entitled to have the judgment against him cancelled: *The State v. Van Vleet*, 23–168; *The State v. Peck*, 37–342; *The State v. Jordan*, 39–387; *In re Jordan*, 39–394.

Authority for imprisonment for non-payment of costs not being expressly given by § 4509, *held*, that this section does not warrant imprisonment for costs; and such imprisonment can be imposed only for non-payment of the fine: *The State v. Erwin*, 44–637.

False schedule. R. § 5006. C. '51, § 3269.

SEC. 4612. If such convict knowingly and wilfully make any false schedule, on oath, relating to the amount or nature of his property, he is guilty of perjury.

CHAPTER 48.

OF THE DISMISSAL OF CRIMINAL ACTIONS BEFORE AND AFTER INDICTMENT, FOR WANT OF PROSECUTION OR OTHERWISE.

When. R. § 5007. C. '51, § 3248.

SECTION 4613. When a person has been held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed unless good cause to the contrary be shown.

If not tried in certain time. R. § 5008. C. '51, § 3249.

SEC. 4614. If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed unless good cause to the contrary be shown.

Where the failure to have a trial results from the default of defendant, or from his seeking to have a verdict set aside, and without demand for trial or objection to continuance, he is not entitled to a dismissal as here provided: *The State v. Arthur*, 21–322.

Discharged on his own undertaking. R. 5009. C. '51, § 3250.

SEC. 4615. If the defendant be not indicted or tried as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking, or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued, but no such continuance can be extended beyond three terms of the court.

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Discharge of. R. § 5010.

SEC. 4616. If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated, and if money has been deposited instead of bail, it must be refunded to him.

By court or district attorney. R. § 5011. C. '51, § 3251.

SEC. 4617. The court may, either upon its own motion or upon the application of the district attorney, and in furtherance of justice, order an action after an indictment to be dismissed, but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record.

After a trial is entered upon, a dismissal of the proceedings by the court or the district attorney, except as specified in §§ 4613 *et seq.* will operate as an acquittal: *The State v. Calledine*, 8–288.

Nolle prosequi. R. § 5012. C. '51, § 3252.

SEC. 4618. The entry of a *nolle prosequi* is abolished, and neither the attorney general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense except as provided in the last section.

Bar. R. § 5013.

SEC. 4619. An order for the dismissal of the action as provided in this chapter, is a bar to another prosecution for the same offense if it be a misdemeanor; but it is not a bar if the offense charged be a felony.

CHAPTER 49.

OF THE INSANITY OF A DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

Trial. R. § 5015. C. '51, § 3260.

SECTION 4620. When a defendant appears for arraignment, trial, judgment, or on any other occasion when he is required, if a reasonable doubt arise as to his sanity, the court must order a jury to be empaneled from the trial jurors in attendance at the term, or who may be summoned by the direction of the court, as provided in this code, to inquire into the fact.

The prisoner's mental condition at the time he appears for arraignment, or upon any other occasion when required, is thus to be inquired into, and not his condition at the time of the commission of the offense. In determining as to whether a reasonable doubt exists as to his sanity, before empaneling the jury the judge may investigate the whole matter, obtain all the light reasonably attainable, and determine from all the circumstances as to whether the necessity for the inquiry exists: *The State v. Arnold*, 12–479.

It is not a ground of challenge to the panel on the trial that the jurors have heard the evidence on such preliminary inquiry as to the prisoner's sanity: *Ibid.*

Suspension. R. § 5016. C. '51, § 3261.

SEC. 4621. The arraignment, trial, judgment, or other proceedings, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury.

Order of procedure. R. § 5017.

SEC. 4622. The trial for the question of insanity must proceed in the following order:

1. The counsel of the defendant must offer the evidence in support of the allegation of insanity;

2. The district attorney must then offer the evidence in support of the case on the part of the state;

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3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted on either side, or both sides, without argument, the district attorney must commence, and the defendant's counsel conclude the argument to the jury;

5. If more than one counsel on each side argue the case to the jury, they must do so alternately:

6. The court shall then, on motion of either party, charge the jury. The provisions of this code, so far as the same are applicable and not herein changed, shall regulate the trial of the question of insanity.

If sane. R. § 5018. C. '51, § 3262.

SEC. 4623. If the jury find that the defendant is sane, the proceedings on the indictment shall be resumed.

If insane. R. § 5019. C. '51, § 3263.

SEC. 4624. If the jury find the defendant insane, the proceedings on the indictment shall be suspended until he becomes sane, and the court, if he deem his discharge dangerous to the public peace or safety, may order that he be in the meantime committed by the sheriff to the Iowa Insane Hospital, and that upon his becoming sane, he be delivered by the superintendent of the hospital to the sheriff.

Bail: released. R. § 5020. C. '51, § 3264.

SEC. 4625. The commitment of the defendant, as provided in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of the money he may have deposited instead of bail.

Detained in hospital. R. § 5021. C. '51, § 3265.

SEC. 4626. If the defendant be received into the hospital, he must be detained there until he becomes sane. When he becomes sane, the superintendent of the hospital must give notice of that fact to the sheriff and to the district attorney of the proper district. The sheriff must thereupon, without delay, bring the defendant from the hospital and place him in the proper custody until he be brought to trial or judgment, as the case may be, or be legally discharged.

Expenses. R. § 5022. C. '51, § 3267.

SEC. 4627. The expense of sending the defendant to the hospital, bringing him back, and any other expense incurred, are to be paid in the first instance by the county from which he was sent, but the county may recover from the estate of the defendant, if he have any, or from a relative, or another county, town, township, or city, bound to provide for or maintain him elsewhere.

Same. R. § 5023.

SEC. 4628. Sheriffs for delivering persons found to be insane, under the provisions of this chapter, are entitled to the same fees therefor, as are allowed for conveying convicts to the penitentiary.

CHAPTER 50.

OF SEARCH WARRANTS, AND PROCEEDINGS THEREON.

Search warrant: definition. R. § 5024. C. '51, § 3291.

SECTION 4629. A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

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Upon what grounds issued. R. § 5025. C. '51, § 3292.

SEC. 4630. It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or of any other person in whose possession it may be;

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, from a house or other place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.

[The words at the end of the section, following "control," as they stand in the original and here, are omitted in the printed code.]

Same. R. § 5026. C. '51, § 3293.

SEC. 4631. No search warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

Applicant examined. R. § 5027. C. '51, § 3294.

SEC. 4632. The magistrate must, before issuing a warrant, examine on oath the applicant therefor and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him by the person making it.

Affidavits must set forth. R. § 5028. C. '51, § 3295.

SEC. 4633. The affidavit must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

Magistrate issue. R. § 5029. C. '51, § 3296.

SEC. 4634. If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named for the property specified, and bring it before him.

Jurisdiction. R. § 5030.

SEC. 4635. The local jurisdiction of magistrates, in exercising the powers conferred on them by this chapter, is as defined in this code.

Form of warrant. R. § 5031.

SEC. 4636. The warrant may be, substantially, in the following form:

County of .....

The State of Iowa:

To any peace officer of said county:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application according to section four thousand six hundred and thirty of this chapter; or, if the affidavit be not positive, that there is probable cause for believing that

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—(stating the ground of the application in the same manner) you are therefore commanded, in the day time, (or at any time of the day or night, as the case may be, according to section four thousand six hundred and thirty of this chapter) to make immediate search on the person of C. D., or, in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be), for the following property, (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me, at (stating the place.)

Dated at ....., this .....day of....., A. D. 18..

E. F., justice of the peace.
(or as the case may be.)

By whom served.
R. § 5032.
C. '51, § 3297.

SEC. 4637. A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requisition, he being present and acting in its execution.

Officer may break open doors.
R. § 5033.
C. '51, § 3298.

SEC. 4638. The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

Same.
R. § 5034.

SEC. 4639. He may break open any outer or inner door or window of a house for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or, when necessary, for his own liberation.

Must be served in day time.
R. § 5035.

SEC. 4640. The magistrate must insert a direction in the warrant, that it be served in the day time unless the affidavit be positive that the property is on the person, or in the place to be searched; in which case, he may insert a direction that it may be served at any time of the day or night.

Return: in what time.
R. § 5036.
C. '51, § 3299.

SEC. 4641. A search warrant must be executed and returned to the magistrate by whom it was issued within ten days after its date. After the expiration of such time, the warrant, unless executed, is void.

Officer receipt for property.
R. § 5037.
C. '51, § 3300.

SEC. 4642. When the officer takes any property under the warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom it was taken or in whose possession it was found, or, in the absence of the person, he must leave it in the place where he found the property.

Return with inventory.
R. § 5038.
C. '51, § 3301.

SEC. 4643. The officer must forthwith return the warrant to the magistrate, and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following effect: "I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Magistrate give copy.
R. § 5039.
C. '51, § 3302.

SEC. 4644. The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

SEC. 4645. If the grounds on which the warrant was issued be

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controverted, the magistrate must proceed to take testimony in relation thereto. Take testimony. R. § 5040. C. '51, § 3303.

SEC. 4646. The testimony given by each witness must be reduced to writing and authenticated by the magistrate. Same. R. § 5041. C. '51, § 3304.

SEC. 4647. If it appear that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken. Property restored. R. § 5042. C. '51, § 3305.

SEC. 4648. If the property taken by virtue of a search warrant was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, as provided in the next chapter. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section four thousand six hundred and thirty of this chapter, the magistrate must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense which the property taken was used as a means of committing, or so intended to be, is triable. Same. R. § 5043. C. '51, § 3306.

SEC. 4649. The magistrate must annex together the affidavits taken before the issuing of the warrant, the warrant, the return, and the inventory, and return them to the next district court of the county, at or before its opening, on the first day of the next term thereof. Disposition of papers. R. § 5044. C. '51, § 3307.

SEC. 4650. Whoever, maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor. Maliciously suing out. R. § 5045. C. '51, § 3308.

SEC. 4651. A peace officer who, in executing a search warrant, wilfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor. Excess of authority. R. § 5046.

SEC. 4652. When a person charged with a felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or the order of the court in which the defendant may be tried. Searching person charged with felony. R. § 5047. C. '51, § 3309.

SEC. 4653. When any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under the direction of the court or magistrate. Property kept for evidence. R. § 5048.

This section and § 4659 simply direct the disposition to be made of stolen or embezzled property by the officer, and the receipts to be given therefor, but they in no manner affect the competency of testimony for either the state or the accused respecting such property: *The State v. Mullen*, 30–203.

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CHAPTER 51.

OF THE DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

Hold by officer. R. § 5049. C. '51, § 3253.

SECTION 4654. When property alleged to have been stolen or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

Delivered to owner. R. § 5050. C. '51, § 3254.

SEC. 4655. On sat sfactory proof of title by the owner of the property, the magistrate before whom the information is laid, or who shall examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

Same. R. § 5051. C. '51, § 3255.

SEC. 4656. If the property stolen or embezzled come into the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified as before provided.

Same. R. § 5052. C. '51, § 3256.

SEC. 4657. If the property stolen or embezzled has not been delivered to the owner, the court before which a conviction is had, may, on proof of his title, order its restoration.

When not claimed. R. § 5053. C. '51, § 3257.

SEC. 4658. If the property stolen or embezzled be not claimed by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody, must, on payment of the necessary expenses incurred for its preservation, deliver it to the auditor of the county to be applied under the direction of the board of supervisors thereof for the benefit of the poor of the county.

Officer give receipts for property. R. § 5054. C. '51, § 3258.

SEC. 4659. When the money or other property is taken from the defendant arrested upon a charge of a public offense, the officer taking it shall, at the time, give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statements are to be sent by the magistrate.

See note to § 4653.

CHAPTER 52.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

Jurisdiction. R. § 5055. C. '51, § 3322.

SECTION 4660. Justices of the peace have jurisdiction of, and must hear, try, and determine all public offenses less than felony, committed within their respective counties, in which the punish-

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ment described by law does not exceed a fine of one hundred dollars, or imprisonment thirty days.

To give the justice jurisdiction, the state need only prove that the offense was committed in the county. The township where committed is immaterial: *The State v. Gibson*, 29–295.

A justice has jurisdiction over offenses consisting in the violation of city ordinances. The jurisdiction of the mayor in such cases, under § 506, is not exclusive: *Jaquith v. Royce*, 42–406.

SEC. 4661. Criminal actions for the commission of a public offense must be commenced before a justice of the peace, by an information subscribed and sworn to, and filed with the justice. Action commenced by information. R. § 5056. C. '51, § 3323.

If the informant subscribes and swears to the affidavit at the end of the information, it is sufficient to comply with the provisions requiring the information to be subscribed and sworn to: *Divine v. The State*, 4–443.

SEC. 4662. Such information must contain:

1. The name of the county and of the justice where the information is filed; Information must contain. R. § 5057. C. '51, § 3324.

2. The names of the parties, if the defendants be known, and if not, then such names as may be given him by the complainant;

3. A statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense as near as may be.

It is not sufficient to charge the offense by its technical name; the acts which constitute the offense must be stated: *The State v. Murray*, 41–580.

SEC. 4663. The information may be substantially in the following form: Form of. R. § 5058. C. '51, § 3325.

.....county,
The State of Iowa,
against
A....B....., defendant.

Before justice.....(here insert the name of the justice.)

The defendant is accused of the crime (here name the offense.)

For that the defendant, on the.....day of.....A. D. 18.., at the (here name the city, village, or township,) in the county aforesaid, (here state the act or omission constituting the offense as in an indictment.)

Under these provisions the information is required to state the facts constituting the offense intended to be charged, with as much precision as an indictment: *The State v. Allen*, 32–491; *The State v. Bitman*, 13–485.

For form of indictment, see § 4297.

An information may be amended as to a material defect: *The State v. Merchant*, 38–375; *The State v. Doe*, 50–541.

SEC. 4664. The justice must file such information, and mark thereon the time of filing the same. Justice must file. R. § 5059. C. '51, § 3326.

SEC. 4665. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, and may be served in like manner. Warrant may issue. R. § 5060. C. '51, § 3327.

SEC. 4666. The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same. Service. R. § 5061. C. '51, § 3328.

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Appearance.
R. § 5062.
C. '51, § 3329.

SEC. 4667. When the defendant is brought before the justice, the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead. If he objects that he is wrongly named in the information, he must give his right name, and if he refuses to do so, or does not object that he is wrongly named, the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection.

Pleading.
R. § 5063.
C. '51, § 3330.

SEC. 4668. The defendant may plead the same pleas as upon an indictment. His pleas must be oral, and shall be entered on the docket of the justice.

Same.
R. § 5064.
C. '51, § 3331.

SEC. 4669. Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant.

A justice has no authority to try a prisoner after he has demanded a jury: *Dupont v. Downing*, 6–173.

CHANGE OF VENUE.

Change of venue.
R. § 5065.

SEC. 4670. If a change of venue be applied for, an affidavit must be filed stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant cannot obtain justice before him, as the affiant verily believes.

Same.
R. § 5066.
9 G. A. ch. 33.

SEC. 4671. If such affidavit be filed the change of venue must be allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, unless said justice be a party to the action, or is related to either party by consanguinity or affinity within the fourth degree, or where he has been attorney for either party in the action or proceeding, and in such case the justice before whom such action or proceeding is commenced, shall transmit all the original papers, together with a transcript of all his docket entries to the next nearest justice in the county against whom none of the above objections exist, who may require the defendant to plead as provided in section four thousand six hundred and sixty-seven of this chapter, if he has not already done so, and shall proceed to try the case, unless a jury trial be demanded, but no more than one change of venue in the same case shall be allowed.

Where the justice to whom the case is sent on change of venue, refuses to act, the officer having the defendant in charge has no authority to take him before another justice, and any action of such justice in the matter would be void: *Connell v. Stelson*, 33–147.

SELECTION OF JURY.

Jury trial.
R. § 5067.
C. '51, § 3332.

SEC. 4672. Before the justice has heard any testimony upon the trial, the defendant may demand a trial by jury.

When the police judge of a city is exercising the powers and jurisdiction of a justice (§ 543) a defendant on trial before him may demand a jury as here provided, but in a prosecution before such judge for the violation of a city ordinance the defendant is not entitled to a jury: *Zelle v. McHenry*, 51–572.

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Jury: how obtained. R. § 5068. C. '51, § 3333.

SEC. 4673. If a trial by jury be demanded, the justice shall direct any peace officer of the county to make a list in writing of the names of eighteen inhabitants of the county having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names.

Same. R. § 5069. C. '51, § 3334.

SEC. 4674. In case the prosecutor or the defendant neglect or refuse to strike out such names, the justice shall direct some disinterested person to strike out the names for either or both of the parties so neglecting or refusing, and upon such names being struck out, the justice must issue a venire directed to any peace officer of the county, requiring him to summon the twelve persons whose names remain upon the list, to appear before such justice at the time and place named therein, to make a jury for the trial of the cause.

Jurors summoned. R. § 5070. C. '51, § 3335.

SEC. 4675. The officer to whom such venire is delivered must forthwith summon such jurors, and return the venire to the justice within the time therein specified, naming the persons summoned and the manner of service.

Selection of jury. R. § 5071. C. '51, § 3336.

SEC. 4676. The names of the persons returned as jurors shall be written on separate ballots, folded each in the same manner as nearly as possible, and so that the name be not visible, and shall, under the direction of the justice, be deposited in a box or other convenient thing.

Same. R. § 5072. C. '51, § 3337.

SEC. 4677. The justice must then draw out six of the ballots successively, and if any of the persons whose names are drawn do not appear, or are challenged, or are set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

Challenges. R. § 5073. C. '51, § 3338.

SEC. 4678. The same challenges may be taken by either party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed.

Talesmen. R. § 5074. C. '51, § 3339.

SEC. 4679. If any of the jurors named in the venire cannot be found, or do not attend, or are challenged by either party, so that a sufficient number cannot be obtained, the justice may direct the officer to summon any bystander or others who may be competent, and against whom no sufficient cause of challenge appears, to act as jurors.

Failure to return: new venire. R. § 5075. C. '51, § 3340.

SEC. 4680. If the officer by whom the venire is received do not return it as required, he may be punished by the justice as for contempt, and the justice shall issue a new venire for the summoning of the same jurors, upon which the same proceeding shall be had as upon the one first issued.

Six a jury. R. § 5076. C. '51, § 3341.

SEC. 4681. When six jurors appear and are accepted, they shall constitute the jury.

Oath. R. § 5077. C. '51, § 3342.

SEC. 4682. The justice must thereupon administer to them the following oath or affirmation: You do swear, (or you do solemnly affirm, as the case may be,) that you will well and truly try the issue between the state of Iowa and the defendant, and a true verdict give according to the evidence.

TRIAL AND JUDGMENT.

Proceedings of jury. R. § 5078. C. '51, § 3343.

SEC. 4683. After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be de-

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livered in public. After which, they may either decide in court or retire for consideration.

Retire with officer: oath, R. § 5079. C. '51, § 3344.

SEC. 4684. If they do not immediately agree, they must retire with the officer, who shall be sworn to the following effect: "You do swear that you will keep the jury together in some private and convenient place, without meat or drink, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself, unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed."

Verdict. R. § 5080. C. '51, § 3345.

SEC. 4685. When the jury have agreed upon their verdict, they must deliver it publicly to the justice, who shall enter it on his docket.

Kept together. R. § 5081. C. '51, § 3346.

SEC. 4686. The jury must be kept together after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless, for good cause, the justice sooner discharge them.

Discharged. R. § 5082. C. '51, § 3347.

SEC. 4687. If the jury be discharged as provided in the last section, the justice may proceed again to the trial in the same manner as upon the first trial; and so on till a verdict is rendered.

Judgment. R. § 5083. C. '51, § 3348.

SEC. 4688. When the defendant pleads guilty, or is convicted, either by the justice or by a jury, the justice shall render judgment thereon, or fine, or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment.

Same. R. § 5084.

SEC. 4689. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied.

For similar provision, See § 4509.

Defendant discharged. R. § 5085. C. '51, § 3350.

SEC. 4690. When the defendant is acquitted, either by the justice, or by a jury, he must be immediately discharged.

Costs: appeal: notice: justice make statement: transcript: papers filed: court compel correction. R. § 5086.

SEC. 4691. When the defendant is acquitted, the justice shall, if he is satisfied that the prosecution is malicious or without probable cause, tax the costs against the prosecuting witness and render judgment therefor, from which he may appeal to the district court, by there giving notice to the justice that he claims such appeal, and the fact of the giving of such notice shall be entered on his record by the justice. If notice of appeal is given as herein contemplated, the justice shall, without delay, make out, sign, and file in the case a full and true statement of all the testimony admitted on the trial, and on which he bases his finding that the prosecution was malicious or without probable cause, and shall, without delay, make out a transcript of his docket entries, and shall file it, together with the statement of the testimony as aforesaid, and all other papers on file in the case, in the clerk's office of the district court of the county. And such appeal shall stand for hearing in said court at the term thereof commencing next after said papers are filed. And said court shall have full power to compel the correction by said justice of any error made apparent in his transcript, said statement of testimony, or in any papers returned by him, or may itself make the necessary correction therein, and may, on the papers, in case they shall be submitted to it, either affirm or reverse the judgment of the justice, or render such judgment as the justice should have rendered in the case.

Under the Rev. (which allowed appeals by the state), *held*, that although the justice did not tax up the costs to the prosecuting witness, the district court, on appeal, might do so under § 4702 (Rev. § 5100), and

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that the court might take such action without taking further evidence than that introduced on the trial, provided that was sufficient: *In re Trenchard*, 16–53.

As to appeal by prosecuting witness from a judgment for costs taxed against him, see *The State v. Roney*, 37–30.

Certificate of conviction. R. § 5087. C. '51, § 3351.

SEC. 4692. Whenever a conviction is had upon a plea of guilty, or upon trial, the justice must make and sign with his name of office, a certificate of such conviction, in which it shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof.

Judgment: how executed. R. § 5090. C. '51, § 3354.

SEC. 4693. The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice specifying the particulars of such judgment.

Fine. R. § 5091. C. '51, § 3355.

SEC. 4694. If a fine be imposed, and paid before commitment, it shall be received by the justice, and by him paid over to the county treasurer, within thirty days after the receipt thereof, for the use of the schools of the county, as provided by law.

Same. R. § 5092. C. '51 § 3356.

SEC. 4695. If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who must, in like manner, within thirty days after the receipt thereof, pay it into the county treasury, for the use of the schools in the county, as provided by law.

Same. R. § 5093. C. '51, § 3367

SEC. 4696. If the fine, or any part thereof, is paid to the justice or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay, with the county auditor.

How taken. R. § 5095.

SEC. 4697. The justice rendering a judgment against the defendant, must inform him of his right to an appeal therefrom, and make an entry on the docket of the giving of such information, and the defendant may thereupon take an appeal, by giving notice orally to the justice, that he appeals, and the justice must make an entry on his docket of the giving of such notice.

The mere filing of an appeal bond does not effect an appeal; it must be taken by giving notice as here provided, and if not so taken the case may be stricken from the docket of the district court: *The State v. Leyden*, 13–433.

There is no provision allowing a defendant in a criminal action to secure a review of errors of law only; §§ 3597 *et seq.* do not apply in criminal cases; appeal is the only remedy: *Part of Lot, etc., v. The State*, 1–507; *The State v. Flinn*, 51–133.

The provisions of this section are applicable to trials before a mayor for a violation of a city ordinance (§ 506): *The State v. Hoag*, 46–337.

Rev. § 5094, which allowed an appeal by the state, was held unconstitutional, so far as it authorized a retrial, in the district court, of a defendant acquitted before a justice having jurisdiction of the offense: *The State v. Van Horton*, 26–402.

Bail: form of bond. R. § 5096. C. '51, § 3359.

SEC. 4698. The justice must thereupon enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed, unless bail in that amount be put in, by an undertaking substantially in the following form:

County of.....

A. B. having been convicted before C. D., a justice of the peace of said county, of the crime of (here designate it generally as in the information), by a judgment rendered on the.....day

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of ...., A. D. 18—, and having appealed from said judgment to the district court of said county:

We, A. B. and E. F., (or I., E. F.) or (we, E. F. and G. H.,) hereby undertake that the said A. B. will appear in the district court of said county, at the term thereof to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we, (or I, as the case may be) will pay to the state of Iowa the sum of ....dollars, (the amount of bail fixed.)

A. B.
E. F.
(As the case may be.)

Acknowledged before, and accepted by me, at ...., in the township of ....., this .... day of ...., 18—.

C. D.,
Justice of the Peace.

This bond provides only for appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *The State v. Beneke*, 9–203.

Qualifications. R. § 5097.

SEC. 4699. The bail must possess the qualifications, must justify, and must be taken in the same manner prescribed in chapter thirty-eight of this title, and the same proceedings had in all respects, as nearly as applicable, except as in this chapter otherwise provided.

By whom taken. R. § 5098.

SEC. 4700. The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court or the clerk thereof.

Witness bound over. R. § 5099. C. '51, § 3360.

SEC. 4701. When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof a certified copy of the entries on his docket, together with all the undertakings and papers in the case.

TRIAL IN DISTRICT COURT.

Trial when appealed. R. § 5100. C. '51, § § 3361-4.

SEC. 4702. The cause, when thus appealed, shall stand for trial anew in the district court, in the same manner that it should have been tried before the justice, and as nearly as practicable as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced the substantial rights of either party; and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case according to the law, and shall give judgment accordingly.

An appeal waives any irregularities in the proceedings before the justice: *The State v. McCombs*, 13–426.

A defendant pleading guilty before the justice and sentenced upon such plea, may, on appeal, withdraw his plea in the district court, as provided in § 4362: *The State v. Kraft*, 10–330.

An appeal brings up the case on the merits. There is no way in which

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defendant may secure a review of errors of law: *The State v. Flinn*, 51–133; nor can the case be remanded with directions to grant a change of venue. It must be tried in the district court: *The City of Ottumwa v. Schaub*, 51–572.

SEC. 4703. No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed. Appeal not dismissed. R, § 5101.

If no plea was entered of record by the justice, it may be entered by the district court: *The State v. McCombs*, 13–426.

SEC. 4704. If any proceedings be necessary to carry the judgment upon the appeal into effect, they shall be had in the district court. District court. R. § 5102.

SEC. 4705. Either party may appeal from the judgment of the district court, to the supreme court, in the same manner as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail in like manner, and similar proceedings shall be had on the appeal in all respects, as nearly as applicable. Either party may appeal. R. § 5103. C. '51, § 3366.

SEC. 4706. The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken from a judgment prosecuted by indictment. Judgment upon appeal. R. § 5104. C. '51, § 3367.

CHAPTER 53.

OF PROCEEDINGS BEFORE POLICE AND CITY COURTS IN INCORPORATED CITIES AND TOWNS.

SECTION 4707. The proceedings in police and city courts in incorporated cities and towns, in criminal cases within their jurisdiction, shall be regulated by the provisions of this code, when not otherwise regulated by law. Proceedings in police courts. R. § 5105.

This section does not give a defendant on trial in the police court, for violation of a city ordinance, the right to a change of venue: *Zelle v. McHenry*, 51–572.

CHAPTER 54.

OF COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION 4708. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed: Offense may be compromised. exceptions. R. § 5106.

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or,

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3. With an intent to commit a felony.

Same: court may stay proceedings. R. § 5107.

SEC. 4709. If the party injured in such a case, appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case the reasons for the order must be set forth therein, and entered upon the minutes.

Order: bar. R. § 5108.

SEC. 4710. The order authorized by the last section is a bar to another prosecution for the same offense.

Public offense not compromised. R. § 5109.

SEC. 4711. No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter.

CHAPTER 55.

OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

Governor may remit fines and forfeitures. R. § 5116. C. '51, § 3278. 14 G. A. ch. 136, § 3.

SECTION 4712. The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree no pardon shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the general assembly thereon. Before presenting the matter to the general assembly for their action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, and if there be no such paper in such county, then in some adjoining county, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented.

No pardon for murder in the first degree without advice of general assembly.

Notice published.

A pardon does not operate to discharge the convict from the payment of costs adjudged against him on his trial: *Estep v. Lacy*, 35-419.

The governor may grant a pardon upon conditions; and where one condition was that he might revoke it upon such showing as he might deem sufficient, *held*, that the person pardoned could not claim a judicial investigation as to whether he had violated the condition: *Arthur v. Craig*, 48-264.

As to power of governor to pardon, see Const., art. 4, § 16.

Application for pardon. R. § 5120. 14 G. A. ch. 96.

SEC. 4713. When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the district attorney, or attorney general, by whom the action was prosecuted, or the clerk of such court, to furnish him without delay a copy of the minutes of the evidence taken on the trial, and of any other

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facts having reference to the propriety of his exercise of his powers in the premises. He may also take the testimony of such persons bearing upon such application as he may deem advisable, and for this purpose is authorized to administer the necessary oath. Any person who, in giving such testimony, shall swear falsely, and any person who shall knowingly and corruptly make any false statements in an affidavit intended to be used in connection with an application for pardon, or for remission of fine or forfeiture, shall be deemed guilty of perjury, and shall be punished therefor as provided by law.

When officer to make return to secretary of state. R. § 5121. C. '51, § 3279.

SEC. 4714. Whenever any convict is pardoned, or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, it is the duty of the officer to whom the warrant is directed, as soon as may be after executing the same, to make a return in writing thereon to the secretary of state, of his doings under the same, and sign the same with his name of office, and must also file in the office of the clerk of the court in which the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk.

CHAPTER 56.

OF ILLEGITIMATE CHILDREN.

Complaint may be made. R. § 1416. C. '51, § 848.

SECTION 4715. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding shall be entitled in the name of the state against the accused as defendant.

It has been held that proceedings under a similar statute (R. S. p. 200, § 5) were civil, and not criminal, in their nature, and that the mother might dismiss the prosecution and release defendant, if she chose, or receipt in full for the judgment: *Holmes v. The State*, 2 Gr. 501. Whether she might settle and receipt in full, so as to preclude the county from the right to resort to this proceeding to compel the putative father to execute the bond, with surety, to indemnify the county, *quære*, but she may thus preclude herself and the county from the right to maintain the proceeding to secure to her the maintenance of the child: *Blackhawk Co. v. Cotter*, 32–125.

The action cannot be maintained outside of the jurisdiction within which it arose, but a judgment therein is entitled to full faith and credit in any other state (so *held*, in relation to such proceeding under the statutes of Indiana): *The State of Indiana v. Helmer*, 21–370.

Section applied: *County of Mills v. Hamaker*, 11–206.

Filing: notice to be given. R. § 1417. C. '51, § 849.

SEC. 4716. Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action.

Lien created. R. § 1418. C. '51, § 850.

SEC. 4717. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the

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county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.

When complaint verified district judge to issue attachment.

SEC. 4718. If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

District attorney prosecute.

SEC. 4719. The district attorney, on being notified of the facts justifying a complaint as contemplated in section four thousand seven hundred and fifteen of this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant.

Issue: how tried.
R. §§ 1419, 1422.
C. '51, §§ 851, 854.

SEC. 4720. The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action.

Judgment and execution.
R. §§ 1423–4.
C. '51, §§ 855–6.

SEC. 4721. If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums and in such manner as the court shall direct, and with the cost of the suit; and the clerk may issue execution for any sum ordered to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court.

The judgment may be enforced in another state: *The State of Indiana v. Helmer*, 21–370.

Court may enlarge, diminish, or vacate order.

SEC. 4722. The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.

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TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF PRISONS, AND OF THE PENITENTIARY, ITS GOVERNMENT AND DISCIPLINE.

CHAPTER 1.

OF IMPRISONMENT FOR PUBLIC OFFENSES, AND THE DISCIPLINE OF PRISONS.

Jails: for what used. R. § 5122. C. '51, § 3103.

SECTION 4723. The common jails now erected, or which may hereafter be erected in the several counties in this state, in charge of the respective sheriffs, are to be used as prisons:

1. For the detention of persons charged with an offense, and duly committed for trial or examination;

2. For the detention of persons who may be duly committed to secure their attendance as witnesses on the trial of any criminal cause;

3. For the confinement of persons pursuant to sentence upon conviction for any offense, and of all other persons duly committed for any cause authorized by law;

4. The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as the courts and magistrates of this state.

Keeper's duty. R. § 5123. C. '51, § 3104.

SEC. 4724. It is the duty of the keeper of the jail of the county to see that the same is constantly kept in a cleanly and healthy condition, and he must pay strict attention to the personal cleanliness of all the prisoners in his custody as far as may be. Each prisoner must be furnished daily with as much clean water as may be necessary for drink and for personal cleanliness, and with a clean towel and shirt once a week, and must be served three times each day with wholesome food, which must be well cooked, and in sufficient quantity.

Sheriff's duty. R. § 5124. C. '51, § 3105.

SEC. 4725. The sheriff of the county must keep a true and exact calendar of all prisoners committed to any prison under his care, which calendar must contain the names of all persons who are committed, their place of abode, the time of their commitment, the time of discharge, the cause of commitment, the authority that committed them, and description of their person; and when any prisoner is liberated, such calendar must state the time when, and the authority by which such liberation took place; and if any person escape, it must state particularly the time and manner of such escape.

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Calendar for district court
R. § 5125.
C. '51, § 3106.

SEC. 4726. At the opening of each term of the district court within his county, the sheriff must return a copy of such calendar under his hand to the judge of such court; and if any sheriff neglect or refuse so to do, he shall be punished by fine not exceeding one hundred dollars.

What furnished prisoners.
R. § 5127.
C. '51, § 3108.

SEC. 4727. The keeper of each jail must furnish necessary bedding, clothing, fuel, and medical aid for all prisoners under his charge, and keep an accurate account of the same.

When jail takes fire.
R. § 5128.
C. '51, § 3109.

SEC. 4728. Whenever, by reason of any jail being on fire, or any building contiguous or near to a jail being on fire, there be reason to apprehend that the prisoners confined in such jail may be injured or endangered thereby, the sheriff or keeper of such jail may, at his discretion, remove such prisoners to some safe and convenient place, and there confine them so long as may be necessary to avoid such danger.

INSPECTORS OF JAILS.

Who constitute.
R. § 5129.
C. '51, § 3110.

SEC. 4729. In each county of this state the judge of the circuit court and district attorney are inspectors of the jails respectively, and have power, from time to time, to visit and inspect the same, and inquire into all matters connected with the government, discipline, and police of such prisons.

Their duty.
R. § 5130.
C. '51, § 3111.

SEC. 4730. It is the duty of such inspectors to visit and inspect such prisons twice each year, and at the next district court which is thereafter held in their county, to present to such court on the first day of its sitting, a detailed report of the condition of such prisons at the time of such inspection.

Report.
R. § 5131.
C. '51, § 3112.

SEC. 4731. Such report must state the number of persons confined in such prison, and for what cause respectively, the number of persons usually confined in one room, the distinction, if any, usually observed in the treatment of the prisoners, the evils, if any, found to exist in such prisons; and particularly whether any provisions of this chapter have been violated or neglected, and the cause of such violation or neglect.

Right to inspect: given fully.
R. § 5132.
C. '51, § 3113.

SEC. 4732. The keepers of such prisons shall admit the said inspectors, or any of them, into any part of such prisons, to exhibit to them on demand, all the books, papers, documents, and accounts pertaining to the prison or to the prisoners confined therein, and to render them every other facility in their power to enable them to discharge the duties above prescribed.

May swear officers.
R. § 5133.
C. '51, 3114.

SEC. 4733. For the purpose of obtaining the necessary information to enable them to make such reports as is above required in this chapter, the said inspectors have power to examine on oath, to be administered by either of them, any of the officers of such prison, or any of the prisoners therein.

Refractory prisoners.
R. § 5134.
C. '51, § 3115.

SEC. 4734. If any person confined in any jail upon a conviction or charge of any offense, is refractory or disorderly, or if he wilfully destroy or injure any article of bedding, or other furniture, door, or window, or any other part of such prison, the sheriff of the county, after due inquiry, may chain and secure such person, or cause him to be kept in solitary confinement not more than ten days for any one offense; and during such solitary con-

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finement he may be fed with bread and water only, unless other food is necessary for the preservation of his health.

Expenses of jail. R. § 5135. C. '51, § 3116.

SEC. 4735. All charges and expenses of safe keeping, and maintaining convicts and persons charged with public offenses and committed for examination or trial to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the board of supervisors; except prisoners committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county.

This section does not authorize the sheriff to receive any further fees for taking charge of prisoners, etc., than as provided by § 3788: *Grubb v. Louisa Co.*, 40–514. And the county is not liable for the service of a jailor employed by the sheriff: *McDonald v. Woodbury Co.*, 48–404.

While the sheriff is entitled to reasonable compensation as here provided, he cannot sue the county there or until his account has been presented for settlement and allowance: *Marvin v. Fremont Co.*, 11–463.

HARD LABOR.

By whom and when labor must be performed. R. § 5126. C. '51, § 3107. 13 G. A. ch. 69, § 1.

SEC. 4736. Any able-bodied male person over the age of sixteen years, and not over the age of fifty years, now or hereafter confined in any jail in this state, under the judgment of any court of record or of any other tribunal authorized to imprison for the violation of any law, ordinance, by-law, or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such court or other tribunal, when passing final judgment of imprisonment, whether for nonpayment of fine or otherwise, shall have the power to determine, and shall determine, whether such imprisonment shall be at hard labor or not.

Where the judgment of a court of general jurisdiction is that the defendant shall be imprisoned at hard labor as provided by this section, it will be presumed that the facts as to age, etc., necessary to warrant such judgment were shown to the court: *The State v. Winstrand*, 37–110, 113.

A judgment may direct that defendant be confined at hard labor at the rate of $1.50 per day (§ 4741), but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is to be determined by § 4509: *The City of Keokuk v. Dressell*, 47–597; *The State v. Jordan*, 39–387; *In re Jordan*, 39–394; *The State v. Anwerda*, 43–151.

On highways, public grounds, and buildings. Same, § 2.

SEC. 4737. Such labor may be on the streets or public highways on or about public buildings or grounds, or at such other places in the county where confined, and during such reasonable time of the day as the person having charge of the prisoners may direct, and not exceeding eight hours per day.

Section considered: *In re Jordan*, 39–394; and see notes to § 4736.

When sheriff to superintend. Same, § 3.

SEC. 4738. In case the sentence be for the violation of any of the statutes of the state, the sheriff of the county where the imprisonment is, shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, to work with, at the expense of the county in which the convict is confined, and such county shall be entitled to his earnings.

SEC. 4739. When the imprisonment is pursuant to the judg-

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When marshal shall. Same, § 4.

ment of any court, police court, police magistrate, mayor, or other tribunal of any incorporated city or town, for the violation of any ordinance, by-law, or other regulation, the marshal shall superintend the performance of the labor herein contemplated, and shall furnish the tools and materials, if necessary, at the expense of the city or town requiring the labor, and such city or town shall be entitled to the earnings of its convicts.

Officer to prevent escapes. Same, § 5.

SEC. 4740. The officer having charge of any convicts for the purpose specified in this chapter, may use such means as, and no more than, are necessary to prevent escape, and if any convict attempt to escape, either while going from or returning to the jail, or while at labor, or at any time, or if he refuse to labor, the officer having him in charge, after due inquiry may, to secure such person, or to cause him to labor, use the means authorized by section four thousand seven hundred and thirty-four of this chapter; *provided*, such punishment shall be inflicted within the jail or jail enclosure for refusal to work and shall not be considered as any part of the time for which the prisoner is sentenced.

Prisoners credited for labor. Same, § 6.

SEC. 4741. For every day's labor performed by any convict under the provisions hereof, there shall be credited on any judgment for fine and costs against him, the sum of one dollar and fifty cents, and no person shall be entitled to the benefits of the law providing for the liberation of poor convicts, if, in the opinion of the sheriff, the judgment may be satisfied by the labor of the person as herein authorized.

Cruel treatment of prisoners. Same, § 7.

SEC. 4742. If any officer or other person treat any prisoner in a cruel or inhuman manner, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment.

Duty of officer in charge of prisoners. Same, § 8.

SEC. 4743. The officer having such prisoner in charge shall protect him from insult and annoyance, and communication with others while at labor, and going to and returning from the same, and he may use such means as are necessary and proper therefor; and any person persisting in insulting, and annoying, or communicating with any prisoner, after being commanded by such officer to desist, shall be punished by a fine not exceeding ten dollars, or by imprisonment not exceeding three days.

CHAPTER 2.

OF THE PENITENTIARY OF THE STATE, AND THE GOVERNMENT AND DISCIPLINE THEREOF.

At Fort Madison. R. § 5136. C. '51, § 3117.

SECTION 4744. The penitentiary at Fort Madison, in the county of Lee, shall be maintained as the penitentiary of this state in which convicts sentenced for life or any period of time shall be confined, employed, and governed, as hereinafter provided.

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WARDEN.

Warden. R. § 5173.

SEC. 4745. It shall be governed by a warden, subject to the supervision of the governor of the state.

How chosen and term of office: duties. R. § 5174.

SEC. 4746. The warden shall be elected by joint ballot of the general assembly of the state of Iowa, and shall hold his office for two years from the date of his election, and until his successor is elected and qualified. He shall be the general financial and superintending agent of the state for said institution, and shall be held responsible for its government and disciplinary regulations, for the receipt and disbursement of all moneys that may be appropriated for building, construction, general support, the payment of indebtedness, or salaries of his under-officers, or for any other purpose whatever in connection with said institution.

To give bond and take oath: conditions of. R. § 5175.

SEC. 4747. Before entering upon the discharge of his duty, he shall execute a bond payable to the state of Iowa in the penal sum of fifty thousand dollars, with not less than five free-hold securities, to be approved by the governor, conditioned that he will faithfully discharge all of his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys that may come into his hands by virtue of his office, to the purpose for which they are appropriated, and none other; that he will cause to be kept a fair, intelligible, and business-like record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe-keeping, and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden, or guard, through favoritism or other personal consideration; and no one without due and proper regard to their qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and as much oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing, or any other thing for the use of said penitentiary, whereby any profit may inure to him privately, and that at the expiration of his official term he will surrender all books, papers, records, moneys, or other property or securities belonging to said institution to his successor in office. Said warden shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law, according to the best of his ability, which bond shall be filed with the secretary of state.

Reside in penitentiary: appoint clerk. R. § 5142. C. '51, § 3128.

SEC. 4748. The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary, and of all the interests of the state therewith connected, and shall appoint some suitable person as clerk, who shall also act as commissary under the direc-

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tion of the warden, and one deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge, provided that at no time shall there be less than thirteen guards.

To make monthly report to governor. R. § 5177.

SEC. 4749. The warden shall render to the governor of state, between the first and tenth day of every month, and as nearly as practicable every thirty days, and as much oftener as the governor may require, a statement under oath, of all the transactions of the institution, including the receipts and disbursements of funds, for which disbursements he shall, in all cases, present the proper voucher, the entering into or discharging contracts, the reception and discharge of convicts, the construction, altering, or repairing the buildings, walls, etc., and of all his official acts and doings for thirty days next preceding the presentation of said monthly report, which statement must contain an exact account of all moneys received, together with a copy of all proposals received by him and from what source, and on what account, and of all moneys paid out, and for what purpose the same were expended, and a succinct account of all his doings as warden during the said period, and a reference to his authority for such action.

Report preceding each meeting of general assembly. R. § 5178.

SEC. 4750. The warden shall, in addition to the monthly report provided for in the preceding section, on or before the twentieth day of December next preceding the commencement of any regular session of the general assembly, report to the governor, under oath, all his acts and doings for the preceding two years, and the general condition of the institution financially and otherwise, together with the estimates necessary for the next succeeding two years, specifying distinctly the items for which those estimates and the basis upon which his calculations are made, and the governor may require a like or any other report before any special session of the general assembly.

Must enforce discipline and see that officers perform their duties. R. § 5179.

SEC. 4751. The warden shall see that the laws and disciplinary rules and regulations of the institution are faithfully executed by his under-officers, and obeyed by the convicts; and it shall be his duty, upon failure or refusal of any clerk, deputy warden, or guard, to discharge their respective duties agreeably to law, forthwith to discharge such delinquent, and fill the vacancy by the appointment of another person; and disobedience of the convicts shall be punished by the infliction of such penalties as are now provided for by law, and the rules which are now or may hereafter be prescribed for the government of said institution; *provided*, that it shall be the duty of the warden to keep a register of all punishments inflicted on any convict for disobedience, disorderly conduct, indolence, and of the cause for which they were inflicted.

CLERK.

Appointed by warden to give bond and take an oath; conditions of bond. R. § 5180.

SEC. 4752. The clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to said warden. Before he enters upon the discharge of his duties he shall give bond to the state of Iowa in the penal sum of five thousand dollars, with two or more free-hold securities, to be approved by the governor, conditioned that he will keep a fair, honest, impartial, and faithful

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record of the affairs of the penitentiary, written in a fair round hand, with pro er indices, upon a system of book-keeping which shall enable him at all times to present in a plain and intelligible style the financial condition of the institution; that he will discharge all his duties of clerk and commissary faithfully, and with direct reference to the best interests of the penitentiary, agreeably to law, and that he will not become interested directly or indirectly in any contract for furnishing supplies of any nature, kind, or description for the use of said institution, and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall, also, take and subscribe an oath, which shall be indorsed on the back of said bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions, stipulations, and requirements of his bond, and will faithfully discharge his duty as clerk and commissary during his continuance in office agreeably to law, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and suit thereon may be brought for the violation of any of its conditions in the name of the state, for the use of the warden or any other person injured by such violation.

Accounts kept by clerk: mode of keeping books. R. § 5181.

SEC. 4753. Among other entries to be made in the books of the institution, the clerk shall open a separate account in said books with the state, and he also shall have a cash, prisoner's fund, construction, repairing, provision, bedding and lights, fuel, salaries, hospital, and miscellaneous accounts, and an account with the lessees of convict labor, and an account with each officer and guard; and all the entries belonging to any one of the classes, whether they are d bits or credits, shall be made under the appropriate head; and, in order to enable the warden to render his statements herein provided for to the governor, the clerk shall, whenever required by the warden, make out a complete balance sheet and swear to the same.

DEPUTY WARDEN.

Appointed by warden: bond and oath of: duties defined. R. §§ 5182, 5186.

SEC. 4754. The deputy warden shall receive his appointment from the warden, and shall hold his office during the pleasure of the warden; and he shall give bond and security for a like amount, and in the same manner; and take a like oath, and be in all respects subject to like responsibilities with the clerk, so far as the same are applicable. He shall keep a regular time table of the convict labor and record the same in a book to be kept for that purpose, and he shall, moreover, keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor to the clerk at the close of each day.

[As amended by 18th G. A., ch. 154, § 3, striking out the latter part of the section as it originally stood, which provided for diminution of punishment on account of good behavior. The other sections of that act, regulating the same matter, are ins rted following § 4806.]

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GUARDS.

Appointed by warden: bond and oath. R. § 5183.

SEC. 4755. Each of the guards, when appointed, shall give bond to the warden, with security to be approved of by said warden, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duty as such guard, agreeable to law and the rules and regulations of the prison, and the lawful orders of the warden; and shall also take and subscribe an oath, which shall be indorsed on the back of the bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions and stipulations of his bond; which bond shall be filed in the office of the clerk of the penitentiary, and a note thereof made on the record as to the date, amount, and name of the principal and his securities.

Term of office. R. § 5184.

SEC. 4756. Guards thus appointed and qualified shall hold their offices during the pleasure of the warden.

CHAPLAIN.

Warden to appoint: duties. R. § 5185.

SEC. 4757. The warden shall appoint some suitable, discreet, minister of the gospel chaplain of the penitentiary, who shall hold his office at the pleasure of the warden, and who shall give as much of his time as the condition and employment of the convicts will reasonably justify, in giving them moral and religious instruction, and who shall, at all times, when, in the opinion of the warden, the necessary labor of the convicts or the safety of the prison do not forbid it, have access to the convicts for that purpose; and should any of the convicts be illiterate, the chaplain should so instruct them as that he may sustain the character among them of teacher as well as of spiritual adviser and minister.

PHYSICIAN.

Duties. 9 G. A. ch. 48, § 1.

SEC. 4758. The physician of the penitentiary shall visit the prison once every day, and oftener if necessary; examine personally all sick or complaining prisoners reported to him, and prescribe such treatment as in his judgment their cases require.

Keep record. Same, § 2.

SEC. 4759. He shall keep a book, to be called the hospital record, in which he shall accurately record the name of the patient, the age, occupation, symptoms, disease and treatment.

Examine prisoner on reception. Same, § 3.

SEC. 4760. He shall examine every prisoner upon his reception, and make a record of his condition, as to age, constitution, habits, health, ability or disability.

Post mortem examination. Same, § 4.

SEC. 4761. When a prisoner dies, the physician may have the privilege of a post-mortem examination, unless objection be made by the relatives of such patient, and shall record the result of it, making reference in the record of treatment.

Purchase medicines, etc. Same, § 5.

SEC. 4762. He shall have power and authority to purchase by concurrence with and assent of the warden, such medicines and other things as, in his judgment, are necessary for the use of the hospital, and furnish the clerk immediately with the bills of purchase, who shall compare them with the articles received.

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Must conform to rules. Same, § 6.

SEC. 4763. He shall, when visiting the prison, strictly conform to the rules and regulations thereof; he shall express no opinion of the ability or disability of a prisoner except in his record, which shall be authority.

Graduate of medical school. Same, § 7.

SEC. 4764. He shall be a graduate of some regularly established medical college, and must be possessed of surgical instruments sufficient to perform any surgical operation liable to be required.

Warden to appoint. Same, § 8.

SEC. 4765. He shall receive his appointment from the warden, with the concurrence of the governor of the state.

Steward: duties of. Same, § 9.

SEC. 4766. There shall be a steward nominated by him, who shall receive his appointment from the warden, and whose duty it shall be to dispense the medicine prescribed by the physician, and to do all other things necessary to carry out the treatment as directed. He shall act as guard or keeper of the prisoners in the hospital, and shall receive the same wages as other day guards or keepers, and be subject to the same rules and regulations.

PENALTIES.

Officers receiving perquisites. R. § 5168.

SEC. 4767. No officer or other person employed in or about the penitentiary shall be permitted to receive in any way, perquisites for themselves or families, except that the warden shall keep his office, and reside with his family in the penitentiary, and shall be furnished with a garden of a quarter of an acre, and with fuel, lights, provisions for his family and guests, and stationery, from the stock provided for the use of the prison. Nor shall they be permitted to receive any compensation or reward from any contractor, under penalty of dismissal from their office, and forfeiture of one month's pay; and if any officer procure the escape of any convict, or connive at, aid or assist in the escape of any convict from the penitentiary, whether such convict escape or not, he shall be guilty of felony, and shall, upon conviction thereof, be sentenced to hard labor in the penitentiary for any term not less than one nor more than three years.

Officers not interested in contracts. R. § 5170.

SEC. 4768. No officer of the Iowa penitentiary shall be interested directly or indirectly in contracts for furnishing such penitentiary with provisions, clothing, or other necessaries, to be used in any manner by the inmates of such penitentiary, or for the use of such penitentiary, nor shall any or either of such officers be concerned or interested in any manner in contracts for buildings of any kind connected with such penitentiary, or for materials to be used in any such buildings, or in any contract for the labor of any convict.

Punishment for. R. § 5171.

SEC. 4769. Should any officer, in the contemplation of the preceding section, be, or become, in any manner interested in contracts for furnishing provisions, clothing, or other necessaries for the use of such penitentiary, or be, or become, in any manner interested in contracts for buildings, or the construction of buildings of any kind, in any way connected with such penitentiary, or for furnishing material of any kind for the construction of such buildings, or in any contract for the labor of convicts, such officer so interested shall, on proof being made of his being so interested,

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be removed from office, and shall forfeit any interest he may have in any such contract, and on conviction of being so interested by a court of competent jurisdiction, shall be fined in any sum not more than two thousand dollars nor less than five hundred dollars.

Hard labor. R. § 5137. C. '51, § 3118.

SEC. 4770. All punishment in the penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline for the government and good order of the convicts.

Prisoners of U. S. R. § 5138. C. '51, § 3119.

SEC. 4771. Convicts sentenced to hard labor in the penitentiary for life, or any term of time by any court of the United States held within this state, must be received into the prison by the warden thereof, when delivered by the authority of the United States, and there kept in pursuance of their sentences.

Process executed by warden of deputy. R. § 5141. C. '51, § 3130.

SEC. 4772. The warden or his deputy shall serve, execute, and return all process within the precincts of the prison, and such process may be directed to him or his deputy accordingly; and for the doings of his deputy, the warden, as well as the deputy, is answerable.

SUPPLIES FURNISHED ON CONTRACT.

Estimates to be made by warden and sealed proposals advertised for. R. § 5145. C. '51, § 3131.

SEC. 4773. All articles of food, clothing, bedding, raw materials for manufacture, fuel, and other articles that may be necessary for the use of the prison, must be contracted for by the year, when such contracts can be advantageously made, in the following manner: The warden shall annually make an estimate of the quantity of each article necessary for the then next ensuing year, commencing on the first day of October of each year, and ending on the last day of September thereafter, and advertise that he will receive sealed proposals for furnishing and delivering at the prison such articles, or any of them, until the first day of October, payments to be made quarterly, stating the quantity and quality of each article required, the time when each article must be delivered, and the terms of payment; which advertisement he shall cause to be inserted in one or more of the papers published in Fort Madison, and in one or more of the papers published at the seat of government of this state, three weeks successively, the last publication to be at least one month before the first day of October in each year; *provided*, that the estimates of the warden shall first be submitted to, and approved by the governor and council before advertisement thereof; and *provided further*, that all bills shall be submitted to the executive council, and that the awards of contracts for supplies shall be approved by such council.

Estimates to be approved by executive council.

[As amended by 17th G. A., ch. 186, § 1, which added the provisos. Sec. 2 of that act, inserted following § 4806, makes this section, as amended, applicable to the penitentiary at Anamosa.]

Warden to take bills of supplies: duty of clerk. R. § 5148. C. '51, § 3134.

SEC. 4774. The warden must take bills of the quantity and price of the supplies furnished for the prison at the time of delivery, and must exhibit the same to the clerk, who must compare the same with the articles delivered; if the bills are found correct he must enter them with the date in a book to be kept for that purpose; in like manner, bills shall be taken and entered of all services rendered for the prison; if any such bill be found

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incorrect the clerk shall omit to enter it, and immediately give notice to the warden that the error may be corrected.

SEC. 4775. No contract can be accepted by the warden unless the contractor give satisfactory security for the performance of it. Contractor to give security. R. § 5149. C. '51, § 3135.

ESCAPE—DISCHARGE.

SEC. 4776. When any convict escapes from the penitentiary, the warden shall take all proper measures for his apprehension; and for that purpose he may offer a reward not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict. When prisoner escapes. R. § 5160. C. '51, § 3147.

SEC. 4777. No convict can be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority. No discharge until full term is served. R. § 5161. C. '51, § 3148.

SEC. 4778. The warden shall receive and take care of any property that a convict may have with him at the time of his entering the penitentiary, and, when it may be convenient, to place the same at interest for the benefit of such convict; of which property the warden must keep an account, and pay the same to such convict on his discharge, or, in case of his death, to his representatives, unless the same have been otherwise taken and legally disposed of. Warden to take care of property of convict R. § 5162. C. '51, § 3149.

SEC 4779. When any convict is discharged from the penitentiary, the warden shall furnish transportation to said convict to any point within this state that is nearest to his former home or friends; or may furnish such transportation to any point of a like distance without the state. Said transportation shall be furnished by means of tickets for passage, an account of which shall be kept by the warden and paid by the state. The warden shall also furnish to said convict a suit of common clothing and a sum of money not less than three nor more than five dollars. Clothing, money, and transportation furnished on discharge. R. § 5163. C. '51, § 3150. 14 G. A. ch. 51.

[As amended by 15th G. A., ch. 48, which inserted the provision as to transportation to point without the state.]

SEC. 4780. The warden shall demand and receive of each person, not exempt by law, except relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, a sum of twenty-five cents, of which the warden must keep an account, and which money shall be applied for the purchase of books for the use of the prison, under the direction of the inspectors. Visitors. R. § 5164. C. '51, § 3151.

SEC. 4781. The following persons are authorized to visit the penitentiary at pleasure: The governor, secretary, auditor, and treasurer of state, members of the general assembly, judges of the supreme, district and circuit courts, district attorneys of any of the districts of this state, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the walls of the prison where convicts are confined except by special permission of the warden. Who has a right to visit. R. § 5165. C. '51, § 3152.

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Monthly report to auditor of state. R. § 5166. C. '51, § 3153.

SEC. 4782. The warden shall see that rigid economy is practiced in all matters pertaining to the prison and the employment of the convicts, and that duplicate receipts be taken for all expenditures made on account of the prison, one copy of which must be forwarded to the auditor of state monthly.

APPROPRIATION—SUPPORT OF CONVICTS.

Salaries of officers. R. § 5192. 9 G. A. ch. 37; ch. 48, § 9. 12 G. A. ch. 69, § 1.

SEC. 4783. There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, so much as may be necessary to pay monthly to the persons herein named the following sums, to wit: To the warden, one hundred and sixty-six dollars and sixty-seven cents; to the deputy warden, one hundred dollars; to the clerk, seventy dollars; to the surgeon, fifty dollars; to the chaplain, who shall also perform the duties of teacher, seventy dollars; to the hospital steward, fifty dollars; to the turnkey, wall guards, shop guards and night guards, fifty dollars.

Warden shall have rent, fuel, etc.

Provided, that the warden shall be furnished, in addition to the above, with house rent, fuel and lights for himself and family at the expense of the state, but no further perquisites or allowances of any character shall be permitted; and,

Shall file affidavit with auditor of state.

Provided, that on the last of each month the warden shall make and file with the auditor of state an affidavit that during said month he has not directly or indirectly converted to his own use any provisions, supplies, waste, or materials belonging to the state, nor permitted the same to be done by any officer or person, except as herein provided, which said affidavit must be filed before any warrant shall issue to the warden for his own compensation, as provided in this section; and,

Provisions to apply to Anamosa penitentiary.

Provided, further, that the salaries and compensations allowed in this section shall also apply to the additional penitentiary at Anamosa, and that the warden be authorized to appoint a deputy.

[The original section was repealed by 16th G. A., ch. 156, and a substitute enacted; this was repealed by 17th G. A., ch. 167, and another substitute enacted, which, in turn, was repealed by 18th G. A., ch. 200, and the foregoing enacted as a substitute.]

How paid. 12 G. A. ch. 69, § 2.

SEC. 4784. The above sum shall be paid to the warden on his requisition, monthly, accompanied with a detailed statement, in such form as the auditor shall prescribe, of the number and kinds of guards employed; and each statement shall also exhibit the payments made by the money drawn on the previous requisition.

Support of convicts. Same § 3.

SEC. 4785. For the general support of the convicts, there is hereby appropriated the monthly sum of seven dollars, or so much thereof as may be necessary to each convict in said prison, to be estimated by the average number for the preceding month, subject, however, to a deduction from the whole amount for the month of the sum charged to the contractors for convict labor for that month.

[As amended by 17th G. A., ch. 83, substituting "seven" in the second line for "eight and one-third."]

How paid. Same, § 4.

SEC. 4786. The sum appropriated by the last section shall be paid on the requisition of the warden, accompanied with a statement of the number of convicts in his charge, and the amount charged to the contractors for that month.

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When contractors fail to pay. Same, § 5.

SEC. 4787. If, for any reason, the amount charged to the contractors for any month cannot be collected in time to be available for such support, the governor may, by his order, direct the payment of the whole or any part of the eight and one-third dollars per month.

MISCELLANEOUS PROVISIONS.

Auditor of state to collect debts due. Same, § 6.

SEC. 4788. The state auditor is required to take immediate steps to cause to be collected and accounted for all those debts owing to the state on account of the penitentiary, or in any manner connected therewith, and all outstanding claims of whatever nature which the state may have on that account, and to that end he may, if he finds it necessary, place any claim in the hands of the attorney general for prosecution.

[The word "whatever" in the fifth line as in the original, is "any" in the printed code.]

Warden to collect debts by suit. 9 G. A. ch. 156, § 2.

SEC. 4789. In all cases where claims have accrued, or may hereafter accrue, in favor of the warden of the penitentiary of this state, which the warden shall deem it advisable to collect by law, the district attorney of the first judicial district shall bring suit upon and collect the same; and in case the governor of the state shall so direct, the attorney general of the state shall also give his personal attention to said suits.

Property sold for such claims. Same, § 8.

SEC. 4790. Judgments now or hereafter rendered in favor of the warden of the penitentiary, shall be collected upon execution, and the attorney general, or district attorney, shall have the same power to bid upon and purchase property upon such executions as is given where judgments are in favor of the state, and the property shall be held and disposed of for the use of the penitentiary by the governor, in the same manner.

Actions on contracts made with warden and for injuries to property. R. § 5150. C. '51, § 3136.

SEC. 4791. All actions founded on contract made with the warden in his official capacity, may be brought by or against the warden for the time being; and any action for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the prison, or being under the management of the warden thereof, may be prosecuted in the name of the warden for the time being, and no such action shall abate by the warden's ceasing to be in office, but his successor, upon notice, is required to assume the prosecution or defense of the same. In any such action the warden is a competent witness, and his property shall not be taken or attached in any such suit, nor shall any execution issue against him on any judgment thereon, but such judgment shall stand as an ascertained claim against the state; and whenever a new warden is appointed, all the books, accounts, and papers belonging to the prison shall be delivered to him, and he shall be vested with all the powers and subject to all the obligations with regard to any contract or any debts due to or from the prison that his predecessor would have been if no change had taken place in the office.

When office of warden is vacant. R. § 5151. C '51, § 3137.

SEC. 4792. Whenever the office of warden is vacant, or he is absent from the prison, or unable to perform the duties of his office, the deputy warden has the power to perform the duties and

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shall be subject to all the obligations and liabilites of the warden.

Overseers. R. § 5153. C. '51, § 3140.

SEC. 4793. Persons having suitable knowledge and skill in the branches of labor and manufacture carried on in the prison, may, when practicable, be employed as overseers; and they must respectively superintend such portions of the labor of convicts for which they are most suitably qualified, and which shall be assigned to them by the warden; and all of them as well as the other subordinate officers of the prison, must perform such services in the management, superintending, and guarding of the prison, as may be prescribed by the rules and regulations, or directed by the warden.

Delinquency of officers. R. § 5154. C. '51, § 3141.

SEC. 4794. If any subordinate officer of the prison is guilty of negligence or unfaithfulness in the discharge of his duties, or of a violation of any of the laws or rules and regulations for the government of the prison, the warden may deduct from the pay of such officer a sum not exceeding his pay for one month.

Pestilence among convicts. R. § 5156. C. '51, § 3143.

SEC. 4795. In case of any pestilence or contagious sickness breaking out among the convicts in the prison, the warden may cause the convicts confined therein, or any of them to be removed to some suitable place of security where such of them as are sick shall receive all necessary care and medical assistance. Such convicts must be returned as soon as may be to the penitentiary, to be confined according to their respective sentences if the same be unexpired.

Negligence of officers. R. § 5157. C. '51, § 3144.

SEC. 4796. If any officer or other person employed in the prison or its precincts, negligently suffer any convict confined therein to be at large without the precincts of the prison, or out of the cell or apartment assigned to him, or to be conversed with, relieved or comforted contrary to law or the rules and regulations of the prison, he shall be punished by a fine not exceeding five hundred dollars.

Resistance to authority. R. § 5158. C. '51, § 3145.

SEC. 4797. If a convict sentenced to the penitentiary resist the authority of any officer, or refuse to obey his lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual; and if in so doing any convict thus resisting be wounded or killed by such officer or his assistants, they are justified and shall be held guiltless.

Insurrection. R. § 5159. C. '51, § 3146.

SEC. 4798. It is the duty of all the officers and other citizens of the state, by every means in their power, to suppress any insurrection among the convicts sentenced to the penitentiary, and to prevent the escape or rescue of any such convict therefrom, or from any other legal confinement or from any person in whose legal custody they may be; and if in so doing or in arresting any convict who may have escaped, such officer or other person wound or kill such convict, or other person aiding or assisting such convict, they shall be justified and held guiltless.

Governor to visit penitentiary; duty of. R. § 5186.

SEC. 4799. The governor shall visit said penitentiary personally, as often, at least, as once in three months, to inspect the books, papers and records of the clerk, and deputy warden, and strictly to inquire into the official conduct of the warden, to examine into the general, economical, sanitary, and disciplinary regulations of the prison; and to alter and amend the same in any manner which may be best calculated to promote economy in expenditure, and

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the health, safe keeping, and obedience of convicts, and all such alterations and amendments shall be reduced to writing, and signed by the governor, and filed by him with the clerk, who shall forthwith record the same. And in case it is impracticable at any time for the governor to make such visit and inspection personally, he may appoint some suitable person to perform that service and report to him; but such person so appointed shall not have the power to make any alteration in the government of the institution, but may report to the governor only; and it is hereby made the duty of the governor to perform the service personally, if practicable.

[The word "obedience" in the eighth line, as in the original, is "convenience" in the printed code.]

Governor may appoint visitor. R. § 5187.

SEC. 4800. In making the appointment of visitor, as provided for in the preceding section, the governor shall take care that no one is appointed who may be supposed to be under the influence surrounding said penitentiary, or any of its officers, nor shall any one be appointed who has hitherto been officially connected therewith, nor shall the same person be appointed twice in succession.

Governor may remove warden and fill vacancy. R. § 5188.

SEC. 4801. Should the governor at any time become satisfied that the warden is guilty of official negligence or malfeasance, in any particular, so that the safety or health of the convicts is endangered, or any funds, appropriated for said institution, illegally invested or misapplied, or that said warden is in any manner conducting the affairs of the prison contrary to law and good faith, he shall forthwith remove said warden, notifying him of the specific causes for his removal, and also reporting to the next session of the general assembly, specifying his reasons therefor. He shall also appoint a warden to fill the vacancy thus occasioned, who shall qualify in the same manner as the regularly elected warden, but shall hold his office only until the next succeeding general assembly.

To fill vacancy in office of warden. R. § 5189.

SEC. 4802. The governor shall also fill all vacancies that may occur in the office of warden by death, resignation, or otherwise, between the sessions of the general assembly, but no appointment thus made shall last over a session of the general assembly.

Governor to be allowed traveling expenses. R. § 5194.

SEC. 4803. For the services herein required of the governor, he shall be allowed out of the state treasury his traveling expenses, and he shall present a bill therefor, under oath, to the auditor of state, which bill, thus sworn to, shall be a sufficient voucher for the auditor to issue his warrant on the treasury of the state for the amount so claimed.

Compensation of visitor. R. § 5195.

SEC. 4804. Should the governor be compelled to appoint any person, or persons, to visit the penitentiary, as herein provided, such person shall render to the governor an account of his traveling expenses and time employed under said appointment, which account shall be sworn to, and the governor shall determine the amount to which said person is entitled, not exceeding three dollars per day and expenses, and shall give him a certificate thereof, which certificate shall authorize the auditor to issue his warrant on the treasurer of state for said amount in favor of the person entitled thereto.

Penalty for failure of duty R. § 5196.

SEC. 4805. Should any person required to perform any duty relative to the penitentiary, wilfully fail or refuse obedience

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thereto, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not exceeding one thousand dollars, and shall forfeit his office, and should said wilful failure or refusal result in the escape of any of the convicts, or in loss of any of the funds appropriated to the use and benefit of the penitentiary, provided said sum so lost shall exceed the amount of twenty dollars, he shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term not less than two or more than ten years.

Penitentiary at Anamosa.

SEC. 4806. Nothing in this chapter shall be construed to repeal or in any way affect chapters forty-three or one hundred and eight of the Fourteenth General Assembly, providing for an additional penitentiary at or near Anamosa, in the county of Jones.

LEASING CONVICT LABOR.

[Eighteenth General Assembly, Chapter 149.]

Warden to make contract for.

SEC. 1. The warden, with consent of the executive council, is hereby authorized and required to make contracts for the labor of convicts at the penitentiary of the state at Fort Madison, for such time not exceeding ten years, and at such prices as to said council may seem to be for the best interests of the state.

Contracts modified.

SEC. 2. The warden, with the approval of the executive council, is further authorized to modify or cancel any existing contracts in relation to the labor of convicts, with the consent of contracting parties.

[Sec. 3 repeals 17th G. A., ch. 110, relating to the same subject, which had repealed 16th G. A., ch. 97.]

DIMINUTION OF SENTENCE FOR GOOD BEHAVIOR.

[Eighteenth General Assembly, Chapter 154.]

Record of conduct of prisoners.

SEC. 1. The deputy warden of the penitentiary of the state at Fort Madison, and the warden of the additional penitentiary at Anamosa, shall each keep a book in which shall be entered a record of every infraction by a prisoner of the published rules of discipline, with the name of the prisoner guilty. Every prisoner sentenced to either of said penitentiaries for a term of years, or less, who shall have, at the end of the first month no infraction of discipline recorded against him, shall be entitled to a diminution of one day from the time he was sentenced to such penitentiary, and if, at the end of the second month, no infraction of the rules be recorded against him, he shall be entitled to two additional days of diminution from his sentence; and if he shall continue to have no such record against him for the third month, his time shall be shortened three additional days; and if he shall so continue to have no such record against him for the fourth month, his time shall be shortened four additional days; and if he shall so continue for subsequent months, he shall be entitled to five days diminution of time from his sentence for each month he shall so continue his good behavior; and if any prisoner shall so pass the whole term of his service, he shall be entitled to a certificate thereof from the warden, and upon presentation thereof to the governor, he shall be entitled to a restoration of the rights of citi-

Rights of citizenship restored

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zenship that may have been forfeited by his conviction and sentence; and it shall be the duty of the warden to discharge such convict from such penitentiary when he shall have served the time of his service, less the number of days he may be entitled to have deducted therefrom, in the same manner as if no such deduction had been made.

Act not retrospective.

SEC. 2. This act shall not be construed so as to increase the good time earned by prisoners in the penitentiary of the state at Fort Madison, prior to the act going into effect; *provided, however*, that prisoners transferred to said penitentiary from the additional penitentiary at Anamosa, shall be entitled to the same allowance for good time that they would have been allowed at said additional penitentiary.

[Sec. 3 amends § 4754 and 17th G. A., ch. 187, § 1, which see; and also repeals 14th G. A., ch. 43, § 12.]

ACTS APPLICABLE ONLY TO THE ADDITIONAL PENITENTIARY AT ANAMOSA.

[Public Acts of Fourteenth General Assembly, Chapter 43.]

Established.

SEC. 1. There shall be and is hereby permanently established, at or near the stone quarries, near Anamosa, Iowa, an additional penitentiary, in which convicts sentenced for life or any term of time, shall be confined, employed, and governed, as hereinafter provided.

[Sec's 2 to 11, inclusive, are temporary, providing for the purchase of grounds, erection of buildings, etc.

Sec. 12 is repealed by 18th G. A., ch. 154, inserted above.

Sec. 13 seems to be temporary.]

Who to be confined in.

SEC 14. Able-bodied male persons hereafter convicted of crime and sentenced to imprisonment in the penitentiary, may be taken to said quarries and additional penitentiary, and there confined and worked under the care of said warden, as soon as suitable accommodation has been provided therefor.

[Public Acts of the Fourteenth General Assembly, Chapter 108.]

[Sec. 1 is amendatory of a portion of the preceding act, which is omitted. Sec. 2 amends Sec. 12 of the preceding act by adding thereto the following:]

Appropriation for support of convicts.

For the general support of the convicts and payment of the guards and employes in said penitentiary, or at said quarries, there is hereby appropriated the monthly sum of eight and one-third dollars, or so much thereof as may be necessary for each convict, to be estimated by the average number for the preceding month, to be paid to the warden on his requisition, monthly, accompanied with a detailed statement in such form as the auditor of state shall prescribe, exhibiting the payments made by the money drawn on the previous requisition. But no such estimate and statement shall be necessary for the first month after convicts are transferred to or confined and worked in said penitentiary quarries.

[Although the section of which the foregoing is amendatory, has since been repealed, these provisions, as modified by 16th G. A., ch. 137, § 5, (as amended) inserted below, would seem to be still in force.]

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[Sixteenth General Assembly, Chapter 40.]

[Secs. 1 and 2 are temporary.]

Salaries of officers.

SEC. 3. The provisions of the statute relative to the appointment and salary of clerk, physician, and hospital steward for the Fort Madison penitentiary, shall also apply to the additional penitentiary at Anamosa; *provided*, that until the number of prisoners shall reach two hundred the salary of the physician shall not exceed thirty dollars per month, and the warden shall employ some suitable person who shall act as religious adviser and teacher, at a salary not to exceed forty dollars per month.

[Sec. 4 is temporary, relating to the erection of buildings.]

Duties of warden.

SEC. 5. The provisions of the statute in regard to the warden of the penitentiary at Fort Madison shall apply to the warden of the additional penitentiary so far as they do not conflict with the provisions of this act; and he shall safely guard and cause the prisoners to perform labor, and work in the preparation of material for and in the erection of said work as directed by the executive council, as to the mode and manner of work; *provided*, that he shall not appoint a deputy warden.

[Sec. 6 is temporary, providing as to duties and compensation of clerk in connection with erection of buildings.]

Warden shall keep time-table of convict labor.

SEC. 7. The warden shall keep a regular time-table of the convict labor and record the same in a book to be kept for that purpose; and he shall moreover keep a record of all the business under his control and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day.

[The original section was repealed by 17th G. A., ch. 187, and a substitute enacted, which was amended by 18th G. A., ch. 154, § 3, by striking out all except what is here given; see the last mentioned act inserted above.]

What prisoners to be kept in.

SEC. 8. The additional penitentiary at Anamosa, Jones county, shall be maintained as a penitentiary of the state of Iowa, in which such convicts sentenced for life, or any period of time, as the executive council may designate, shall be confined, employed and governed according to the provisions of law relating to the government and discipline of the penitentiary at Fort Madison, county of Lee, so far as the same do not come in conflict with the provisions of this act; *providing*, that nothing in this act shall be so construed as to authorize the leasing of the convict labor.

Repealing clause.

SEC. 9. All resolutions, acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed.

[Sixteenth General Assembly; Chapter 137.]

[Sec's 1, 2, 3 and 4 are temporary, relating to the erection of buildings.]

For support of convicts.

SEC. 5. There is also appropriated an amount sufficient to increase the general support now allowed by law, to eight dollars per month, or so much thereof as may be necessary for each convict in said penitentiary, such increase to be estimated and drawn in the manner now provided by law.

[As amended by 17th G. A., ch. 81, inserting "eight" in the second line in place of "ten."]

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[Seventeenth General Assembly, Chapter 149.]

SEC. 1. The warden of the additional penitentiary at Anamosa, may employ guards for the care of convicts, not exceeding one guard for every eight prisoners. One guard for eight prisoners.

SEC. 2. All acts and parts of acts in conflict with this act are hereby repealed. Repealing clause.

[Seventeenth General Assembly, Chapter 186.]

[Sec. 1 amends § 4773, which see.]

SEC. 2. The provisions of section four thousand seven hundred and seventy-three of the code, and the amendments herein contained, are hereby made to govern all contracts for supplies for the additional penitentiary at Anamosa. Bids for furnishing materials, etc.

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APPENDIX.

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APPENDIX.

PUBLICATION AND DISTRIBUTION OF CODE.

AN ACT to provide for the publication, indexing, and distributing the Code, passed at the adjourned session of the Fourteenth General Assembly.

Be it enacted by the General Assembly of the State of Iowa:

W. H. Seevers appointed to prepare.

SECTION 1. That William H. Seevers is hereby appointed to edit the code and superintend its publication and to prepare a full and complete index and brief marginal notes thereto, and to arrange and properly number in a convenient and suitable manner the parts, titles, divisions, and subdivisions, and to examine and correct the proof-sheets, and cause all clerical, typographical, and grammatical errors of punctuation to be corrected, and to change the number of chapters and all references made in the code from one section or subdivision thereof to another by number, so that the same shall conform to the numbering in the code as printed.

Secretary of State to furnish enrolled bills.

SEC. 2. The secretary of state is directed within ten days after the adjournment of this session, to have the enrolled bills bound in a sufficient number of volumes and deliver the same to the editor, who shall be responsible therefor and shall return the same to said secretary on or before the first day of September, A. D. 1873.

Chapters and sections: how numbered

SEC. 3. The chapters of each title shall be numbered separately, but the sections shall be numbered continuously, and an appendix shall accompany such code, which shall contain the declaration of independence, the constitution of this state, and of the United States, and the naturalization laws.

Clerk, proof-reader; compensation.

SEC. 4. Said editor may employ a clerk who shall be sworn to the faithful performance of his duties, who shall also be proof-reader, at a compensation of not exceeding five dollars per day, to be paid from any funds in the state treasury not otherwise appropriated, the same to be paid monthly on the certificate of such editor.

Size of.

SEC. 5. Said code shall be printed on paper of the same size and quality of the revision of 1860, and if there is no such paper belonging to the state, the secretary, auditor, and treasurer of state shall immediately procure a sufficient quantity for the edition of the code herein provided for.

How printed: by whom.

SEC. 6. Said code shall be printed by the state printer with fresh new type of the same kind as that used in printing the

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revision of 1860, and the state binder shall bind it in the same manner and with the same kind and quality of binding; *provided*, that five hundred copies shall be bound in two volumes and interleaved, one copy of which shall be distributed to each member of this general assembly, and one copy to each officer thereof, the balance to be kept for the use of future general assemblies. These copies shall be first bound by the state binder and immediately upon their completion the secretary of state shall send them to those entitled thereto.

Compensation: how paid.

SEC. 7. When the state printer has delivered any portion of said printing to the state binder, and the same has been executed to the satisfaction of the secretary of state, he shall so certify, and upon such certificate there shall be paid such printer two-thirds the compensation allowed by law therefor, and when any portion of said edition has been bound and delivered to such secretary, and the same has been done to the satisfaction of said secretary, he shall so certify, and upon such certificate there shall be paid the state binder two-thirds of the compensation allowed by law therefor, and when said printing or binding is completed to the satisfaction of such secretary, the residue of said compensation shall be paid.

No. of copies published: and distribution thereof.

SEC. 8. There shall be published fifteen thousand copies of said code, and the secretary of state shall immediately deliver or transmit to the governor two copies; to each judge of a court of record and to each district attorney and deputy officer, one copy each; to the state historical society, five copies, and shall retain in his own office one copy; deposit twenty copies in the state library, transmit to the law library of the state university twenty copies, to the library of each state or territory of the United States, one copy, and one copy to each governor thereof; and to each member of the fourteenth general assembly one copy, and to each secretary and clerk thereof one copy, and to each officer of the house and senate one copy; one copy each to the following named reporters of daily newspapers who have reported the proceedings of this session: Will. Porter, *Daily Leader;* Ambrose Lammey and Edgar M. Hungerford, *Daily Register;* T. P. Keator and E. T. Cressey, *Daily Republican*, and R. B. Baird, *Daily Journal.*

Copies sent county auditors: for sale.

SEC. 9. Of the remainder of the edition, the secretary shall divide five thousand copies among the counties of the state, in proportion to the population, but giving to no county less than ten copies, and, as soon as practicable, transmit to the auditor of each county the number of copies to which his county is entitled, which the auditor is required to sell at three dollars a copy, and pay to the treasurer of his county the amount received by him for them on or before the fifteenth day of November of each year, and the treasurer shall pay the same into the state treasury at the time of making his next return. Each county auditor shall, upon receipt of the copies transmitted to him, execute receipts therefor in duplicate, one of which he shall immediately transmit to the secretary of state, and the other to the state auditor.

Auditor to report to auditor of state.

SEC. 10. The said auditor shall also, on or before the fifteenth day of November of each year, make out in writing, under oath, a statement of the number of copies sold by him, and not before

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accounted for, and the number remaining on hand, and the amount paid to the county treasurer, and transmit such statement to the auditor of state, who shall charge the county treasurer with such amount, and the secretary of state shall certify to the auditor the number of copies transmitted to each county auditor, and the state auditor shall charge such county auditor therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of.

Deliver copies to successor.

SEC. 11. When the auditor goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be sent to the state auditor, which shall be his sufficient discharge for the same; and every county officer receiving a copy, shall give his receipt therefor, and shall pass the copy to his successor, or deliver it to the auditor for the use of subsequent officers, and each shall be liable therefor on his official bond.

Compensation of editor.

SEC. 12. The editor hereby appointed shall receive for his services, to be paid when he has delivered the code, to be prepared by him as herein contemplated, to the state printer, the sum of two thousand dollars, including his services in the general assembly, and the secretary of state shall receive for the distribution of the code as aforesaid, the sum of twelve hundred dollars.

Printing, when to be completed.

SEC. 13. It shall be the duty of the state printer to complete the printing of the code ready for delivery to the state binder not later than the first day of May, and it shall be the duty of said state officers to furnish the paper in due time therefor, and the editor to furnish the copy as fast as possible.

SEC. 14. This act shall take effect from and after its publication in the Daily State Register and the Daily Republican, or any other two newspapers published in the state of Iowa.

Approved, February 20, 1873.

[Fifteenth General Assembly, Chapter 15.]

AN ACT to Provide State Institutions, Justices of the Peace, and Township Clerks with Copies of the Code.

County auditor to furnish code to public institutions, justices, and township clerks.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That it shall be the duty of the auditor of each county in the state to furnish to any state institution in his county, and to each justice of the peace and township clerk of such county, a copy of the code, and take a receipt therefor, which receipt shall be a sufficient voucher for the county auditor in his settlement with the auditor of state; *provided*, such distribution can be made without a reprint of the code.

Where already furnished: legalized.

SEC. 2. In all cases where the county auditors have already furnished copies of the code to the justices of the peace or township clerks or any of them in their respective counties, such action by said county auditors is hereby legalized, and his sworn statement of the number of copies, so furnished, shall be a sufficient voucher therefor in his settlement with the auditor of state.

County auditor may draw upon secretary of state, when.

SEC. 3. Should the number of copies of the code in the possession of any county auditor at time of taking effect of this act be insufficient for the purposes hereinbefore mentioned, it shall be lawful for him to draw upon the secretary of state [for the]

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number required to make up the deficiency, who shall as soon as practicable thereafter transmit the same to such county auditor, and shall certify to the auditor of state the number of copies so transmitted by him. The auditor of state shall charge to such county auditor the number of copies of the code furnished him by the state, and shall credit him with such as have been or may be disposed of as provided in the first and second sections of this act.

Justices and clerks to turn over codes, etc., to successors.

SEC. 4. It shall be the duty of every justice of the peace and township clerk, upon the expiration of his term of office, or whenever his office becomes vacant, to deposit with his successor in office, or with the county auditor, such copy of the code as well as all other books and papers which have come into his hands as such justice of the peace or township clerk.

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DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

The Unanimous Declaration of the Thirteen United States of America.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of

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large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies, at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise; the state remaining, in the meantime, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others, to subject us to a jurisdiction, foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas, to be tried for pretended offenses:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our government:

For suspending our own legislature, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

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He is, at this time, transporting large armies of foreign mercenaries, to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world, for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connexion between them and the state of Great Britain, is, and ought to be totally dissolved; and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things, which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other, our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire.—Josiah Bartlett, William Whipple, Matthew Thornton.

Massachusetts Bay.—Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry.

Rhode Island, &c.—Stephen Hopkins, William Ellery.

Connecticut.—Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott.

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New York.—William Floyd, Philip Livingston, Francis Lewis, Lewis Morris.

New Jersey.—Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark.

Pennsylvania.—Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross.

Delaware.—Cæsar Rodney, George Read, Thomas M'Kean.

Maryland.—Samuel Chase, William Paca, Thomas Stone, Charles Carroll, of Carrollton.

Virginia.—George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jun., Francis Lightfoot Lee, Carter Braxton.

North Carolina.—William Hooper, Joseph Hewes, John Penn.

South Carolina.—Edward Rutledge, Thomas Hayward, Jun., Thomas Lynch, Jun., Arthur Middleton.

Georgia.—Button Gwinnett, Lyman Hall, George Walton.

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CONSTITUTION OF THE UNITED STATES.

WE, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives. Legislative powers.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. Members of house of representatives: how chosen.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen. Qualification of.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.]* The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. Representation and taxation. Census.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies. Vacancies.

*The clause included in brackets is amended by the 14th amendment, 2d section.

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Officers. Impeachment.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Senate.

SEC. 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Senators classed.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Qualifications of senators.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

Vice-president.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

Senate to choose its officers.

The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

To try impeachments.

The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment on impeachment.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Election of members of congress,

SEC. 4. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations except as to the places of choosing senators.

Congress to meet annually.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Elections: how judged.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number

Quorum.

may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Rules.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Journals.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the

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members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Adjournment. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Compensation. privileges. SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Exclusion from office. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emolument whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

Bills for revenue. SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Bills, the formalities of their passage. Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Resolutions, &c., to be approved. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The congress shall have power:

Powers of congress. Taxes. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

Borrowing. To borrow money on the credit of the United States;

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Commerce. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Naturalization. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

Coinage. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

Counterfeiting. To provide for the punishment of counterfeiting the securities, and current coin of the United States;

Post office. To establish post offices and post roads;

Copyright. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Inferior courts. To constitute tribunals inferior to the supreme court;

Piracy. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

War. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Army. To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

Navy. To provide and maintain a navy;

Rules for. To make rules for the government and regulation of the land and naval forces;

Militia and its organization. To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

Exclusive authority over district. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings;—And

General authority. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Limitation of powers. SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such

Importation of persons. importation, not exceeding ten dollars for each person.

Habeas corpus. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

Attainder, etc. No bill of attainder or *ex post facto* law, shall be passed.

Direct tax. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

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No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another. Commercial duties and preferences.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. Money, how drawn.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state. Titles of nobility.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility. Limitations on the state.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Of commerce, war, etc.

ARTICLE II.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows: The executive.

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector. Electors of

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person And proceedings in the choice of President.

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having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.]*

Meeting of electors. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Qualifications for presidency. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Vice president: when to act. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

Compensation of president. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Oath of office. Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

Powers of the president. Commander. SEC. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to

Pardons. grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

*This clause has been superseded by the twelfth amendment.

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He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments. Treaties. Appointment of officers.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session. Fill vacancies.

SEC. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive embassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States. Give information to congress, etc.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Impeachment

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. Judicial power. Tenure. Compensation.

SEC. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state, between citizens of different states, between citizens of the same state, claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects. Extent of judicial power.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make. Jurisdiction of supreme court

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Trial by jury.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Treason.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Attainder.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

Acts, records, etc., of states.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Citizenship.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Fugitives from justice.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

Fugitive slaves.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

New states.

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

Territory of United States.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

Republican government.

SEC. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

Amendments to the constitution.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of

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the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation. Former debts recognized.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Supreme law.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States. Oath of office. Religious test.

ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same. Ratification.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names,

GEORGE WASHINGTON, PRESIDENT,
and Deputy from Virginia.

New Hampshire.—John Langdon, Nicholas Gilman.
Massachusetts.—Nathaniel Gorham, Rufus King.
Connecticut.—Wm. Samuel Johnson, Roger Sherman.
New York.—Alexander Hamilton.
New Jersey.—William Livingston, David Brearly, William Patterson, Jonathan Dayton.
Pennsylvania.—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Governeur Morris.

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Delaware.—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

Maryland.—James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll.

Virginia.—John Blair, James Madison, Jr.

North Carolina.—William Blount, Richard Dobbs Spaight, Hugh Williamson.

South Carolina.—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

Georgia.—William Few, Abr. Baldwin.

Attest, WILLIAM JACKSON, *Secretary.*

AMENDMENTS.

ARTICLE I.

Religion, speech, press and petition.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

Bearing arms.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

Quartering of soldiers.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

Criminal proceedings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or

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public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. Private property taken, &c.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. Trial by jury in criminal proceedings.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. Same, in suits at common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Excessive bail.

ARTICLE IX.

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Rights retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Powers not delegated reserved.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. States not to be sued.

ARTICLE XII.

SEC. 1. The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for Manner of choosing president. Electors.

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as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate: the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

House of representatives.

Vice president to act when no choice.

Senate to elect vice president.

Eligibility.

ARTICLE XIII.

SECTION. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Slavery and involuntary servitude prohibited.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

Legislation by congress.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.

Citizens of the United States are citizens of the state where they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

States prohibited from passing any law abridging the rights of citizens of the United States.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the

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whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Representatives apportioned among the several states.

Basis of representation reduced.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Officers who have taken an oath to support the constitution of the United States, and who engage in rebellion or insurrection prohibited from holding office.

Congress may remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The public debt of the United States shall not be questioned.

The United States and any state prohibited from paying any debt incurred in aid of rebellion or insurrection

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Legislation by congress.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Race, color or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

Legislation by congress.

The first ten of these amendments were proposed by congress, (with others which were not ratified by three-fourths of the legislatures of the several states,) by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by resolution of the year 1794, and was ratified before 1796. The twelfth article was proposed by congress by resolution of October, 1803, and was ratified before September, 1804. The thirteenth article was proposed by congress, by resolution, of the year 1865, and was ratified before December 18, 1865. The fourteenth article was proposed by congress, by resolution, of the year 1866, and was ratified before the 20th day of July, 1868. The fifteenth article was proposed by congress, by resolution, of the year 1869, and was ratified before the 30th day of March, 1870.

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NATURALIZATION OF ALIENS.

REVISED STATUTES OF THE UNITED STATES OF 1878.

TITLE XXX.

SECTION 2165. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

Declaration of intention.

First. He shall declare on oath before a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk, two years at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty, of which the alien may be at the time a citizen or subject.

Oath.

Second. He shall, at the time of his application to be admitted, declare on oath before some one of the courts above specified, that he will support the constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Residence, etc.

Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United State five years at least, and within the state or territory where such court is at the time held, one year at least; and that during that time, he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall, in no case, be allowed to prove his residence.

Titles of nobility to be renounced.

Fourth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Residents in U. S. before 29th Jan. 1795.

Fifth. Any alien who was residing within the limits, and under the jurisdiction of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen on due proof made to some one of

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the courts above specified, that he has resided two years at least, within the jurisdiction of the United States, and one year at least, immediately preceding his application within the state or territory where such court is at the time held; and on his declaring on oath, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; and, also, on its appearing to the satisfaction of the court, that, during such term of two years, he has behaved as a man of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien, applying for admission to citizenship, has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or order of nobility, all of the proceedings, required in this condition to be performed in the court, shall be recorded by the clerk thereof.

Persons residing in U. S. between 18th June, 1798, and 18th June, 1812.

Sixth. Any alien, who was residing within the limits, and under the jurisdiction of the United States, between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the eighteenth day of June, one thousand eight hundred and twelve, and who has continued to reside within the same, may be admitted to become a citizen of the United States without having made any previous declaration of his intention to become such; but whenever any person without a certificate of such declaration of intention makes application to be admitted a citizen, it must be proved to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the United States, before the eighteenth day of June, one thousand eight hundred and twelve, and has continued to reside within the same, and the residence of the applicant within the limits and under the jurisdiction of the United States for at least five years immediately preceding the time of such application, must be proved by the oath of citizens of the United States; which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place where the applicant has resided for at least five years, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.

Declaration of intention. How made. Act of Feb. 1, 1876.

[Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the declaration of intention to become a citizen of the United States, required by section two thousand one hundred and sixty-five of the Revised Statutes of the United States, may be made by an alien before the clerk of any of the courts named in said section two thousand one hundred and sixty-five; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid, as if made before one of the courts named in said section.]

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Aliens honorably discharged from military service.

SEC. 2166. Any alien, of the age of twenty-one years and upwards, who has enlisted, or may enlist in the armies of the United States, either the regular or the volunteer forces, and has been or may be hereafter honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such, and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character as now provided by law, be satisfied by competent proof of such persons having been honorably discharged from the service of the United States.

Minor residents.

SEC. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arrival at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165; but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall, in all other respects, comply with the laws in regard to naturalization.

Widow and children of declarants.

SEC. 2168. When any alien, who has complied with the first condition specified in section 2165, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

Aliens of African nativity and descent.

SEC. 2169. The provisions of this title shall apply to aliens [being free white persons and to aliens] of African nativity and to persons of African descent.

Residence of five years in U. S.

SEC. 2170. No alien shall be admitted to become a citizen who has not, for the continued term of five years next preceding his admission, resided within the United States.

Alien enemies not admitted.

SEC. 2171. No alien, who is a native citizen, or subject, or a denizen of any country, state, or sovereignty, with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States or the territories thereof on the eighteenth day of June in the year one thousand eight hundred and twelve, who had, before that day, made a delaration according to law of their intention to become citizens of the United States, or who were, on that day, entitled to become citizens without making such declaration, may be admitted to become citizens thereof notwithstanding they were alien enemies at the time, and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law,

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of any alien enemy at any time previous to the actual naturalization of such alien.

Children of persons naturalized under certain laws to be citizens.

SEC. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years, at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. But no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the revolutionary war, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

Police court of District of Columbia.

SEC. 2173. The police court of the District of Columbia shall have no power to naturalize foreigners.

Naturalization of seamen.

SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

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ORDINANCE OF 1787.

FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO.

One district.

Be it ordained by the United States, in Congress assembled, That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress, make it expedient.

Descent of estates.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild, to take a share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her *third part* of the real estate for life, and one-third part of the personal estate; and this law relative to descents and *dower* shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws, as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses; provided such wills be duly proved, such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Dower.

Wills.

Conveyances.

Saving to the French their laws of descent and conveyances.

Governor

Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district,

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and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Secretary. There shall be appointed, from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings every six months, to the secretary of congress.

Court. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

Governor and judges to adopt laws. The governor and judges, or a majority of them, shall adopt and publish, in the district, such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Governor, commander. The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by congress.

Governor to appoint officers, until it is organized. Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of peace and good order in the same. After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Counties, townships, etc. For the prevention of crimes and injuries, the laws to be adopted or made, shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district, in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

When to elect representatives. So soon as there shall be five thousand free male inhabitants of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly; *provided*, that for every five hundred free male inhabitants, there shall be one representative, and so on pro- Ratio. gressively with the number of free male inhabitants, shall the right of representation increase, until the number of representa-

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tives shall amount to twenty-five, after which, the number and proportion of representatives shall be regulated by the legislature; *provided*, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; *provided also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold, and two years' residence in the district shall be necessary to qualify a man as an elector of a representative.

Qualification.

The representative thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

Term of representative.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum. And the members of the council shall be nominated and appointed in the following manner, to wit: as soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress; five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when in his opinion it shall be expedient.

General assembly, how constituted.

Legislative council.

Powers of general assembly.

Bills.

The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation, of fidelity and of office; the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have author-

Oath of office.

Delegate in congress.

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ity, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent governments therein, and for their admission to share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest: Preamble.

It is hereby ordained and declared, by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit: Articles of compact.

ARTICLE 1. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory. Religion.

ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for criminal offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide and without fraud, previously formed. Common law rights secured.

ART. 3. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent, and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars, authorized by congress; but laws, founded in justice and humanity, shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. Education. The Indians.

ART. 4. The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, Territory to remain part of the confederacy.

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contracted, or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts or new states, shall never interfere with

The soil. the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No

Taxes. tax shall be imposed on lands, the property of the United States; and in no case shall non-resident proprietors be taxed higher than

Navigable waters. residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ART. 5. There shall be formed, in the said territory, not less

New state may be formed. than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: the western state in the said territory shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line; *provided, however, and it is further understood and declared*, That the boundaries of these three states shall be subject so far to be altered, that if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the

When to be admitted into the union. southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government; *provided*, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

Slavery. ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of

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crimes, whereof the party shall have been duly convicted; *provided always*, that any person escaping into the same, from whom labor or service is lawfully claimed in any of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the twenty-third of April, one thousand seven hundred and eighty-four, relative to the subject of this ordinance, be, and the same are hereby repealed, and declared null and void. Repeal.

DONE by the United States, in congress assembled, the thirteenth day of July, in the year of our Lord one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

WILLIAM GRAYSON, *Chairman.*

CHARLES THOMPSON, *Secretary.*

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ORGANIC LAW OF MICHIGAN.

An Act to divide the Indiana territory into two separate Governments.

Michigan set off.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the thirtieth day of June next, all that part of the Indiana territory, which lies north of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie, and east of a line drawn from the said southerly bend through the middle of said lake to its northern extremity, and thence due north to the northern boundary of the United States, shall, for the purpose of temporary government, constitute a separate territory, and be called Michigan.

Its government.

SEC. 2. *And be it further enacted*, That there shall be established within the said territory, a government in all respects similar to that provided by the ordinance of congress, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, for the government of the territory of the United States, northwest of the river Ohio; and by an act passed on the seventh day of August, one thousand seven hundred and eighty-nine, entitled "an Act to provide for the government of the territory northwest of the river Ohio;" and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States, northwest of the river Ohio, by the said ordinance.

Powers and compensation of officers as in Indiana.

SEC. 3. *And be it further enacted*, That the officers for the said territory, who by virtue of this act shall be appointed by the president of the United States, by and with the advice and consent of the senate, shall respectively exercise the same powers, perform the same duties, and receive for their services the same compensations, as by the ordinance aforesaid and the laws of the United States, have been provided and established for similar officers in the Indiana territory; and the duties and emoluments of superintendent of Indian affairs, shall be united with those of governor.

Indiana not affected.

SEC. 4. *And be it further enacted*, That nothing in this act contained, shall be construed so as, in any manner, to affect the government now in force in the Indiana territory, further than to prohibit the exercise thereof within the said territory of Michigan, from and after the aforesaid thirtieth day of June next.

Suits pending.

SEC. 5. *And be it further enacted*, That all suits, process, and proceedings, which, on the thirtieth day of June next, shall be pending in the court of any county, which shall be included within the said territory of Michigan; and also all suits, process, and proceedings, which on the said thirtieth day of June next, shall be pending in the general court of the Indiana territory, in conse-

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quence of any writ of removal or order for trial at bar, and which had been removed from any of the counties included within the limits of the territory of Michigan aforesaid, shall, in all things concerning the same, be proceeded on, and judgments and decrees rendered thereon, in the same manner as if the said Indiana territory had remained undivided.

SEC. 6. *And be it further enacted*, That Detroit shall be the seat of government of the said territory, until congress shall otherwise direct. Seat of government.

Approved January 11, 1805.

ORGANIC LAW OF WISCONSIN.

An Act establishing the Territorial Government of Wisconsin.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the third day of July next, the country included within the following boundaries shall constitute a separate territory, for the purposes of temporary government, by the name of Wisconsin; that is to say: Bounded on the east by a line drawn from the northeast corner of the state of Illinois, through the middle of Lake Michigan, to a point in the middle of said lake, and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menominee river; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of of said lake; thence through the middle of the main channel of the Montreal river, to its mouth; thence with a direct line across Lake Superior, to where the territorial line of the United States last touches said lake northwest; thence on the north, with the said territorial line, to the White-earth river; on the west, by a line from the said boundary line following down the middle of the main channel of White-earth river, to the Missouri river, and down the middle of the main channel of the Missouri river to a point due west from the northwest corner of the state of Missouri; and on the south, from said point, due east to the northwest corner of the state of Missouri; and thence with the boundaries of the states of Missouri and Illinois, as already fixed by acts of congress. And after the said third day of July next, all power and authority of the government of Michigan in and over the territory hereby constituted, shall cease; *provided*, that nothing in this act contained shall be construed to impair the rights of person or property, now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now

What country shall constitute the Wisconsin territory.

Proviso.

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existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed; *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner, and at such times, as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

Proviso.

Appointment and powers of governor.

SEC. 2. *And be it further enacted*, That the executive power and authority in and over the said territory shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of the said territory, and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

Secretary, his duties.

SEC. 3. *And be it further enacted*, That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings on or before the first Monday in December in each year to the president of the United States; and at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence, of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform, all the powers and duties of the governor during such vacancy or necessary absence.

Legislature, how constituted and elected.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue four years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue two years. An apportionment shall be made, as nearly equal as practicable, among the several counties, for the election of the council and representatives,

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giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken and made by the sheriffs of the said counties, respectively, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties is entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties for the council, shall be declared, by the said governor, to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared, by the governor, to be duly elected; *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place on such day as he shall appoint; but, thereafter, the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session, in any year, shall exceed the term of seventy-five days. Proviso.

Who shall be eligible to office.

SEC. 5. *And be it further enacted*, That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters at all subsequent elections shall be such as shall be determined by the legislative assembly; *provided*, that the right of suffrage shall be exercised only by citizens of the United States. Proviso.

Powers of the legislature.

SEC. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and, if disapproved by the congress of the United States, the same shall be null and of no effect.

What officers are to be elected by the people.

SEC. 7. *And be it further enacted*, That all township officers and all county officers, except judicial officers, justices of the peace, sheriffs, and clerks of courts, shall be elected by the people, in such manner as may be provided by the governor and legislative assembly. The governor shall nominate, and, by and with

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the advice and consent of the legislative council, shall appoint all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

Disqualifications for office.

SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold or be appointed to any office created, or the salary or emoluments of which shall have been increased whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission under the United States, or any of its officers, except as a militia officer, shall be a member of the said council, or shall hold any office under the government of the said territory.

Judiciary.

SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice, and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory, annually, and they shall hold their offices during good behavior. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law; *provided however*, that the justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court, shall a trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of

Proviso.

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the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error, and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory in the same manner as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern district of the state of New York receives for similar services.

Attorney to be appointed.

SEC. 10. *And be it further enacted*, That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the Michigan territory. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the northern district of the state of New York; and shall, in addition, be paid the sum of two hundred dollars, annually, as a compensation for extra services.

Marshal.

Governor, &c., to be approved by the senate.

SEC. 11. *And be it further enacted*, That the governor, secretary, chief justice and associate judges, attorney and marshal, shall be nominated, and by and with the advice and consent of the senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall before they act as such respectively take an oath or affirmation before some judge or justice of the peace in the existing territory of Michigan, duly commissioned and qualified to administer an oath or affirmation, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And afterwards the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted by the person taking the same to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of two thousand five hundred dollars for his services as governor and as superintendent of Indian affairs. The said

Salaries.

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chief justice and associate judges shall each receive an annual salary of eighteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each per day, during their attendance at the sessions thereof, and three dollars each for every twenty miles' travel in going to and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated, annually, the sum of three hundred and fifty dollars, to be expended by the governor to defray the contingent expenses of the territory, and there shall also be appropriated annually, a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

Contingent expenses.

SEC. 12. *And be it further enacted*, That the inhabitants of the said territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the territory of Michigan, and to its inhabitants, and the existing laws of the territory of Michigan shall be extended over said territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the governor and legislative assembly of the said territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in said territory, so far as the same, or any provisions thereof may be applicable.

Rights, etc., under the territorial compact of July, 1787, extended to Wisconsin.

And also those secured to Michigan.

SEC. 13. *And be it further enacted*, That the legislative assembly of the territory of Wisconsin shall hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the said governor and legislative assembly. And twenty thousand dollars, to be paid out of any money in the treasury, not otherwise appropriated, is hereby given to the said territory, which shall be applied by the governor and legislative assembly to defray the expenses of erecting public buildings at the seat of government.

Legislative sessions, when held.

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SEC. 14. *And be it further enacted*, That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such manner, as the governor shall appoint and direct. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected. Delegate to the house of representatives of the United States.

SEC. 15. *And be it further enacted*, That all suits, process, and proceedings, and all indictments and informations which shall be undetermined on the third day of July next, in the courts held by the additional judge for the Michigan territory, in the counties of Brown and Iowa; and all suits, process, and proceedings, and all indictments and informations which shall be undetermined on the said day of July, in the county courts of the several counties of Crawford, Brown, Iowa, Dubuque, Milwaukee, and Des Moines, shall be transferred to be heard, tried, prosecuted and determined, in the district courts hereby established, which may include the said counties. Provisions respecting undetermined suits.

SEC. 16. *And be it further enacted*, That all causes which shall have been or may be removed from the courts held by the additional judge for the Michigan territory, in the counties of Brown and Iowa, by appeal or otherwise, into the supreme court for the territory of Michigan, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Wisconsin, there to be proceeded in to final determination in the same manner that they might have been in the said supreme court of the territory of Michigan.

SEC. 17. *And be it further enacted*, That the sum of five thousand dollars be, and the same is hereby, appropriated, out of any money in the treasury not otherwise appropriated, to be expended by and under the direction of the legislative assembly of said territory, in the purchase of a library for the accommodation of said assembly, and of the supreme court hereby established. Five thousand dollars for the purchase of a library.

Approved, April 20, 1836.

ORGANIC LAW OF IOWA.

An Act to divide the Territory of Wisconsin, and to establish the Territorial Government of Iowa.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the third day of July next, all that part of the Iowa, July 4th, 1838.

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present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purposes of temporary government, be and constitute a separate territorial government, by the name of Iowa, and that, from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted, shall cease; *provided*, that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed; *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner and at such times, as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

Rights and powers reserved.

Governor.

SEC. 2. *And be it further enacted*, That the executive power and authority in and over the said territory of Iowa, shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the law of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

Secretary.

SEC. 3. *And be it further enacted*, That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States; and, at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence of the governor from the territory, the secretary shall have, and he is hereby

To transmit laws.

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authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy. To act as governor.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. An apportionment shall be made as nearly equal as practicable among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in, and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory, to be taken and made by the sheriffs of the said counties respectively, unless the same shall have been taken within three months previous to the third day of July next, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts are entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties or districts for the council, shall be declared by the said governor to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared by the governor to be duly elected; *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place and on such day as he shall appoint; but thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session in any year, shall exceed the term of seventy-five days. Legislative power. Council. House of representatives. Census. Elections, etc., to be regulated by law.

SEC. 5. *And be it further enacted*, That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters, at all subsequent elections, shall be such Right of suffrage.

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as shall be determined by the legislative assembly; *provided*, that the right of suffrage shall be exercised only by citizens of the United States.

Legislative power: extent of.

SEC. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and if disapproved by the congress of the United States, the same shall be null and of no effect.

Elective officers.

SEC. 7. *And be it further enacted*, That all township officers, and all county officers except judicial officers, justices of the the peace, sheriffs, and clerks of courts, shall be elected by the people, in such manner as is now prescribed by the laws of the territory of Wisconsin, or as may, after the first election, be provided by the governor and legislative assembly of Iowa territory.

Judicial, etc.

The governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council, shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

Ineligibility.

SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold, or be appointed to, any office created, or the salary or emoluments of which shall have been increased whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, or any of its officers, except as a militia officer, shall be a member of the said council or house of representatives, or shall hold any office under the government of the said territory.

Judicial power.

SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory annually; and they shall hold their offices during the term of four years. The said territory

Districts, and the courts thereof.

shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointment, respectively, reside in the districts which shall be assigned

Jurisdiction.

to them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law; *provided however*, that justices of the peace shall not have jurisdiction of

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any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and districts courts, respectively, shall possess a chancery as well as a common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk, happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case, removed to the supreme court, shall trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decision of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerk shall receive in all such cases, the same fees which the clerks of the district courts of Wisconsin territory now receive for similar services.

at common law and chancery.

Clerks.

Writs of error, etc.

SEC. 10. *And be it further enacted*, That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Wisconsin. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees as the marshal of the district court of the United States for the present territory of Wisconsin; and shall, in addition, be paid the sum of two hundred dollars annually as a compensation for extra services.

Attorney.

Marshal.

SEC. 11. *And be it further enacted*, That the governor, secretary, chief justice and associate judges, attorney and marshal, shall be nominated, and, by and with the advice and consent of the senate, appointed by the president of the United States. The

Appointments by president.

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governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation, before some judge or justice of the peace in the existing territory of Wisconsin, duly commissioned and qualified to administer an oath or affirmation, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And, afterwards, the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath, or affirmation, before said governor, or secretary, or some judge or justice of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and one thousand dollars as superintendent of Indian affairs. The said chief judge and associate justices shall each receive an annual salary of fifteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each, per day, during their attendance at the session thereof, and three dollars each for every twenty miles travel in going to, and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated annually the sum of three hundred and fifty dollars to be expended by the governor to defray the contingent expenses of the territory; and there shall also be appropriated annually a sum sufficient to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses, and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

Oath of office.

Salary of governor, judges, and secretary.

Pay of members of legislature.

SEC. 12. *And be it further enacted*, That the inhabitants of the said territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin, and to its inhabitants; and the existing laws of the territory of Wisconsin shall be extended over said territory, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said territory of Iowa; and, further, the laws of the United States are hereby extended over, and shall be in force in said territory, so far as the same, or any provisions thereof, may be applicable.

Fundamental rights.

Laws of Wisconsin.

SEC. 13. *And be it further enacted*, That the legislative assembly of the territory of Iowa shall hold its session at such time and

Sessions of legislature.

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place, in said territory, as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the governor and legislative assembly. And the sum of twenty thousand dollars, out of any money in the treasury not otherwise appropriated, is hereby granted to the said territory of Iowa, which shall be applied by the governor and legislative assembly thereof, to defray the expenses of erecting public buildings at the seat of government.

Delegate to congress.

SEC. 14. *And be it further enacted*, That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such manner as the governor shall appoint and direct. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected.

Legal proceedings pending.

SEC. 15. *And be it further enacted*, That all suits, process, and proceedings, and all indictments and informations, which shall be undetermined on the third day of July next, in the district courts of Wisconsin territory, west of the Mississippi river, shall be transferred to be heard, tried, prosecuted and determined in the district courts hereby established, which may include the said counties.

Officers to continue in office.

SEC. 16. *And be it further enacted*, That all justices of the peace, constables, sheriffs, and all other executive and judicial officers, who shall be in office on the third day of July next, in that portion of the present territory of Wisconsin, which will then, by this act, become the territory of Iowa, shall be, and are hereby authorized and required to continue to exercise and perform the duties of their respective offices, as officers of the territory of Iowa, temporarily, and until they or others shall be duly appointed to fill their places by the territorial government of Iowa, in the manner herein directed; *provided*, that no officer shall hold or continue in office by virtue of this provision, over twelve months from the said third day of July next.

Causes pending in supreme court of Wisconsin transferred to supreme court of Iowa.

SEC. 17. *And be it further enacted*, That all causes which shall have been or may be removed from the courts held by the present territory of Wisconsin, in the counties west of the Mississippi river, by appeal or otherwise, into the supreme court for the territory of Wisconsin, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Iowa, there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Wisconsin.

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Appropriation for library.

SEC. 18. *And be it further enacted*, That the sum of five thousand dollars be, and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be expended by, and under the direction of the governor of said territory of Iowa, in the purchase of a library, to be kept at the seat of government, for the accommodation of the governor, legislative assembly, judges, secretary, marshal, and attorney of said territory, and such other persons as the governor and legislative assembly shall direct.

Re-organization of legislature of Wisconsin.

SEC. 19. *And be it further enacted*, That from and after the day named in this act for the organization of the territory of Iowa, the term of the members of the council and house of representatives of the territory of Wisconsin shall be deemed to have expired, and an entirely new organization of the council and house of representatives of the territory of Wisconsin, as constituted by this act, shall take place as follows: As soon as practicable, after the passage of this act, the governor of the territory of Wisconsin shall apportion the thirteen members of the council, and twenty-six members of the house of representatives, among the several counties or districts comprised within said territory, according to their population, as nearly as may be, (Indians excepted.) The first election shall be held at such time as the governor shall appoint and direct, and shall be conducted, and returns thereof made in all respects according to the provisions of the laws of said territory, and the governor shall declare the person having the greatest number of votes to be elected, and shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. The persons thus elected shall meet at Madison, the seat of government, on such day as he shall appoint, but thereafter, the apportioning of the representation in the several counties to the council and house of representatives, according to population, the day of their election, and the day for the commencement of the session of the legislative assembly, shall be prescribed by law.

Temporary arrangements in Iowa.

SEC. 20. *And be it further enacted*, That temporarily, and until otherwise provided by law of the legislative assembly, the governor of the territory of Iowa may define the judicial districts of said territory, and assign the judges who may be appointed for said territory, to the several districts, and also appoint the time for holding courts in the several counties in each district, by proclamation to be issued by him; but the legislative assembly, at their first, or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times of holding the courts, or any of them.

Approved, June 12, 1838.

AMENDMENTS.

An Act to alter and amend the Organic Law of the Territories of Wisconsin and Iowa.

Acts to be approved by governor, &c.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every bill which shall have passed the council and house of

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representatives of the territories of Iowa and Wisconsin shall, before it become a law, be presented to the governor of the territory; if he approve he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly by adjournment prevent its return, in which case it shall not be a law.

Power of congress not affected.

SEC. 2. *And be it further enacted*, That this act shall not be so construed as to deprive congress of the right to disapprove of any law passed by the said legislative assembly, or in any way to impair or alter the power of congress over laws passed by said assembly.

Approved, March 3d, 1839.

An Act to authorize the election or appointment of certain officers in the Territory of Iowa, and for other purposes.

Certain officers may be elected.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the legislative assembly of the territory of Iowa, shall be, and are hereby authorized to provide by law for the election or appointment of sheriffs, judges of probate, justices of the peace, and county surveyors, within the said territory, in such way or manner, and at such times and places as to them may seem proper; and after a law shall have been passed by the legislative assembly for that purpose, all elections or appointments of the above named officers thereafter to be had or made shall be in pursuance of such law.

Term of the delegate.

SEC. 2. *And be it further enacted*, That the term of service of the present delegate for said territory of Iowa shall expire on the twenty-seventh day of October, eighteen hundred and forty; and the qualified electors of said territory may elect a delegate to serve from the said twenty-seventh day of October to the fourth day of March thereafter, at such time and place as shall be prescribed by law by the legislative assembly, and thereafter a delegate shall be elected, at such time and place as the legislative assembly may direct, to serve for a congress, as members of the house of representatives are now elected.

Approved, March 3d, 1839.

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ADMISSION OF IOWA.

An Act for the admission of the States of Iowa and Florida into the Union.

Preamble.

WHEREAS, the people of the territory of Iowa did, on the seventh day of October, eighteen hundred and forty-four, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and state government; and whereas,

Act of March 3, 1845, ch. 75, and ch. 76

the people of the territory of Florida did, in like manner, by their delegates, on the eleventh day of January, eighteen hundred and thirty-nine, form for themselves a constitution and state government, both of which said constitutions are republican; and said conventions having asked the admission of their respective territories into the union as states, on equal footing with the original states:

Iowa and Florida admitted.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the states of Iowa and Florida be, and the same are hereby declared to be states of the United States of America, and are hereby admitted into the union on equal footing with the original states, in all respects whatsoever.

Boundaries of Iowa.

SEC. 2. *And be it further enacted*, That the following shall be the boundaries of the said state of Iowa, to-wit: beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-earth river thence west along the said parallel of latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington city, thence due south to the northern boundary line of the state of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.

Iowa to have concurrent jurisdiction on the Mississippi and other rivers.

SEC. 3. *And be it further enacted*, That the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same: such rivers to be common to both: and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well to the inhabitants of said state, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state of Iowa.

Assent of people of Iowa to this act necessary.

SEC. 4. *And be it further enacted*, That it is made and declared to be a fundamental condition of the admission of said state of Iowa into the union, that so much of this act as relates

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to the said state of Iowa shall be assented to by a majority of the qualified electors at their township elections, in the manner and at the time prescribed in the sixth section of the thirteenth article of the constitution adopted at Iowa city the first day of November, Anno Domini eighteen hundred and fourty-four, or by the legislature of said state. And so soon as such assent shall be given, the president of the United States shall announce the same by proclamation; and therefrom without further proceedings on the part of congress the admission of the said state of Iowa into the union, on an equal footing in all respects whatever with the original states, shall be considered as complete.

Boundaries of Florida.

SEC. 5. *And be it further enacted*, That said state of Florida shall embrace the territories of East and West Florida, which by the treaty of amity, settlement and limits between the United States and Spain, on the twenty-second day of February, eighteen hundred and nineteen, were ceded to the United States.

Each one representative in congress.

SEC. 6. *And be it further enacted*, That until the next census and apportionment shall be made, each of said states of Iowa and Florida shall be entitled to one representative in the house of representatives of the United States.

Not to interfere with or tax the public lands.

SEC. 7. *And be it further enacted*, That said states of Iowa and Florida are admitted into the union on the express condition that they shall never interfere with the primary disposal of the public lands lying within them, nor levy any tax on the same whilst remaining the property of the United States: *provided*, that the ordinance of the convention that formed the constitution of Iowa, and which is appended to the said constitution, shall not be deemed or taken to have any effect or validity, or to be recognized as in any manner obligatory upon the government of the United States.

Ordinance of the convention of Iowa not obligatory on United States.

Approved March 3, 1845.

An Act supplemental to the Act for the admission of the states of Iowa and Florida into the Union.

Application of United States laws to Iowa.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the state of Iowa as elsewhere within the United States.

District court.

SEC. 2. *And be it further enacted*, That the said state shall be one district, and be called the district of Iowa; and a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge. He shall hold, at the seat of government of the said state, two sessions of the said district court annually, on the first Monday in January, and he shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled "an act to establish the judicial courts of the United States." He shall appoint a clerk for the said district, who shall reside and keep the records of the said court at the place of holding the same; and shall receive, for the

Jurisdiction.

Act of September 24, 1789, ch. 20, sec. 10.

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services performed by him, the same fees to which the clerk of the Kentucky district is by law entitled for similar services.

Compensation of the judge.

SEC. 3. *And be it further enacted*, That there shall be allowed to the judge of the said district court the annual compensation of fifteen hundred dollars, to commence from the date of his appointment, to be paid quarterly at the treasury of the United States.

United States attorney to be appointed.

SEC. 4. *And be it further enacted*, That there shall be appointed in the said district, a person learned in the law, to act as attorney for the United States; who shall, in addition to his stated fees, be paid annually by the United States two hundred dollars, as a full compensation for all extra services; the said payments to be made quarterly, at the treasury of the United States.

United States marshal to be appointed.

Compensation.

SEC. 5. *And be it further enacted*, That a marshal shall be appointed for the said district, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed and allowed to marshals in other districts; and shall, moreover, be entitled to the sum of two hundred dollars annually, as a compensation for all extra services.

Propositions to be submitted to the legislature of Iowa.

SEC. 6. *And be it further enacted*, That in lieu of the propositions submitted to the congress of the United States, by an ordinance passed on the first day of November, eighteen hundred and forty-four, by the convention of delegates at Iowa city, assembled for the purpose of making a constitution for the state of Iowa, which are hereby rejected, the following propositions be, and the same are hereby, offered to the legislature of the state of Iowa, for their acceptance or rejection; which, if accepted, under the authority conferred on the said legislature, by the convention which framed the constitution of the said state, shall be obligatory upon the United States.

Grant of lands for the use of schools.

1. That section numbered sixteen in every township of the public lands, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of schools.

Grant of lands for the use of a university. Act of July 20, 1840, chap. 90.

2. That the seventy-two sections of land set apart and reserved for the use and support of a university, by an act of congress approved on the twentieth day of July, eighteen hundred and forty, entitled "An act granting two townships of land for the use of a university in the territory of Iowa," are hereby granted and conveyed to the state, to be appropriated solely to the use and support of such university, in such manner as the legislature may prescribe.

Grant of lands for completing the public buildings.

3. That five entire sections of land to be selected and located under the direction of the legislature, in legal divisions of not less than one quarter section, from any of the unappropriated lands belonging to the United States within the said state, are hereby granted to the state for the pupose of completing the public buildings of the said state, or for the erection of public buildings at the seat of government of the said state, as the legislature may determine and direct.

Salt springs granted to the state.

4. That all salt-springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the legislature thereof, within one year after the admission of said state, and the same, when so selected,

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to be used on such terms, conditions, and regulations, as the legislature of the state shall direct: *provided*, that no salt-spring, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals, shall, by this section be granted to said state: *and provided also*, that the general assembly shall never lease or sell the same, at any one time, for a longer period than ten years, without the consent of congress.

Proviso.

Further proviso.

5. That five per cent. of the net proceeds of sales of all public lands lying within the said state, which have been or shall be sold by congress, from and after the admission of said state, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said state, as the legislature may direct: *provided*, that the five foregoing propositions herein offered are on the condition that the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide by an ordinance, irrevocable without the consent of the United States, that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed upon lands the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county, township, or any other purpose, for the term of three years from and after the date of the patents, respectively.

Five per cent. of net proceeds of public lands appropriated for roads and canals.

Proviso.

Iowa not to interfere with disposal of public lands, etc.

U. S. lands not to be taxed.

Non-residents not to be taxed higher than residents.

Bounty lands exempt from taxation for three years.

Approved, March 3, 1845.

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CONSTITUTION OF IOWA.

Preamble. WE, THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the STATE OF IOWA, the boundaries whereof shall be as follows:

Boundaries. Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river; thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the state of Missouri—as established by the constitution of that state, adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines river; thence westwardly along the said northern boundary line of the state of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollett's map; thence up the main channel of the said Big Sioux river, according to the said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latititude; thence east along said parallel of forty-three degrees and thirty minutes, until said parallel intersects the middle of the main channel of the Mississippi river; thence down the middle of the main channel of the said Mississippi river to the place of beginning.

ARTICLE 1.—BILL OF RIGHTS.

Rights of persons. SECTION 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

This section announces and secures the equality of all men before the law; and *held*, that a regulation of a common carrier, by which a colored person was denied the privilege of a seat at the table provided for passengers, could not be enforced: *Coger v. The N. W. U. P. Co.*, 37–145. Also *held*, that a colored child could not be excluded from the public schools: *Clark v. Board of Directors*, etc., 24–266; *Smith v. Directors*, etc. 4)–518; *Dove v. Ind. School Dist.*, 41–689.

This section is not violated by § 1526 of the Code providing that permits to sell intoxicating liquors shall only be granted to persons of good moral character: *In re Ruth*, 32–250; nor by the provisions of the prohibitory liquor law: *Santo v. The State*, 2–165, 216.

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SEC. 2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it. Political power.

Political power consists of legislative, executive and judicial authority, and these all inhere in the people, in the first instance: *Stewart v. Board of Supervisors*, 30–9, and see notes to art. 3, § 1.

SEC. 3. The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry. Religion.

The statute exempting church property from taxation (Code § 797,) is not in conflict with this section: *Trustees of Griswold College v. The State*, 46–275.

The use of a school-house for the purpose of religious worship, when authorized by a vote of the electors of the district, is not prohibited: *Davis v. Boget*, 50–11.

SEC. 4. No religious test shall be required as a qualification for any office of public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law. Religious test.

This section reaches individuals, as well as classes, and renders competent as a witness for the defendant in a criminal prosecution, a person who is jointly indicted with him for the crime, but who is put upon a separate trial: *The State v. Nash*, 10–81. And even where such defendants are put upon trial jointly, either one is entitled to the testimony of his co-defendant; *The State v. Gigher*, 23–318.

The legislature may declare that interest in the event of a suit may or may not disqualify a witness, as they think best; and *held*, that the provisions of Rev. § 3983 that the husband or wife should not be a witness for or against the other in a civil action to which either of them was a party, was not in conflict with this section: *Karney v. Paisley*, 13–89, (but as to the ground upon which this decision is based, see *Blake v. Graves*, 18–312.)

The provisions of this section, as to witnesses, do not give a party the right to the testimony of a child not possessed of sufficient understanding, by reason of tender years, to feel the obligations of an oath: *Kilburn v. Mullen*, 22–498.

SEC. 5. Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the constitution and laws of this state. Dueling.

SEC. 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens. Laws uniform.

If a law operates upon every person within the relations and circumstances provided for, it is sufficient as to uniformity: *Iowa R. Land Co. v. Soper*, 39–112, 116; therefore, *held*, that Code, § 1307, as to liability of railroad company for injuries to employes is not open to the objection that it is not of uniform operation: *McAunich v. M. & M. R. Co.*, 20–338;

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and so *held*, also, as to code, § 1289, making railroad companies liable, in certain cases, for double damages for stock killed: *Jones v. G. & C.U.R.Co.*, 16–6.

Uniformity in taxation comes within the purview of this section: *City of Dubuque v. Ill. Cent. R. Co.*, 39–56; and *held*, that 12 G. A., ch. 180, providing a special method for the taxation of express and telegraph companies, was not objectionable under this section, as the burdens imposed by it fell equally upon all citizens coming within a certain class or condition: *U. S. Ex. Co. v. Ellyson*, 28–370.

Also, *held*, that the power given to cities to improve streets and make the cost thereof a lien upon abutting property was not void as authorizing unequal taxation: *Warren v. Henley*, 31–31.

Sec. 114 of Code of 51, as amended (Rev. § § 250, 287), allowing each county to determine by vote whether swine and sheep should be allowed to run at large, *held*, not unconstitutional as not being uniform in operation: *Dalby v. Wolf*, 14–228, but acts which provided that they should be in force in any county only upon being adopted by a vote of the people of that county, were held unconstitutional: *Grebrick v. The State*, 5–491; *The State v. Weir*, 33–134; and see notes to art. 3, § 1.

17. G. A., ch. 119, prohibiting the sale of ale, wine, and beer, etc., within two miles of the corporate limits of a municipal corporation, *held* not liable to objection as not being of uniform operation: *The State v. Schroeder*, 51–197.

The provisions of § 1527, that permits to sell intoxicating liquors shall only be given to persons of good moral character, is not in violation of this section: *In re Ruth*, 32–250.

A curative act is not necessarily unconstitutional, as not being of uniform operation: *McMillen v. County Judge, etc.*, 6–391. So a law legalizing the defective organization of a specified school district was sustained: *The State v. Squires*, 26–340.

This section, *held*, not to affect an exclusive ferry license granted by a city, under authority conferred before the enactment of this constitutional provision: *Burlington, etc., Ferry Co. v. Davis*, 48–133.

9 G. A., ch. 102, providing that the fact that the defendant in an action was in the military service of the United States or the state, should be sufficient cause for continuance, so long as defendant was in such service, *held*, not in conflict with this section: *McCormick v. Rusch*, 15–127.

Liberty of speech and the press.

SEC. 7. Every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.

Personal security.

SEC. 8. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Code, § 1544, authorizing the issuance of a search warrant for the seizure of intoxicating liquors, is not unconstitutional, as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Santo v. The State*, 2–165, 212.

Description of the place *held* sufficient in a particular case: *The State v. Thompson*, 44–399.

Trial by jury.

SEC. 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law.

It seems that the right of trial by jury implies a trial by a jury of twelve men, except where the constitution authorizes trial by a less number:

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Sunto v. The State, 2–165, 221; *Baurose v. The State*, 1–374. But the state law may make offenses of inferior grades originally cognizable by inferior courts, and may provide for trial by a jury of less number than twelve in such courts: *Bryan v. The State*, 4–349.

If, in the inferior tribunal, a party has a trial before the constitutional jury provided for such court, though of less than twelve men, he cannot, of right, claim in the face of the statute a second trial on the merits on appeal to the district court: *City of Des Moines v. Layman*, 21–153.

The right of trial by jury discussed generally: *Trimble v. The State*, 2 Gr. 404.

The right is not infringed by the provisions of § 11, that a certain grade of offenses may be tried summarily: See notes to that section.

The right of a defendant in a criminal prosecution to a trial by a jury of twelve men is a personal right, which may be waived: *The State v. Kaufman*, 51–578.

As to whether the assessment of damages for the taking of private property by a jury of three, appointed by the county judge, as contemplated in Rev. § 1065, was a trial by jury, see *City of Des Moines v. Layman*, 21–153.

The appraisers appointed to assess damages resulting to a land owner from the establishment of a highway, are not a jury within the meaning of this section, and upon appeal properly taken from their decision, such owner is entitled to trial by jury: *Sigafoos v. Talbot*, 25–214.

Neither the old or new constitution, nor any statute ever gave an absolute right of trial by jury in equity suits; 4th G. A., chap. 90, § 1, providing "that in all cases in the district court either party may demand a trial by jury, and jury fees in said court are hereby abolished," was simply a repeal of the provisions of the Code of 1851 (§ § 1772 and 2528), by which the jury fee was provided, and required to be paid in advance, and did not guarantee the right of jury trial in cases in which it did not previously exist: *The State v. Orwig*, 25–280.

So the right of trial by jury is not impaired by Code § 2509, providing that the foreclosure of mortgages shall be by equitable proceedings: *Clough v. Seay*, 49–111.

A provision requiring a party to pay a jury fee, or increasing the jury fee, is not in conflict with this section: *Adae v. Zangs*, 41–536; *Steele v. Cent. R. of Iowa*, 43–109; *Little v. McGuire*, 43–447; *The State v. Verwayne*, 44–621.

Any provision authorizing the reference of questions of fact in actions by ordinary proceedings, without the consent of both parties, would be in violation of the right of jury trial: *McMartin v. Bingham*, 27–234; *Blair Town Lot, etc. Co. v. Walker*, 50–376.

Under this section and § 4 of art. 5, every party has a right, either to a trial by jury, or a trial *de novo* upon appeal: *Sherwood v. Sherwood*, 44–192.

The section giving to a stay bond the effect of a judgment confessed against the parties thereto, is not objectionable as denying them the right of trial, or depriving them of property without due process of law. The bond amounts to a waiver of the privilege which it is competent for them to make: *Cavender v. Heirs of Smith*, 5–157.

The meaning of the phrases "due process of law," "due course of law," and "course of the common law," etc., discussed; and, *held*, that a judgment in proceedings for partition of real estate, commenced against a portion of the defendants by publication, as provided by act of Jan'y 4, 1839, was not void as against such defendants, as depriving them of their property without the benefit of judicial proceedings, according to the course of the common law (under the provision of the ordinance of 1787): *Mason v. Messenger*, 17–261.

The provisions authorizing a sale of property in suit for partition, when division thereof cannot be made (Code § 3290) are not unconstitutional as depriving a party of his property without due process of law: *Metcalf v. Hoopingardner*, 45–510.

Rev. § § 2274, 2275, allowing a money judgment for the value of improvements, against the owner of the land in a proceeding under the occupying claimant law, *held*, unconstitutional under this section: *Childs v. Shower*, 18–261.

Code § 1229, giving to any one who drains mineral land one-tenth of the mineral taken therefrom, *held*, not unconstitutional as depriving the owner of his property without due process of law: *Ahern v. The Dubuque, etc. Mining Co.*, 48–140.

The "short foreclosure" of mortgages on real property, by notice

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and sale, without action in court, under c. 118, Code 1851, was in conflict with this section (per Lowe, C.J.): *Thatcher v. Haun*, 12–393, 313; but such proceedings were not unconstitutional under the constitution of 1846, which did not contain the last clause of this section: *Boyd v. Ellis*, 11–97.

Code § 3058, *held*, to be in conflict with this section, as in certain contingencies operating to deprive a person of his property without due process of law: *Foule v. Mann*, 53–42.

The state has the taxing power, and where property is taken in the valid exercise of that power, the owner is not deprived of it "without due process of law," but there are indispensible requisites to the power, which cannot be dispensed with, and as to these, the tax deed may be made presumptive, but not conclusive: *Allen v. Armstrong*, 16–508. Therefore Rev. § 784, making a tax deed conclusive of the regularity of all prior proceedings, was held unconstitutional: *McCready v. Sexton*, 29–356, 390.

Held, that this section was not violated by a law authorizing local taxes in aid of railways: *Stewart v. Polk Co.*, 30–9. But see *Hanson v. Vernon*, 27–28, and cases cited.

As applicable to this section, see cases under § § 10 and 21.

Rights of persons accused.

SEC. 10. In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel.

This section, giving the accused the right to be confronted by the witnesses against him, is violated by allowing the introduction of a certificate of a notary public as to the fact that a bill was protested, when such fact is material in establishing the guilt of accused: *The State v. Reidel*, 26–430.

Depositions of witnesses, or minutes of evidence on preliminary examinations, are not admissible as against a defendant in a criminal prosecution: *The State v. Collins*, 32–36.

The right to be confronted by the witnesses against him is personal with the accused and not jurisdictional, and may be waived; so, *held*, in a case where, by consent of accused, a written transcript of the testimony taken on a former trial was read to the jury in place of recalling the witnesses themselves: *The State v. Polson*, 29–133.

This section does not give the defendant the absolute right to have a prisoner in the penitentiary or county prison, produced as a witness. The order of the court provided in such case by § 3578, is discretionary: *The State v. Kennedy*, 20–372.

Admission in evidence of a dying declaration, *held*, not to violate the provisions of this section: *The State v. Nash*, 7–347, 377.

Sec. 3145, providing for imprisonment of debtor for contempt in certain cases, *held*, in conflict with this and the preceding sections as denying the right of trial by jury: *Ex parte Grace*, 12–208.

Without indictment.

SEC. 11. All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on

By indictment.

presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.

The provisions allowing a trial in a summary manner, before a justice of the peace or other officer, in cases here specified, is not in violation of the right of trial by jury guaranteed in § 9, and in art. 2 of the Ordinance

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of 1787. The right to one jury trial is all that is guaranteed, and that is preserved by allowing an appeal to the district court, where the cause is to be tried anew by a jury: *Zelle v. McHenry*, 51–572; *The State v. Benecke*, 9–203.

When a defendant is tried before a justice for an offense of which the justice has not jurisdiction, the district court does not acquire jurisdiction on appeal from the judgment of the justice: *The State v. Carpenter*, 23–576.

Where defendant is indicted for an indictable offense, but is found guilty of a lesser degree thereof, or of an offense necessarily included in the offense for which he is indicted (§§ 4465, 4466), he may be convicted and punished for such lesser offense, although exclusive jurisdiction thereof is given to a justice: *The State v. Shepard*, 10–126; *The State v. Jarvis*, 21–44; so, under an indictment for larceny, charging the value of the goods stolen to be more than $20, the district court has jurisdiction to try defendant and sentence him, if found guilty, although the jury find the value of the goods to be less than that amount: *The State v. Stingley*, 10–488; and the question whether the offense is triable as a misdemeanor or a felony, is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of the jury: *The State v. Church*, 8–252.

This section does not limit the power of the legislature to prescribe the form and constituent elements of an indictment, and authorize one as good and sufficient, which would not be so at the common law: *The State v. Bevans*, 37–178.

The number of the grand jury is left to legislative regulation: *The State v. Ostrander*, 18–435.

An indictment for an offense, the punishment for which does not exceed a fine of one hundred dollars or imprisonment for thirty days, is not authorized, and all proceedings thereunder are unauthorized and void; so *held*, in case of an indictment for illegal sale of intoxicating liquors: *Walters v. The State*, 5–507; *The State v. Kœsler*, 6–398; *The State v. Shawbeck*, 7–322.

Rev. § 5094, allowing the state to appeal from the judgments of justices in criminal cases, *held*, not in conflict with this section: *The State v. Tait*, 22–140 (but it was held unconstitutional under the next section: See notes to that section).

An ordinance which provided, in case of the non-payment of a fine, for an imprisonment for a longer time than here authorized, *held*, not void; but, *held*, that it might be enforced up to the limit of the punishment allowed: *The City of Keokuk v. Dressell*, 47–597.

The corresponding section of the Const. of 1846, *held*, prospective, and applicable, not only to offenses cognizable by justices of the peace at the time of its adoption, but also to those which should thereafter be made so cognizable: *Bryan v. The State*, 4–349.

Twice tried. Bail.

SEC. 13. **No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.**

Where the former conviction or acquittal was procured by collusion or fraud, it may be treated as a nullity and disregarded: *The State v. Green*, 16–239.

A dismissal of the proceedings, either by the court or the district attorney, after the trial has commenced, unless as specified in §§ 4617 and following, will operate as an acquittal: *The State v. Callendine*, 8–288.

Although a defendant is put upon his trial on a good indictment, yet, if the verdict is so defective that no judgment can be rendered upon it, it may be set aside and the defendant again put upon trial. The defective verdict will not be regarded as amounting to an acquittal: *The State v. Redman*, 17–329; *The State v. Arthur*, 21–322.

Where a party accused of a criminal offense of which a justice of the peace has jurisdiction, is so tried and acquitted, he cannot be again tried upon an appeal taken by the state to the district court, and the provisions of the Rev. (§ 5091) allowing an appeal by the state, *held*, unconstitutional: *The State v. Van Horton*, 26–402.

Where a defendant has been convicted of a lower degree of the offense than that for which he was indicted and put upon trial, such conviction operates as an acquittal of the degree

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for which he was tried, and if he appeal and secure a reversal, he can only be again tried for the offense, or degree of the offense, of which he was convicted: *The State v. Tweedy*, 11–350; *The State v. Clemons*, 51–274, and see notes to § § 4465 and 4466.

The provision of this section as to bail applies to cases under Code § § 4177 and 4178, and a party charged with murder *in the second degree*, is entitled to bail, notwithstanding the language there used: *The State v. Hufford*, 23–579.

As to the right to bail, see *The State v. Klingman*, 14–404.

Habeas corpus.

SEC. 13. The writ of habeas corpus shall not be suspended or refused when application is made as required by law, unless, in case of rebellion or invasion, the public safety may require it.

The right of appeal in such proceedings exists only as provided by law: *In re Curley*, 34–184.

Military.

SEC. 14. The military shall be subordinate to the civil power. No standing army shall be kept up by the state in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years.

Quartering soldiers.

SEC. 15. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

Treason.

SEC. 16. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

Bail. Punishments.

SEC. 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

Rev. § 3276 making officers of municipal corporations personally liable for failure to levy tax to pay off judgments, etc., *held*, not to impose an unusual fine nor an excessive punishment upon such officers: *Porter v. Thomson*, 22–391.

Eminent domain.

SEC. 18. Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

This section prohibits by implication the taking of private property for any but *public* use, and allows it only upon just compensation being made. The question as to when public exigencies demand the exercise of the power, is solely a question for the legislature, upon whose determination the court cannot sit in judgment. But the question as to what is such a public use as to justify the use of the power, is for the courts. However, if a public use be declared by the legislature, the courts will hold such use public unless it manifestly appears from the provisions of the act that they can have no tendency to advance or promote such public use. Therefore, *held*, that the act of 11th G. A., ch. 127, authorizing the taking of private property for the establishment of a private road was unconstitutional: *Bankhead v. Brown*, 25–540.

The use may be a public one, though it be for private profit, and hence the exercise of the power of eminent domain in favor of railroads, mills, etc., is upheld: *Stewart v. Board of Supervisors*, 30–9.

Section discussed as bearing upon the question whether the legislature may authorize the voting of a tax by a township or state, to aid in the construction of a railway: *Ibid.*; *Hanson v. Vernon*, 27–28, and cases cited.

It is only when the damages are

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properly assessed that they are to be paid or secured. The compensation must be ascertained in the mode prescribed by law: *McCrory v. Griswold*, 7–248; thus, a party is not entitled to enjoin the laying out of a public road through his land, on the ground that compensation is not made. His only remedy is by proceedings to have his damages assessed in the manner provided in such cases: *Connelly v. Griswold*, 7–416. And if his claim is rejected as not filed in proper time, he cannot resist the opening of the highway on the ground that he has not had compensation: *Dunlap v. Pulley*, 28–469; *Abbott v. Board of Supervisors*, 36–354.

The provision as to "just compensation" means that the person whose property is taken for public use shall have a *fair equivalent in money* for the injury done him by such taking. This compensation should be precisely commensurate with the injury sustained from the taking of the property: *Sater v. Burlington, etc., Plank Road Co.*, 1–386; *Henry v. D. & P. R. Co.*, 2–288.

A payment of the damages assessed is a condition precedent to the right to enter upon and take the land under the right of way act, and if the property is taken before such compensation is made, the owner may proceed as against a trespasser: *Henry v. D. & P. R. Co.*, 10–540; *Daniels v. C. & N. W. R. Co.*, 35–129.

As to whether an assessment of damages by a jury of three persons appointed by the county judge as provided in Rev. § 1065, was an assessment by a *jury*, see *The City of Des Moines v. Layman*, 21–143. It seems that appraisers are not such a jury as the Constitution contemplates: *Sigafoos v. Talbot*, 25–214.

Benefits to result to the property from the proposed improvement are not to be estimated: *Israel v. Jewett*, 29–475; and benefits to result from the *construction* of an improvement, as well as benefits from the *use* thereof are to be excluded: *Frederick v. Shane*, 32–254. So, where the establishment of a road renders the erection of fences necessary, the damages should not be diminished by the value of any advantages resulting from the construction of such fences: *Bland v. Hixenbaugh*, 39–532.

Legitimate taxation is not the taking of private property for public use without compensation, within the meaning of this section. The protection afforded the citizen by the government is the just compensation required. So the extension of city limits so as to include adjoining lands, which the owner lays out in lots and invites settlers to occupy with dwellings, etc., and which is thereby subjected to city taxes, is legitimate, and it is not necessary that such extension be made dependent on the consent of the owners of the property. But if an extension, although legitimate on its face, is in reality nothing more than authority to the city to tax the land to a certain distance outside of its limits, it is a taking of private property for public use without just compensation. An indefinite or unreasonable extension so as to embrace land at a distance from the local government and which is used as agricultural land, is unconstitutional, and such a provision is not relieved of its objectionable character by making the lands so brought within the city limits and not laid out into lots or out lots, only taxable by the acre according to their value for agricultural and other purposes: *Morford v. Unger*, 8–82; *Langworthy v. Dubuque*, 16–271.

The legislature may authorize the use of the streets of a city by a railway company for the construction and operation of its road, without compensation being made to the city or to adjoining property owners. But the city may have property acquired for other authorized purposes, which could not be so taken without compensation being made: *The City of Clinton v. C. R. & M. R. R. Co.*, 24–455.

The provisions of the prohibitory liquor law, authorizing the destruction of liquors in certain cases, *held*, not to be in violation of this section: *Santo v. The State*, 2–165, 216.

This section does not authorize the recovery of damages for the *vacation* of a highway: *Brady v. Shinkle*, 40–576; *Ellsworth v. Chickasaw Co.*, 45–571.

Levying a tax upon property abutting upon a street, to pave such street, is not an exercise of the right of eminent domain, but of the power of taxation: *Warren v. Henley*, 31–31.

Compensation provided by Code § 469, for damage resulting from changing grade of street, is not compensation for the taking of private property, etc., and this section of the constitution is not applicable: *Meyer v. The City of Burlington*, 52–560.

An ordinance authorizing the destruction of buildings to stop the

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spread of fire does not authorize a taking for public use so as to give a right to compensation. A city cannot exercise the right of eminent domain, except when expressly given: *Field v. The City of Des Moines*, 39–515, 586.

Code § 1558, making a judgment for the wrongful sale of intoxicating liquor a lien upon the property in which the business is carried on, is not the taking thereof for public use: *Polk Co. v. Hierb*, 37–361, 365.

Code § 1255, allowing the taking of property pending an appeal in an *ad quod damnum* proceeding, *held*, not in conflict with this section: *Peterson v. Ferreby*, 30–327.

Imprisonment for debt.

SEC. 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace.

Code § 3145, providing for imprisonment of debtor for contempt in refusing to turn over property, etc., is not in conflict with this section: *Ex parte Grace*, 12–208; (but such provision is in conflict with art. I, § 10: See same case in notes to that section.)

Petition.

SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.

Attainder.

SEC. 21. No bill of attainder, *ex-post-facto* law, or law impairing the obligation of contracts, shall ever be passed.

An *ex post facto* law is one which makes acts, innocent when done, criminal, or if criminal when done, aggravates the crime, increases the punishment, or reduces the measure of proof. The term applies only to criminal laws. Retrospective or retroactive laws are not in conflict with the constitution of the United States or this constitution, and the power of the legislature to pass them has been uniformly recognized, unless they interfere with vested rights: *The State v. Squires*, 26–340; so *held*, in case of an act legalizing the establishment of county roads: *Bennett v. Fisher*, 26–197; and, *held*, also, that an act curing defects in the acknowledgment of deeds may render the recording of such instruments valid as to subsequent purchasers, but not as to parties whose rights had vested prior to the passage of the act: *Brinton v. Seevers*, 12–389; *Newman v. Samuels*, 17–528.

Retrospective laws, as distinguished from *ex post facto* laws, are not in conflict with this section: *Iowa R. Land Co. v. Soper*, 39–112, 117.

A law enacted prior to the formation of a contract cannot be objectionable as impairing the obligation thereof: *Davis v. Bronson*, 6–410.

A law depriving a judgment debtor of the right to have his property appraised or sold subject to redemption, is not in conflict with this provision: *Holland v. Dickerson*, 41–367; but a law giving a right of redemption from sales under foreclosure of mortgage, in cases where it did not exist at the time the mortgage was made, *held*, to impair the obligation of the contract and to be unconstitutional: *Malony v. Fortune*, 14–417; and so *held*, in regard to a law giving a right to an appraisement in sales under execution, when none existed at the time of the making of the contract: *Rosier v. Hale*, 10–470.

A law extending the time within which action may be brought upon a contract, is not unconstitutional; *Edwards v. McCaddon*, 20–520; nor is an act extending the time within which a defendant might answer in proceedings to foreclose a mortgage: *Holloway v. Sherman*, 12–282; and so *held*, of an act providing for a continuance in cases where the defendant was in the military service of the U. S. or of the state. The power to change the remedy, in general, discussed: *Ibid.*

Code § 2521, prohibiting an action upon a judgment, within fifteen years from its rendition, without leave of the court, *held*, not unconstitutional when applied to judgments rendered before its passage, as impairing their obligation. Although it takes away one remedy, it leaves a complete one: *Watts v. Everett*, 47–269.

The statute allowing the want of consideration to be pleaded in an action on a sealed instrument, does not impair the obligation of the contract when applied to an instrument executed out of the state, where the common law rule making the seal conclusive as to the consideration, is in force: *Williams v. Haines*, 27–251.

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A decision of a court declaring a contract void, is not unconstitutional as impairing the obligation of contracts. So *held*, in case of bonds issued by counties in payment for stock in railroad companies, when the bonds were held void: *McClure v. Owen*, 26–243.

A change in the revenue law as to the mode of enforcing a tax does not impair the obligation of contracts: *Haskel v. The City of Burlington*, 30–232.

14 G. A., ch. 26, § 9, which released railroad companies from the payment of taxes previously levied upon the property of such railroads by a city, *held*, unconstitutional as impairing the obligation of a valid contract: *City of Davenport v. C. R. I. & P. R. Co.*, 38–633; *The City of Dubuque v. Ill. Cent. R. Co.*, 39–56; *The City of Dubuque v. C. D. & M. R. Co.*, 47–196.

Code § 1940, as to vendors' liens, *held*, unconstitutional as applied to liens existing when it took effect: *Jordan v. Wimer*, 45–65.

Aliens hold property.

SEC. 22. Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native-born citizens.

This section does not change the common law rule as to non-resident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 3 Gr. 408; but the section does not restrict the power of the legislature to extend the same privileges to other foreigners than those named (per Cole, J.): *Purcell v. Smith*, 21–540; and it confers upon resident aliens the right to *transmit* as well as to *acquire* real property by descent (per Dillon, J.): *Ibid.*

Slavery.

SEC. 23. There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.

Reservation of rents.

SEC. 24. No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years.

Rights retained.

SEC. 25. The enumeration of rights shall not be construed to impair or deny others, retained by the people.

The theory of the constitution is that all powers not vested in the general assembly remain in the state: *The State v. Wapello Co.*, 13–388.

"There is, as it were, back of the constitution, an unwritten constitution which guarantees and well protects all the absolute rights of the people." (Per Beck, J.): *Hanson v. Vernon*, 27–28, 73; but see *Stewart v. Board of Supervisors*, 30–9, 18, and note to art. 3, § 1.

ARTICLE 2.—RIGHT OF SUFFRAGE.

Electors.

SECTION 1. Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.

This section confers upon persons possessing the qualifications here specified, the right to vote, which right cannot be impaired by the legislature. But it may regulate the exercise of the right and provide a method for determining whether persons proposing to vote possess the required qualifications. A registry law is therefore not unconstitutional: *Edmonds v. Banbury*, 28–267.

9 G. A., Ex. S., ch. 29, providing that citizens of the state in the military service of the U. S. should have the right to vote at all elections authorized by law, whether such persons at the time of voting were within or without the state, and providing for the opening of polls and holding of elections wherever a regiment or battallion of Iowa troops was stationed, *held*, not in conflict with this section: *Morrison v. Springer*, 1[illegible]–304.

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Privilege.

SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such elections, going to and returning therefrom.

Same.

SEC. 3. No elector shall be obliged to perform military duty on the day of election, except in time of war or public danger.

Resident.

SEC. 4. No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place or station within this state.

Insane.

SEC. 5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector.

Ballot.

SEC. 6. All elections by the people shall be by ballot.

ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

Departments of the government.

SECTION 1. The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

This section does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments: *Bryan v. Cattell*, 15–538.

The charter of a city, conferring upon the mayor judicial authority, is not in conflict with this section. The mayor of a city is not a part of the government of the state of Iowa: *Santo v. The State*, 2–165, 220.

Code § 431, providing for proceedings in the circuit court for the annexation of contiguous territory to a city, is not in conflict with this section: *The City of Burlington v. Leebrick*, 43–252, 258.

LEGISLATIVE DEPARTMENT.

Legislative authority.

SECTION 1. The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives; and the style of every law shall be—"*Be it enacted by the General Assembly of the State of Iowa.*"

All the legislative authority inherent in the people is vested in the general assembly, and the legislative power of the general assembly is therefore supreme, except as it is bounded by the limitations written in the constitution: *Stewart v. Board of Supervisors*, 30–9, 18; and see notes to art. 1, § 25.

The law-making authority of the state is the general assembly, and it has power to legislate upon all subjects of legislation, unless prohibited from so doing expressly or by clear implication: *The City of Davenport v. C. R. I. & P. R. Co.*, 38–633, 643.

The taxing power is one of the sovereign powers of the state, vested in the general assembly, and it therefore has the right to subject all kinds of property to taxation for proper purposes: *Ibid.*

The legislative authority being vested in the general assembly, it is not competent for it to submit the question whether an act shall become a law to a vote of the people. Therefore, it was held that § 18 of the prohibitory liquor law of 1855, providing for the submission of the question to vote in each county as to whether such law should be in force in that county, was unconstitutional, and that the act itself was in force throughout the state without such submission: *Santo v. The State*, 2–165, 203; *The State v. Beneke*, 9–203. For the same reason the license act of 1857, containing a provision that the prohibitory law of 1855 should not be repealed in any

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county except by a vote of the people of that county, was held unconstitutional: *Geebrick v. The State*, 5–491: see also, *The State v. Weir*, 33–134. But § 114 of the Code of 1851, and the Act of 1857 (Rev. § § 287 and following), allowing the county judge to submit to vote in each county the question whether sheep and swine should be allowed to run at large, was held not unconstitutional on this ground, inasmuch as the law was in force without a vote of the people, and it simply authorized the people of the county to adopt a mere police regulation: *Dalby v. Wolf*, 14–228.

Held, not unconstitutional to provide in an act, enlarging the boundaries of a city, that it shall only take effect after its acceptance by the city council: *Morford v. Unger*, 8–82.

16 G. A., ch. 143, empowering cities of a certain grade to establish superior courts by vote, etc., is not unconstitutional as providing for an exercise of legislative power by the people. The statute itself is in force without any vote, but simply confers upon cities an option to be exercised by vote to avail themselves of the power conferred: *Lytle v. May*, 49–224.

Sessions.

SEC. 2. The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation.

As to the powers of the general assembly at an extra session, see note to art. 4, § 11.

Members of the house of representatives.

SEC. 3. The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the presidential election, when the election shall be on the Tuesday next after the first Monday in November, and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified.

Eligibility.

SEC. 4. No person shall be a member of the house of representatives who shall not have attained the age of twenty-one years; be a free white male citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may have been chosen to represent.

Senators.

SEC. 5. Senators shall be chosen for a term of four years, at the same time and place as representatives; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship.

Number and classification.

SEC. 6. The number of senators shall not be less than one-third nor more than one-half the representative body; and shall be so classified by lot that one class, being as nearly one-half as possible, shall be elected every two years. When the number of senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in numbers as practicable.

Elections determined.

SEC. 7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

Quorum.

SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day

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to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Authority of the houses.

SEC. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.

Protest.

SEC. 10. Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.

Privilege.

SEC. 11. Senators and representatives, in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to and returning from the same.

Vacancies.

SEC. 12. When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.

Doors open.

SEC. 13. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

Adjournments.

SEC. 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

Bills

SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

To be approved, etc.

SEC. 16. Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him, (Sunday excepted,) the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval, if approved by him, and with his objections, if he disapproves thereof.

Same.

SEC. 17. No bill shall be passed unless by the assent of a majority of all members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered upon the journal.

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Receipts, etc. SEC. 18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at every regular session of the general assembly.

Impeachment. SEC. 19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

Who liable to and judgment. SEC. 20. The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Members not appointed to office. SEC. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Disqualification. SEC. 22. No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Same. SEC. 23. No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly, or be eligible to hold any office of trust or profit in this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

Money drawn. SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

Compensation of members. SEC. 25. Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per diem compensation as fixed by law for the regular session, and none other.

Laws; when to take effect. SEC. 26. No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next, after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If the general assembly shall deem any law of immediate importance, they may Publication.

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provide that the same shall take effect by publication in newspapers in the state.

The act of Jan. 24, 1855, conferring upon the governor authority to publish acts of a general nature as here contemplated, and providing that they should take effect from such publication, *held*, unconstitutional as delegating to the governor powers of the general assembly: *Scott v. Clark*, 1–70; *Pilkey v. Gleason*, 1–522; see, also, Code § 33 and notes.

Divorce.

SEC. 27. No divorce shall be granted by the general assembly.

Lotteries.

SEC. 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.

A contract in furtherance of a lottery scheme, *held*, void: *Guenther v. Dewein*, 11–133.

Acts; subject to be expressed in title.

SEC. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

The intention of this provision is to prevent the union, in the same act, of incongruous matters and of objects having no connection, and it was designed to prevent surprise in legislation by having matter of one nature embraced in a bill whose title expressed another. But the unity of object is to be looked for in the ultimate end and not in the detail or steps leading to the end. Various acts discussed as bearing upon the question whether the subject covered was sufficiently embraced in the title: *The State ex rel. etc., v. County Judge*, 2–280; and see *Morford v. Unger*, 8–82; *Whiting v. City of Mt. Pleasant*, 11–482.

Every law prescribing duties must have the same object of liabilities; therefore *held*, that Code § 1307, prescribing the liabilities of railroad companies in certain cases, etc., was sufficiently embraced in the title of the bill in which it was originally enacted, which was "an act in relation to the duties of railroad companies:" *McAunich v. M. & M. R. Co.*, 20–338; so, where an act in one section legalized the organization of a school district, and in another legalized the acts of the officers thereof, *held*, that the second was so connected with the first that it was sufficiently embraced in the title "an act to legalize the organization of the," etc., or at least that the invalidity on this ground would extend only to the second section: *The State v. Squires*, 26–340.

The act of 1855 for the suppression of intemperance, *held*, not to embrace more than one subject, the several provisions therein being but so many steps fairly conducive to the end or object expressed in the title: *Santo v. The State*, 2–165; and an act entitled "an act for revising and consolidating the laws and incorporating the city of Dubuque and establish a city court therein," *held*, not objectionable as embracing more than one subject: *Davis v. Woolnough*, 9–104, 107.

Rev. § § 3275 and 3276, *held*, to be sufficiently included within the title of that portion of the Rev. passed as "the code of civil practice:" *Porter v. Thomson*, 22–391.

17 G. A. ch. 119, prohibiting the sale of ale, wine, beer, etc., within two miles of the corporate limits of a municipal corporation or of the place of holding an election, etc., *held*, not unconstitutional as embracing more than one subject: *The State v. Schroeder*, 51–197.

Section applied in particular cases: *Williamson v. City of Keokuk*, 44–88, 91; *Duncombe v. Prindle*, 12–1; *The Farmers' Ins. Co. v. Highsmith*, 44–330.

Local or special laws.

SEC. 30. The general assembly shall not pass local or special laws in the following cases:

For the assessment and collection of taxes for state, county, or road purposes;

For laying out, opening, and working roads or highways;

For changing the names of persons;

For the incorporation of cities and towns;

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For vacating roads, town plats, streets, alleys, or public squares;

For locating or changing county seats.

Laws general and uniform.

Boundaries of counties.

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

This section, as to assessment and collection of taxes, is not infringed by Code § 814 allowing a debtor to deduct the amount of his moneys and credits in listing his property for assessment: *Macklot v. City of Davenport*, 17–379.

A law remitting penalties upon taxes not paid within a certain time, is not a special law within the meaning of this provision: *Beecher v. Board of Supervisors*, 50–538.

The legislature cannot pass a special act amending the charter of a municipal corporation. Such act would be in conflict with the clause prohibiting special acts for the incorporation of cities and towns, and would be a law not of general and uniform operation, in a case where a general law could be made applicable: *Ex parte Pritz*, 9–30; *Davis v. Woolnough*, 9–104; *Hetherington v. Bissell*, 10–145; *Baker v. Steamboat Milwaukee*, 14–214.

This provision is not violated by a law empowering cities and towns, incorporated under a special charter, to amend such charter (Code § 548): *Von Phul v. Hammer*, 29–222.

A law applicable to all cities and towns existing under special charter, is not unconstitutional, even though it be considered an amendment of their charters: *The State v. King*, 37–462.

A law establishing a special court in a particular town named, and providing for the jurisdiction, etc., thereof, *held*, unconstitutional as being in fact an amendment to the city charter, and as being a local and special law in a case where a general law could be made applicable: *The Town of McGregor v. Baylies*, 19–43.

An act which operates upon a particular condition, and attaches to it certain consequences whenever that condition exists, is not in conflict with this provision. So an act applying only to cities under special charters was held not unconstitutional, although it could apply to but few cities: *Haskel v. City of Burlington*, 30–232; and so 14. G. A., ch. 42, (private acts) validating the acts of municipal corporations in levying special taxes in excess of the legal limit, to pay judgments, was considered constitutional: *Iowa Railroad Land Co. v. Soper*, 39–112.

A curative act legalizing the levy and assessment of taxes made for a year when no law authorizing any levy and assessment was in force, *held*, not in conflict with this section: *Boardman v. Beckwith*, 18–292.

Although the passage of a local or special law incorporating a certain school district would be in conflict with this section, yet a curative act legalizing a defective organization thereof is not unconstitutional. In such case a general law could not be made applicable: *The State v. Squires*, 26–340.

Code § 1307, as to liability of railroad companies for injuries to employes, is not objectionable as not being of general and uniform operation. It operates uniformly upon all persons under the circumstances therein contemplated: *McAunich v. M. & M. R. Co.*, 20–338; *Deppe v. C. R. I & P. R.Co.*, 36–52; so *held*, also, as to 12 G. A., ch. 180, which provided a special method of taxation for express and telegraph companies: *U. S. Express Co. v. Ellyson*, 23–370.

A special act authorizing the building of a particular railroad, *held*, not in violation of the provision of this section, for the reason that the object of the act was to execute certain trusts confided to the state, to secure the building of a railroad on a particular route: *The City of Clinton v. C. R. & M. R. R. Co.*, 24–455.

As to the requirement that laws shall have a uniform operation, see art. 1, § 6, and notes.

Extra compensation.

SEC. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been ren-

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dered, or the contract entered into; nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local or private purposes, unless such appropriation, compensation, or claim be allowed by two-thirds of the members elected to each branch of the general assembly.

Oath of members.

SEC. 32. Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear, (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator, (or representative, as the case may be,) according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.

Census.

SEC. 33. The general assembly shall, in the years one thousand eight hundred and fifty-nine, one thousand eight hundred and sixty-three, one thousand eight hundred and sixty-five, one thousand eight hundred and sixty-seven, one thousand eight hundred and sixty-nine, and one thousand eight hundred and seventy-five, and every ten years thereafter, cause an enumeration to be made of all the inhabitants of the state.

Apportionment.

SEC. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of inhabitants in each.

Districts.

SEC. 35. The senate shall not consist of more than fifty members, nor the house of representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the state according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

Ratio of representation.

SEC. 36. At its first session under this constitution, and at every subsequent regular session, the general assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

Districts.

SEC. 37. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

Elections by general assembly.

SEC. 38. In all elections by the general assembly, the members thereof shall vote viva voce; and the votes shall be entered on the journal.

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ARTICLE 4.—EXECUTIVE DEPARTMENT.

Governor.

SECTION 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of Iowa.

Election and term.

SEC. 2. The governor shall be elected by the qualified electors at the time and place of voting for members of the general assembly, and shall hold his office two years from the time of his installation, and until his successor is elected and qualified.

Lieutenant governor.

SEC. 3. There shall be a lieutenant governor, who shall hold his office two years, and be elected at the same time as the governor. In voting for governor and lieutenant governor, the electors shall designate for whom they vote as governor, and for whom as lieutenant governor. The returns of every election for governor and lieutenant governor, shall be sealed up and transmitted to the seat of government of the state, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

Returns of elections.

Election by general assembly.

SEC. 4. Persons respectively having the highest number of votes, for governor and lieutenant governor, shall be declared duly elected; but in case two or more persons shall have an equal, and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of said persons governor, or lieutenant governor, as the case may be.

Contested elections.

SEC. 5. Contested elections for governor, or lieutenant governor, shall be determined by the general assembly in such manner as may be prescribed by law.

Eligibility.

SEC. 6. No person shall be eligible to the office of governor, or lieutenant governor, who shall not have been a citizen of the United States, and a resident of the state two years next preceding the election, and attained the age of thirty years at the time of said election.

Commander.

SEC. 7. The governor shall be commander-in-chief of the militia, the army, and navy of this state.

Duties.

SEC. 8. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

Same.

SEC. 9. He shall take care that the laws are faithfully executed.

Vacancies.

SEC. 10. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

Convening assembly.

SEC. 11. He may, on extraordinary occasions, convene the general assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

The general assembly, when it is convened in special or extra session, has full legislative authority, unless its business is restricted by some constitutional provision. Its action is not confined to the special purpose for which it is convened, and it may enact any law at such session that it might at a regular session: *Morford v. Unger*, 8-82.

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Message.

SEC. 12. He shall communicate, by message, to the general assembly, at every regular session, the condition of the state, and recommend such matters as he shall deem expedient.

Adjournment.

SEC. 13. In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next general assembly.

Disqualification.

SEC. 14. No person shall, while holding any office under the authority of the United States, or this state, execute the office of governor, or lieutenant governor, except as hereinafter expressly provided.

Two years.

SEC. 15. The official term of the governor, and lieutenant governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The lieutenant governor, while acting as governor, shall receive the same pay as provided for governor; and while presiding in the senate, shall receive as compensation therefor, the same mileage and double the per diem pay provided for a senator, and none other.

Pardons, etc.

SEC. 16. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reason therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.

See Code, § 4712, and notes.

Lieutenant governor to act as governor.

SEC. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.

President of senate.

SEC. 18. The lieutenant governor shall be president of the senate, but shall only vote when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president pro tempore.

Vacancies.

SEC. 19. If the lieutenant governor, while acting as governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the president pro tempore of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.

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SEC. 20. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the state of Iowa. Seal of state.

SEC. 21. All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state. Commissions, etc.

SEC. 22. A secretary of state, auditor of state, and treasurer of state, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law. Secretary, auditor and treasurer.

ARTICLE 5.—JUDICIAL DEPARTMENT.

SECTION 1. The judicial power shall be vested in a supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish. Courts.

See: *Laird v. Dickerson*, 40–665; *Iowa Railroad Land Co. v. Soper*, 39 –112, 123.

SEC. 2. The supreme court shall consist of three judges, two of whom shall constitute a quorum to hold court. Supreme court.

SEC. 3. The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their court at such time and place as the general assembly may prescribe. The judges of the supreme court so elected, shall be classified so that one judge shall go out of office every two years; and the judge holding the shortest term of office under such classification, shall be chief justice of the court during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each judge of the supreme court shall be six years, and until his successor shall have been elected and qualified. The judges of the supreme court shall be ineligible to any other office in the state, during the term for which they have been elected. Judges elected

SEC. 4. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state. Jurisdiction.

The supreme court has only appellate jurisdiction: *Westbrook v. Wicks*, 36–382.

Its jurisdiction may be restricted by the general assembly; and therefore, *held*, that where an act gave the district court *final* jurisdiction in a matter, there was no right of appeal from its judgment to the supreme court: *Lampson v. Platt*, 1–556.

The distinction between the law and equity attributes of the supreme court is here too well defined to be erased by legislative action: *Claussen v. Lafrenz*, 4 Gr. 224.

The supreme court can only acquire jurisdiction in a chancery cause by appeal, and it can only review and decide questions made in and decided by the court below. Upon a trial *de novo* of a chancery cause, it cannot consider new testimony, and it has no power to entertain a bill of review: *Mc Gregor v. Gardner*, 16–538.

Code § 3169, dispensing with the necessity of motion for new trial, is

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not in conflict with this provision Previous to that statute the ruling of the lower court on a motion to set aside the verdict as contrary to the evidence was reviewed as a matter of law, and the section referred to simply acts as a standing motion for new trial: *Coffin v. City Council of Davenport*, 26–515.

A party cannot insist upon his constitution right to a trial *de novo* on appeal, unless he has pursued the method pointed out for securing such right: *Cross v. B. & S. W. R. Co.*, 51–683; and § 2742, as it originally stood, regulated, but did not take away, the right of appeal in cases in chancery: *Richards v. Hintrager*, 45–253; but that section was unconstitutional, in so far as it denied the right of trial *de novo* in certain equitable actions, such as divorce: *Sherwood v. Sherwood*, 44–192.

District judge elected.

SEC. 5. The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected.

This section does not prevent a judge from holding court in another district than his own, by exchange, under the provisions of Code § 175: *The State v. Stingley*, 10–488.

Jurisdiction

SEC. 6. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

The district court is here invested with all the powers of a court of law, and those of a court of equity, and the distinctions between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 Gr. 224.

Held, that in a proceeding in equity the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7–110.

The jurisdiction of the district court is not limited by the provisions giving justices jurisdiction in cases where the amount does not exceed one hundred dollars: *Nelson v. Gray*, 2 Gr. 597; *Hutton v. Drebilbis*, 2 Gr. 593.

The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that Rev. § 2395, which prohibited the bringing of action in that court on claims against an estate for a mere money demand, except with the approbation of the county court, was not intended to take away the jurisdiction of that court, but merely as a restraint on the plaintiff: *Merritt v. Robinson*, 17–61; and that the failure on the part of the plaintiff to obtain such leave must be set up as a defense, and could not be made the ground of a collateral attack on the judgment: *Cooley v. Smith*, 17–99; and further, as to the jurisdiction of district courts, see *Laird v. Dickerson*, 40–655, 669.

Conservators of the peace.

SEC. 7. The judges of the supreme and district courts shall be conservators of the peace throughout the state.

Style of process.

SEC. 8. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

An original notice is not "process" within the meaning of this section: *Nichols v. Burlington, etc., Plank Road Co.*, 4 Gr. 42.

"Process" defined. "Prosecutions" as here used, are such criminal prosecutions as shall be instituted and prosecuted before the tribunals provided for in this article, under the statutes of the state, and do not include prosecutions for violations of city ordinances. The latter may be in the name of the city: *City of Davenport v. Bird*, 34–524.

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The expressions "State of Iowa" and "The State of Iowa," are essentially the same: *Harriman v. The State*, 2 Gr. 270.

An indictment in which the presentment is "in behalf of the state of Iowa," is good although the expression "In the name and by the authority of the state of Iowa," is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution, that it is made "in the name and by the authority," etc.: *Wrockledge v. The State*, 1–167.

Salaries.

SEC. 9. The salary of each judge of the supreme court shall be two thousand dollars per annum; and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hund.ed and sixty; after which time they shall severally receive such compensation as the general assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they shall have been elected.

Judicial districts.

SEC. 10. The state shall be divided into eleven judicial districts; and after the year eighteen hundred and sixty, the general assembly may re-organize the judicial districts, and increase or diminish the number of districts, or the number of judges of the said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session; and no re-organization of the districts, or diminution of the judges, shall have the effect of removing a judge from office. Such re-organization of the districts, or any change in the boundaries thereof, or any increase or diminution of the number of judges, shall take place every four years thereafter, if necessary, and at no other time.

When chosen.

SEC. 11. The judges of the supreme and district courts shall be chosen at the general election; and the term of office of each judge shall commence on the first day of January next after his election.

Attorney general.

SEC. 12. The general assembly shall provide, by law, for the election of an attorney-general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

District attorney.

SEC. 13. The qualified electors of each judicial district shall, at the time of the election of district judge, elect a district attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.

Duty of general assembly.

SEC. 14. It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.

ARTICLE 6.—MILITIA.

Who constitute.

SECTION 1. The militia of this state shall be composed of all able-bodied male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state; and shall be armed, equipped, and trained, as the general assembly may provide by law.

Exemption.

SEC. 2. No person or persons conscientiously scrupulous of

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bearing arms shall be compelled to do military duty in time of peace; *provided*, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

Officers.

SEC. 3. All commissioned officers of the militia (staff officers excepted) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor.

ARTICLE 7.—STATE DEBTS.

Limitation of state indebtedness.

SECTION 1. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Same.

SEC. 2. The state may contract debts to supply casual deficits or failures in revenues; or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Losses to school funds audited.

SEC. 3. All losses to the permanent school, or university fund of this state, which shall have been occasioned by the defalcation, mismanagement, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state, in favor of the respective fund sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

The school fund belongs to the state, and it has solemnly pledged itself to maintain the same inviolate: *County of Des Moines v. Harker*, 34-84.

For what other purposes state may contract debt.

SEC. 4. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the debts so contracted shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

Other debts to be authorized by special law.

SEC. 5. Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of this state, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been sub-

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mitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people. Submitted to the people.

SEC. 6. The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid. Legislature may repeal.

SEC. 7. Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object. Tax imposed, distinctly stated.

ARTICLE 8.—CORPORATIONS.

SECTION 1. No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided. Corporations, how created.

It was not intended hereby to repeal city charters already granted: *Warren v. Henly*, 31–51.

Local or special laws for incorporation of cities and towns prohibited, see art. 3, § 30.

SEC. 2. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. Property taxable.

This clause *requires* the legislature to provide for the taxation of the property of corporations the same as that of individuals, and an act releasing such property from city taxes, *held*, void: *City of Davenport v. C. R. I. & P. R. Co.*, 38–633, 642; *City of Dubuque v. Ill. Cent. R. Co.*, 39–56; and see *Iowa R. Land Co. v. Woodbury Co.*, 39–172.

14 G. A., ch. 26, as to taxation of property of railway corporations, and 12 G. A., ch. 180, as to taxation of express and telegraph companies, *held*, not in conflict with this section: *U. S. Express Co. v. Ellyson*, 28–370; *City of Dubuque v. C. D. & M. R. Co.*, 47–196.

As to taxation of railroad property in general, see *City of Davenport v. M. & M. R. Co.*, 16–348; *D. & S. C. R. Co. v. City of Dubuque*, 17–120.

SEC. 3. The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state. State not to be a stockholder.

SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly. Corporation not to be a stockholder.

SEC. 5. No act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less Act creating banking associations submitted to the people.

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than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

Held, that this provision was not intended to forbid the repeal by the legislature of acts organizing banks (such repeal, however, being required to be by a two-thirds vote: See § 12 of this article): *Morseman v. Younkin*, 27–350.

State bank.

SEC. 6. Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a state bank with branches.

Founded on special basis.

SEC. 7. If a state bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.

General banking law to provide for.

SEC. 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of state, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in United States stocks, or in interest-paying stocks of states in good credit and standing, to be rated at ten per cent. below their average value in the city of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of such stocks, to the amount of ten per cent. on the dollar, the bank or banks owning said stock shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders responsible.

SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

Bill holders to have preference.

SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Suspension of specie payments.

SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

General assembly may amend or repeal by two-thirds vote.

SEC. 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1.—*Education.*

Board of education.

SECTION 1. The educational interest of the state, including common schools and other educational institutions, shall be under the management of a board of education, which shall consist of the lieutenant-governor, who shall be the presiding officer of the

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board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the state.

Who eligible.

SEC. 2. No person shall be eligible as a member of said board who shall not have attained the age of twenty-five years, and shall have been one year a citizen of the state.

How elected.

SEC. 3. One member of said board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this constitution, the board shall be divided, as nearly as practicable, into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one-half of the board shall be chosen every two years thereafter.

How divided.

First session held.

SEC. 4. The first session of the board of education shall be held at the seat of government, on the first Monday of December, after their election; after which the general assembly may fix the time and place of meeting.

Limited to twenty days.

SEC. 5. The session of the board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two-thirds of the board, the governor may order a special session.

Secretary.

SEC. 6. The board of education shall appoint a secretary, who shall be the executive officer of the board, and perform such duties as may be imposed upon him by the board, and the laws of the state. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the general assembly.

Rules and regulations of board.

SEC. 7. All rules and regulations made by the board shall be published and distributed to the several counties, townships, and school districts, as may be provided for by the board, and when so made, published, and distributed, they shall have the force and effect of law.

Power to make, etc.

SEC. 8. The board of education shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools, and other educational institutions, that are instituted, to receive aid from the school or university fund of this state; but all acts, rules, and regulations of said board may be altered, amended, or repealed by the general assembly; and when so altered, amended, or repealed, they shall not be re-enacted by the board of education.

General assembly may repeal, etc.

The legislature has thus full power to make needful regulations, and this power has been given to district boards, and in the absence of abuse of such power being shown, the rules of such boards will not be held unconstitutional (per Cole, J.): *Burdick v. Babcock*, 31–562, 571.

7th G. A., ch. 52, providing a full system of public instruction for the state, *held*, unconstitutional on the ground that under this section the legislature had no authority to pass such an act: *Dist. Tp. v. The City of Dubuque*, 7–262.

Governor ex-officio a member.

SEC. 9. The governor of the state shall be, *ex-officio*, a member of said board.

Contingent.

SEC. 10. The board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the general assembly.

State university.

SEC. 11. The state university shall be established at one place

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without branches at any other place, and the university fund shall be applied to that institution, and no other.

Board of education to provide for education of youths of the state.

SEC. 12. The board of education shall provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

Held, that the expression "all youths" prohibits any distinction being made between white and colored children: *Clark v. Board of Directors*, etc., 24-266; *Smith v. Directors, etc.*, 40-518; *Dove v. Independent School District*, 41-689.

Compensation.

SEC. 13. The members of the board of education shall each receive the same per diem during the time of their session, and mileage going to and returning therefrom, as members of the general assembly.

Quorum.

SEC. 14. A majority of the board shall constitute a quorum for the transaction of business; but no rule, regulation, or law, for the government of common schools or other educational institutions shall pass without the concurrence of a majority of all the members of the board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the board shall be, "Be it enacted by the board of education of the state of Iowa."

Style of acts.

When board may be abolished.

SEC. 15. At any time after the year one thousand eight hundred and sixty-three, the general assembly shall have power to abolish or reorganize said board of education, and provide for the educational interest of the state in any other manner that to them shall seem best and proper.

The board of education was abolished by 10 G. A., ch. 52, § 1.

2.—SCHOOL FUNDS AND SCHOOL LANDS.

Under control of general assembly.

SECTION 1. The educational and school funds and lands, shall be under the control and management of the general assembly of this state.

Permanent fund.

SEC. 2. The university lands, and the proceeds thereof, and all moneys belonging to said fund shall be a permanent fund for the sole use of the state university. The interest arising from the same shall be annually appropriated for the support and benefit of said university.

Lands appropriated to educational purposes.

SEC. 3. The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by congress,

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on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.

See notes to § 7 *infra*.

Fines, etc., how appropriated.

SEC. 4. The money which may have been or shall be paid by persons as an equivalent from exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied in the several counties in which such money is paid, or fine collected, among the several school districts of said counties, in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall from time to time provide.

See Code § § 1838 and 3370.

Lands reserved, or granted, or funds accruing from sale thereof to be a permanent fund.

SEC. 5. The general assembly shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons to this state, for the use of the university, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said university, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

Interest applied.

Who agents of school funds.

SEC. 6. The financial agents of the school funds shall be the same that, by law, receive and control the state and county revenue, for other civil purposes, under such regulations as may be provided by law.

Money to be distributed.

SEC. 7. The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly.

An act as to distribution of the school fund, *held*. unconstitutional, as in conflict with this section: *District Tp. v. County Judge*, 13-250.

ARTICLE X.—AMENDMENTS TO THE CONSTITUTION.

How proposed.

SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all

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Submission.

the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

As to method of submitting propositions to amend, see 16th G. A., ch. 114, inserted following the constitution.

More than one.

SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

Convention.

SEC. 3. At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, "Shall there be a convention to revise the constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention.

ARTICLE XI.—MISCELLANEOUS.

Jurisdiction of justice of the peace.

SECTION 1. The jurisdiction of justices of the peace shall extend to all civil cases, (except cases in chancery, and cases where the question of title to real estate may arise,) where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

The jurisdiction of justices in such cases is not exclusive, but concurrent with courts of record: *Nelson v. Gray*, 2 Gr. 397; *Hutton v. Drebilbis*, 2 Gr. 593.

Counties.

SEC. 2. No new county shall be hereafter created containing less than four hundred and thirty-two square miles; nor shall the territory of any organized county be reduced below that area; except the county of Worth, and the counties west of it along the northern boundary of this state, may be organized without additional territory.

11 G. A., ch. 192, organizing the county of Crocker, *held*, unconstitutional under this section: *Garfield v. Brayton*, 33–16.

This section, *held*, not to prohibit the legislature from establishing a second county seat in a county already organized: *Trimble v. The State*, 2 Gr. 404.

Indebtedness of political or municipal corporations.

SEC. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.

The constitutional inhibition applies not only to bonded indebtedness, but indebtedness incurred in any manner or for any purpose: *The*

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City of Council Bluffs v. Stewart, 51–385; also to indebtedness already due: *Grant v. City of Davenport*, 36–396.

It matters not whether the indebtedness is for necessary expenses. It must not exceed the limit here fixed, and one contracting with a city must at his peril take notice of its financial condition. The indebtedness is prohibited unless it can be shown to be, with reasonable certainty, within the ordinary current revenues: *French v. City of Burlington*, 42–614.

The indebtedness here contemplated is different from an obligation to pay. A contract under which a certain sum within the constitutional limit was to be paid each year, would be valid, although the entire amount of the obligation of the contract was greatly in excess of the constitutional limit: *Dively v. City of Cedar Falls*, 27–227.

This section applies not only to a present indebtedness, but also to such a one as is payable on a contingency at some future time, or which depends on some contingency before a liability is created; but it must appear that such contingency is sure to take place, irrespective of any action taken or option exercised in the future. Therefore, *held*, that an ordinance of a city authorizing the erection of water works by a private company, with the provision that the city might, at its option, purchase them in the future on certain terms, etc., was not the incurring of an indebtedness: *Burlington Water Co. v. Woodward*, 49–58.

In estimating the indebtedness, it is not proper to deduct therefrom uncollected taxes and the levy for the current year: *City of Council Bluffs v. Stewart*, 51–385.

A city has a right to retain and apply its current revenues to the payment of its ordinary and current expenses, even as against a judgment creditor; and where the contract made by the municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the "incurring of indebtedness" within the meaning of the constitutional provision: *Grant v. The City of Davenport*, 36–396.

It is not ground for restraining the collection of a tax that, when collected, it will be applied in part payment of an unconstitutional indebtedness: *Strohm v City of Iowa City* 47–42.

A school district township is such a corporation as is here contemplated: *Winspear v. District Township of Holman*, 37–542; and an order issued in excess of the limitation is void. Such order not being negotiable, a *bona fide* holder will acquire no rights thereunder: *Nat'l, etc., Bank v. Ind. District of Marshall*, 39–490. So, also, bonds and coupons issued in excess of the constitutional limit, by such a district, are void without regard to the good faith and want of notice of purchasers: *Mosher v. Ind. Sch. District of Ackley*, 44–122.

15 G. A., ch. 23, giving to holders of bonds issued in excess of the constitutional limit a lien for material furnished by them upon the building in which it was used, *held*, unconstitutional as in conflict with this section: *Ibid.*

Bonds issued by a municipal corporation in excess of the limit here imposed, are void, even in the hands of an innocent holder for value: *McPherson v. Foster*, 43–48. So *held*, also, in case of a guaranty: *Carter v. The City of Dubuque*, 35–416.

Bonds issued in payment of a judgment which was recovered on debts contracted in violation of this section, are valid in the hands of innocent holders for value: *S. C. & St. P. R. Co. v. County of Osceola*, 45–168; *Same v. Same*, 52–26.

The adoption of the constitution did not impair any contract previously made, although in excess of the limit here imposed, but any provisions of a city charter authorizing the contracting of a greater indebtedness than here contemplated, were repealed (see § § 1 and 2 of art. 12). The fact that as a result of the incurring of the indebtedness the city is to acquire valuable property productive of revenue, does not take the case out of the meaning of this section: *Scott v. City of Davenport*, 34–208.

Where a city, shortly before the taking effect of this constitution, contracted with a company to supply gas to certain lamp posts for a term of years, and an action was brought for gas furnished during a period subsequent to the taking effect of the constitution, *held*, that the city had become "indebted" under the contract prior to the taking effect of the constitution, and that this section was therefore no defense to the action: *Davenport G. L. & C. Co. v. City of Davenport*, 13–229.

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Boundaries.

SEC. 4. The boundaries of the state may be enlarged, with the consent of congress and the general assembly.

Oath of office.

SEC. 5. Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office.

How vacancies filled.

SEC. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.

How lands granted may be located,

SEC. 7. The general assembly shall not locate any of the public lands which have been, or may be granted by congress to this state, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant so exempted, shall not exceed three hundred and twenty acres.

Seat of government.

SEC. 8. The seat of government is hereby permanently established, as now fixed by law, at the city of Des Moines, in the county of Polk; and the state university at Iowa City, in the county of Johnson.

ARTICLE XII. — SCHEDULE.

Supreme law of the state.

SECTION 1. The constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Laws in force.

SEC. 2. All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.

Any provisions in a city charter inconsistent with the constitution (as for instance with § 3 of the preceding art.) were repealed by the adoption of the Const.: *Dively v. City of Cedar Falls*, 27–227; *Scott v. City of Davenport*, 34–208.

Legal proceedings not affected.

SEC. 3. All indictments, prosecutions, suits, pleas, plaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of error, *certiorari*, and injunctions, shall be carried on in the several courts, in the same manner as now provided by law, and all offenses, misdemeanors, and crimes that may have been committed before the taking effect of this constitution. shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this constitution been made.

Fines, etc., inure to the state.

SEC. 4. All fines, penalties, or forfeitures due, or to become due, or accruing to the state, or to any county therein, or to the school fund, shall inure to the state, county, or school fund, in the manner prescribed by law.

Bonds in force.

SEC. 5. All bonds executed to the state, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.

First election.

Governor and lieutenant governor.

SEC. 6. The first election under this constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty-seven, at which time the electors of the state shall elect the governor and lieutenant-governor. There shall also be elected at such election, the successors of such state sen-

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ators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the house of representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the general assembly which commenced on the first Monday of December, one thousand eight hundred and fifty-six.

Same. Secretary, auditor, etc.

SEC. 7. The first election for secretary, auditor, and treasurer of state, attorney general, district judges, members of the board of education, district attorneys, members of congress, and such state officers as shall be elected at the April election, in the year one thousand eight hundred and fifty-seven, (except the superintendent of public instruction,) and such county officers as were elected at the August election, in the year one thousand eight hundred and fifty-six, except prosecuting attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight; *provided* that the time for which any district judge or other state or county officer elected at the April election in the year one thousand eight hundred and fifty-eight shall not extend beyond the time fixed for filling like offices at the October election, in the year one thousand eight hundred and fifty-eight.

Same. Judges of supreme court.

SEC. 8. The first election for judges of the supreme court, and such county officers as shall be elected at the August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year one thousand eight hundred and fifty-nine.

First session general assembly.

SEC. 9. The first regular session of the general assembly shall be held in the year one thousand eight hundred and fifty-eight, commencing on the second Monday of January of said year.

Senators.

SEC. 10. Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty-nine, at which time their successors shall be elected as may be prescribed by law.

Offices not vacated by new constitution.

SEC. 11. Every person elected by popular vote, by a vote of the general assembly, or who may hold office by executive appointment, which office is continued by this constitution, and every person who shall be so elected or appointed to any such office, before the taking effect of this constitution, (except as in this constitution otherwise provided) shall continue in office until the term for which such person has been or may be elected or appointed shall expire; but no such person shall continue in office after the taking effect of this constitution, for a longer period than the term of such office, in this constitution prescribed.

State to be districted.

SEC. 12. The general assembly, at the first session under this constitution, shall district the state into eleven judicial districts, for district court purposes; and shall also provide for the apportionment of the members of the general assembly in accordance with the provisions of this constitution.

Constitution to be voted for August, 1857.

SEC. 13. This constitution shall be submitted to the electors of the state at the August election, in the year one thousand eight hundred and fifty-seven, in the several election districts in this state. The ballots at such elections shall be written or printed as follows: those in favor of the constitution, "new constitution—yes." Those against the constitution, "new constitution—no." The elections shall be conducted in the same manner as the gene-

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ral elections of the state, and the poll-books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the secretary of state, which abstracts shall be canvassed in the manner provided for the canvass of state officers. And if it shall appear that a majority of all the votes cast at such election for and against this constitution are in favor of the same, the governor shall immediately issue his proclamation stating that fact, and such constitution shall be the constitution of the state of Iowa, and shall take effect from and after the publication of said proclamation.

Proposition to strike out the word "white."

SEC. 14. At the same election that this constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "white," from the article on the "right of suffrage," shall be separately submitted to the electors of this state for adoption or rejection, in the manner following, viz: a separate ballot may be given by every person having a right to vote at said election, to be deposited in a separate box. And those given for the adoption of such proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' yes." And those given against the proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' no." And if at said election the number of ballots cast in favor of said proposition, shall be equal to a majority of those cast for and against this constitution, then said word "white" shall be stricken from said article and be no part thereof.

Mills Co.

SEC. 15. Until otherwise directed by law, the county of Mills shall be in and a part of the sixth judicial district of this state.

Done in convention at Iowa City, this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America, the eighty-first.

In testimony whereof, we have hereunto subscribed our names:

TIMOTHY DAY,	M. W. ROBINSON,
S. G. WINCHESTER,	LEWIS TODHUNTER,
DAVID BUNKER,	JOHN EDWARDS,
D. P. PALMER,	J. C. TRAER,
GEO. W. ELLS,	JAMES F. WILSON,
J. C. HALL,	AMOS HARRIS,
JOHN H. PETERS,	JNO. T. CLARKE,
WM. H. WARREN,	S. AYRES,
H. W. GRAY,	HARVEY J. SKIFF,
ROBT. GOWER,	J. A. PARVIN,
H. D. GIBSON,	W. PENN CLARK,
THOMAS SEELEY,	JERE. HOLLINGSWORTH,
A. H. MARVIN,	WM. PATTERSON
J. H. EMERSON,	D. W. PRICE,
R. L. B. CLARKE,	ALPHEUS SCOTT,
JAMES A. YOUNG,	GEORGE GILLASPY,
D. H. SOLOMON,	EDWARD JOHNSTONE.

FRANCIS SPRINGER, *President.*

ATTEST:

TH. J. SAUNDERS, *Secretary.*

E. N. BATES, *Assistant Secretary.*

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METHOD OF SUBMITTING AMENDMENTS.

[Sixteenth General Assembly, Chapter 114.]

SECTION 1. Whenever any proposition to amend the constitution has passed the general assembly and [been] referred to the next succeeding legislature as provided in section one, article ten, of the constitution, the secretary of state shall cause the same to be published in two newspapers of general circulation in each congressional district in the state for the time provided in section one, article ten of the constitution; and the fact of such publication having been made shall be verified by the affidavits of the publishers of such newspapers, and such affidavits, together with the certificate of the secretary of state that he had designated the newspapers in which the publication was made, shall be filed, preserved and recorded in a book kept for that purpose in the office of the secretary of state; and the secretary of state shall report his action in the premises to the next succeeding general assembly.

When proposition has passed the general assembly.

Publication.

Certificate of secretary of state.

And report.

SEC. 2. Whenever a proposition to amend the constitution shall have passed the general assembly and been agreed to by the next succeeding general assembly as provided in section one, article ten, of the constitution, the same shall be submitted to the qualified electors at the next ensuing general election; and the ballots relating to such amendment or amendments shall be separate from the ballots for officers cast at such election, and shall be deposited in boxes to be provided by the judges of election, separate from said ballots so cast for officers; and there shall be written or printed on such ballots the entire proposed amendment or amendments with the word "for" or "against"—as the elector may desire—preceding each amendment voted upon; and the election shall be conducted in the same manner as the election for state officers, except as herein otherwise provided; and the canvass shall be in the same manner, and by the same officers and like returns made thereof as of the ballots cast for the secretary of state; and the board of state canvassers shall declare the result and enter the same of record in the book mentioned in section one of this act, immediately following and in connection with the proofs of publication.

Proposition having passed two general assemblies.

Shall be submitted at next general election.

Ballots.

Election.

Returns.

SEC. 3. Whenever a proposition to amend the constitution is submitted to a vote of the electors, the governor shall include such proposed amendment in his proclamation provided for in section 577 of the Code.

Duty of governor.

SEC. 4. Expenses incurred under the provisions of this act, shall be audited and allowed by the executive council and paid out of any money in the state treasury not otherwise appropriated.

Expenses under this act.

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TABLE OF SESSION LAWS.

INDEX.

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TABLE OF SESSION LAWS.

The following table gives, consecutively, the titles of all acts of a general, public, and permanent nature, passed since the enactment of the Code of 1873, with the date of taking effect, either by the proper publication, in case there is a publication clause, or by the general constitutional provision; and shows also where such acts will be found inserted or referred to in this work:

PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY (1874).

[The acts of this session are published in two series, one containing the public laws, the other those of a private, local, or temporary nature; the chapters in each series being numbered independently.]

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
1	An act to authorize the secretary of state to furnish stationery for the use of standing or select committees of the general assembly, or either branch thereof. Took effect by publication, Feb'y 7, 1874.	.....	.....	26
2	An act to amend chapter 5, of title IX, of the Code, and to release certain penalties. Took effect by publication, Feb'y 7, 1874.	1 2 3, 4 5, 6 7	.....	303 305 306 307 *
3	An act to amend section 12, of chapter 2 of the Code, and to provide for the payment of the members, officers and employees of the general assembly.... Took effect by publication, Feb'y 19, 1874.	....	.....	3
4	An act to repeal section 1105 of the Code..... Took effect by publication, Feb'y 20, 1874.	.....	.....	279
5	An act to empower cities and towns to make contracts with railroad and bridge companies for the use of wagon-bridges across rivers..... Took effect by publication, Feb'y 25, 1874.	.....	.....	259
6	An act to amend section 464 of the Code of 1873.... Took effect by publication, Mar. 4, 1874.	.....	.....	109
7	An act to pay the board of trustees of the Iowa State Agricultural College and Farm..... Took effect by publication, Mar. 8, 1874.	.....	.....	467
8	An act to provide for the permanent survey of lands. Took effect July 4, 1874.	.....	.....	862
9	An act to amend section 289 and section 290 of the Code of 1873..... Took effect July 4, 1874.		Amended by 16 G. A., ch. 125; 17 G. A., ch. 154; 18 G. A., ch. 183.	64
10	An act to amend section 2626 of the Code of Iowa. Took effect July 4, 1874.	.....	.....	704
11	An act to repeal sections 3903 and 3904 of the Code of 1873, and to provide a substitute therefor ..... Took effect July 4, 1874.	.....	.....	987 988

* Omitted, temporary.

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PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
12	An act to amend section 165 of the Code	1	.....	39
	Took effect July 4, 1874.	2	.....	*
13	An act for the punishment of persons having in their possession burglar tools or implements with intent to commit the crime of burglary...	.....	.....	983
	Took effect July 4, 1874.			
14	An act to punish carelessness in the use of steam-boilers	.....	.....	1026
	Took effect July 4, 1874.			
15	An act to provide state institutions, justices of the peace, and township clerks with copies of the Code	.....	.....	1165
	Took effect by publication, Mar. 16, 1874.			
16	An act relating to the payment of jurors	.....	.....	54
	Took effect by publication, Mar. 16, 1874.			
17	An act to amend chapter 7 of title XXIV of the Code	.....	.....	1007
	Took effect by publication, Mar. 16, 1874.			
18	An act to amend sections 1292 and 1293 of the Code	.....	.....	355
	Took effect July 4, 1874.			
19	An act to amend title VII, chapter 1, section 946, of the Code.....	.....	.....	241
	Took effect by publication, Mar. 21, 1874.			
20	An act authorizing railway corporations to issue preferred stock for *its* bonded indebtedness....	.....	.....	348
	Took effect by publication, Mar. 21, 1874.			
21	An act for the support of the State Reform School.	.....	Amended; 17 G. A., ch. 97...	480
	Took effect by publication, Mar. 24, 1874.			
22	An act to amend section 1194 of the Code of Iowa of 1873.....	.....	.....	322
	Took effect July 4, 1874.			
23	An act to provide for the creation and enforcement of liens in certain cases where corporations have issued bonds in excess of the amount allowed by law.....	.....	.....	603
	Took effect by publication, April 2, 1874.			
24	An act to repeal chapter 135 of the acts of the Twelfth General Assembly.....	.....	.....	†
	Took effect by publication, April 2, 1874.			
25	An act to provide that lands to be laid out into town or city lots shall be free from incumbrance, and that the same when thus laid out shall be accurately described relative to some established corner of the congressional division of which they are part.....	.....	Amended; 16 G. A., ch. 63. Repealed; 18 G. A., ch. 53.	151
	Took effect July 4, 1874.			
26	An act to amend section 1433 of the Code of 1873.	.....	.....	398
	Took effect by publication, April 3, 1874.			

*Omitted, temporary.
†Omitted, as pertaining to swamp lands.

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PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY —*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
27	An act to repeal sections 1721 and 1802 of chapter 9, title XII, of the Code, and to enact substitutes therefor..... Took effect July 4, 1874.	.....	.....	502 510
28	An act to amend section 796, title VI, chapter 1, of the Code of 1873..... Took effect July 4, 1874.	.....	Amended; 18 G. A., ch. 13...	189
29	An act to remit the penalty and interest on delinquent personal property taxes in certain cases.. Took effect by publication, April 4, 1874.	.....	.....	206
30	An act to amend section 4254, chapter 12, of title XXV of the Code of 1873, relating to preliminary examinations..... Took effect July 4, 1874.	.....	.....	1060
31	An act to provide for the inspection of coal mines. Took effect July 4, 1874.	.....	Repealed; 18 G. A., ch. 202..	443
32	An act to amend section 3812, chapter 3, title XXIII of the Code, in relation to jury fees..... Took effect July 4, 1874.	.....	Repealed; 16 G. A., ch. 39...	961
33	An act to repeal section 3641 of chapter 1 of title XXII, of the Code, and to enact a substitute therefor..... Took effect July 4, 1874.	.....	.....	919
34	An act authorizing the establishment of public ways to lands having stone and mineral thereon. Took effect by publication, Mar. 25, 1874.	.....	.....	344
35	An act in relation to riparian owners on the Mississippi and Missouri rivers..... Took effect July 4, 1874.	.....	.....	345
36	An act to make cities and towns responsible for the value of buildings destroyed for the purpose of preventing the spread of conflagrations..... Took effect by publication, April 6, 1874.	.....	.....	145
37	An act to amend chapter 6, title XI, of the Code Took effect July 4, 1874.	.....	....	433
38	An act to amend section 4064 of the Code..... Took effect July 4, 1874.	.....	.....	1025
39	An act to divide counties into supervisor districts. Took effect by publication, April 9, 1874.	.....	Amended; 17 G. A. ch. 63....	69
40	An act to amend chapter 2, title IX, of the Code of 1873, to authorize corporations other than those for pecuniary profit to change their name, and to amend articles of incorporation..... Took effect July 4, 1874.	.....	.....	278
41	An act to amend chapter 1, title XXI, of the Code of 1873, Of justices of the peace and their courts, in relation to forcible entry and detention of real property..... Took effect by publication, April 2, 1874.	.....	.....	915
42	An act to amend section 3072 of the Code of Iowa Took effect July 4, 1874.	.....	.....	816

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PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS. REPEALING OR AMENDING.	PAGE.
43	An act to amend section 2315, chapter 1, title XVI, of the Code of 1873..... Took effect by publication, April 9, 1874.	.....	.....	635
44	An act to amend section 2142 of chapter 8, of title XIV, of the Code, allowing assignments of mechanics' liens..... Took effect by publication, April 2, 1874.	.....	Repealed; 16 G. A., ch. 100..	596
45	An act to amend section 799, chapter 1, title VI, of the Code..... Took effect July 4, 1874.	.....	.....	191
46	An act to amend chapter 2, title VI, of the Code, in relation to tax-sales and redemption of property in counties having two county seats..... Took effect by publication, April 10, 1874.	.....	.....	*
47	An act to amend chapter 4, of title X, of the Code, on "Taking private property for works of internal improvement." Took effect by publication, March 28, 1874.	.....	.....	* 341
48	An act to amend section 4779, chapter 2, title XXVI, of the Code..... Took effect by publication, April 2, 1874.	.....	.....	1151
49	An act to amend sections 2131, 2133, 2134, and 2135 of the Code, relating to mechanics' liens..... Took effect by publication, April 7, 1874.	.....	Repealed; 16 G. A. ch. 100..	596
50	An act to provide for the appointment of a board of fish commissioners, for the construction of fish-ways, for the protection and propagation of fish, and to repeal sections 4052 and 4053, and to amend section 4054..... Took effect by publication, Mar. 31, 1874.	1–5 8, 9 6, 7 10	.... Amended; 16 G. A., ch. 70.....	409 1023 1023
51	An act to authorize cities and towns to provide for the improvements of alleys..... Took effect by publication, Mar. 28, 1874.	.....	Amended; 16 G. A., ch. 116, § 12	110
52	An act to amend section 509 of the Code of 1873..... Took effect Ju y 4, 1874.	.....	.....	129
53	An act to amend sections 1386, 1392, 1436, and 1438 of chapter 2, title XI, of the Code..... Took effect by publication, Mar. 28, 1874.	1 2	....	386 388 399
54	An act to authorize the re-survey and platting of city or town plats, or additions thereto, in cases where the original plats have been lost and not acknowledged or recorded..... Took effect July 4, 1874.	.....	.....	153
55	An act to amend section 1144 of chapter 4, of title IX, of the Code..... Took effect by publication, April 23, 1874.	.....	.....	292
56	An act to amend sections 3181 and 3182 of the Code of 1873..... Took effect by publication, April 4, 1874.	.....	.....	841

*Omitted as local.

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PUBLIC LAWS, FIFTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
57	An act to provide for holding teachers' normal institutes..... Took effect by publication, April 1, 1874.	.....	Amended; 17 G. A., ch. 54.....	502
58	An act to fix the compensation of state printer and state binder..... Took effect July 4, 1874.	1 2	....	945 946
59	An act to prohibit the encouragement of minors to remain in certain buildings..... Took effect July 4, 1874.	.....	.....	1019
60	An act to provide for the organization and management of savings banks..... Took effect July 4, 1874.	.....	.....	311
61	An act in relation to vacation of town plats..... Took effect July 4, 1874.	.....	.....	154
62	An act to amend section 906 of the Code..... Took effect July 4, 1874.	.....	.....	231
63	An act to amend section 812, chapter 1, title VI, Code of Iowa..... Took effect July 4, 1874.	.....	.....	195
64	An act to establish and maintain industrial expositions in public schools of the state..... Took effect July 4, 1874.	.....	.....	519
65	An act to amend section 1260, chapter 4, title X, of the Code of Iowa..... Took effect July 4, 1874.	.....	Repealed; 18 G. A., ch. 15.....	340
66	An act to amend Section 800 of the Code of 1873. Took effect July 4, 1874.	.....	.....	191
67	An act allowing school-districts lying in two adjoining counties the right to vote mills instead of specific sums for school purposes..... Took effect July 4, 1874.	.....	.....	505
68	An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state..... Took effect July 4, 1874.	.....	Repealed in part; 17 G. A., ch. 77.....	363
69	An act to repeal section 4048, title XXIV, chapter 11, of the Code, and to enact a substitute in lieu thereof..... Took effect July 4, 1874.		Amended; 16 G. A., ch. 122. Repealed; 17 G. A., ch. 156.	1020
70	An act to amend chapter 3, title XI, of the Code, in relation to domestic and other animals ..... Took effect by publication, April 1, 1874.	1 2 3 4 5 6 7	.... Amended; 18 G. A., ch. 188, § 1.	4'5 401 402 403 404 404 404
71	An act to regulate the leasing of lands belonging to the Iowa State Agricultural College..... Took effect by publication, Mar. 28, 1874.	.....	.....	468

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SIXTEENTH GENERAL ASSEMBLY (1876).

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE
4	An act to amend section 767 of the Code of 1873, concerning deputies. Took effect by publication, Feb'y 17, 1876.	.....	.....	183
6	An act to repeal section 390 of chapter 9, title IV, of the Code, relating to township officers, and enacting a substitute in lieu thereof. Took effect by publication, Feb'y 17, 1876.	.....	Amended; 18 G. A., ch. 201.	90
7	An act to increase the number of judges of the supreme court. Took effect by publication, Feb'y 12, 1876.	.....	.....	157
10	An act relating to the recording of United States and State patents for lands. Took effect July 4, 1876.	.....	.....	925
11	An act to amend chapter 2, of title XVI, of the Code, relating to probate of wills. Took effect by publication, Feb'y 24, 1876.	.....	.....	687
14	An act to amend chapter 7, of title XIV, of the Code, in relation to assignments for the benefit of creditors. Took effect by publication, Feb'y 26, 1876.	.....	.....	596
20	An act to amend section 765, of the Code, in relation to powers of commissioners appointed by the governor. Took effect July 4, 1876.	.....	.....	183
21	An act to repeal the following section of the Code, and enact a substitute therefor, viz: section 985, title VII, chapter 2, in relation to powers and duties of road supervisors. Took effect July 4, 1876.	.....	.....	250
23	An act to amend section 660 of the Code, in relation to the election of electors of president and vice president. Took effect July 4, 1876.	.....	.....	169
24	An act to amend section 463, of the Code, title 4, chapter 10, "Of Cities and Incorporated Towns". Took effect July 4, 1876.	.....	.....	108
25	An act to repeal section 3800, chapter 2, title 23, of the Code, and to enact a substitute therefor. Took effect July 4, 1876.	.....	.....	957
26	An act to amend section 1362, chapter 1, title 11, of the Code. Took effect July 4, 1876.	.....	Amended, 17 G. A., ch. 37.	382
28	An act to amend section 1428 of the Code. Took effect July 4, 1876.	.....	.....	397
29	An act to amend section 989, of chapter 2, of title VII, of the Code, in relation to the powers and duties of road supervisors. Took effect by publication, Mar. 9, 1876.	.....	.....	251

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE
30	An act to define the crime of swindling and to punish the same..... Took effect by publication, March 10, 1876.	.....	.....	1033
33	An act to provide for the election of certain officers in certain cities of the first class..... Took effect by publication, March 5, 1876.	.....	Amended; 17 G. A., ch. 20.	133
35	An act to amend section 3808 of the Code, relating to the fees of township trustees..... Took effect July 4, 1876.	.....	.....	930
36	An act in relation to evidence in actions upon account..... Took effect July 4, 1876.	.....	.....	727
37	An act to repeal section 1156, title IX, chapter 4, in relation to insurance companies, and to enact a substitute therefor..... Took effect by publication, March 10, 1876.	.....	.....	226
38	An act to amend chapter 5, title XII, of the Code of 1873, and add thereto..... Took effect by publication, Mar. 10, 1876.....	1 2–4	....	475 478
39	An act to repeal chapter 32 of the Public Acts of the Fifteenth General Assembly, and re-enact section 3812 of the Code..... Took effect by publication, Mar. 14, 1876.	.....	.....	961
40	An act to amend chapter 43 of the acts of the Fourteenth General Assembly, and for other purposes..... Took effect by publication, Mar. 16, 1876.	.....	Amended; 17 G. A., ch. 187; 18 G. A., ch. 154.	1158
47	An act empowering cities to extend their corporate limits..... Took effect by publication, Mar. 10, 1876.	.....	Amended; 17 G. A., ch. 169.	101
50	An act to compel township clerks to post up statements of receipts and disbursements at each general election..... Took effect July 4, 1876.	.....	.....	91
52	An act to amend section 2049 of the Code of 1873..... Took effect by publication, Mar. 15, 1876.	.....	.....	576
55	An act relating to life insurance, and to prevent injustice to the assured..... Took effect by publication, Mar. 15, 1876.	.....	.....	309
57	An act to authorize cities and towns to settle and adjust certain indebtedness, and to provide for payment of the same..... Took effect by publication, Mar. 16, 1876.	.....	.....	126
58	An act to amend section 518 of the Code of 1873, title IV, chapter 10, "Of cities and incorporated towns." Took effect July 4, 1876.	.....	.....	130
60	An act to amend section 1144, in chapter 4 of title IX of the Code, relating to fire insurance companies..... Took effect by publication, Mar. 14, 1876.	.....	.....	262

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
61	An act to amend section 3809 of the Code..... Took effect July 4, 1876.	.....	.....	960
62	An act to amend section 3814 of chapter 3, title XXIII, of the Code, relating to the fees of witnesses..... Took effect by publication, March 15, 1876.	.....	.....	961
63	An act to amend chapter 25, laws of the Fifteenth General Assembly, in relation to city and town lots, and in relation to the annexation of contiguous territory to cities and towns..... Took effect by publication, March 16, 1876.	.....	Repealed; 18 G. A., ch. 53....	153
64	An act to repeal section 1793, chapter 9, title XII, of the Code, in relation to children attending schools in adjoining districts, and enacting a substitute therefor..... Took effect by publication, March 14, 1876.	.....	Amended; 17 G. A., ch. 41...	508
66	An act authorizing the governor to appoint aids-de-camps, additional to section 1054, chapter 1, title VIII, of the Code..... Took effect by publication, March 15, 1876.	.....	Repealed; 18 G. A., ch. 74....	260
68	An act to facilitate business with railroads, express and telegraph companies..... Took effect by publication, March 14, 1876.	.....	.....	373
69	An act to restrain vagrancy and common beggary Took effect by publication, March 15, 1876.	.....	.....	1043
70	An act to promote fish culture in the state of Iowa, and amend chapter 50 of the laws of the Fifteenth General Assembly, enlarge and define the duties of fish commissioner, and appropriate money to carry out the provisions of this act... Took effect by publication, March 17, 1876.	.....	Amended; 17 G. A., ch. 80. 18 G. A., ch. 92.	409 1023
71	An act to repeal sections 1681, 1682 and 1683, chapter 6, title XII, of the Code, and for other purposes..... Took effect by publication, March 17, 1876.	.....	.....	482
72	An act to repeal section 576, title V, chapter 1, of the Code, and to enact a substitute therefor.. Took effect July 4, 1876.	.....	.....	156
75	An act to repeal section 1271 of the Code of 1873, and enact a substitute therefor..... Took effect July 4, 1876.	.....	.....	343
76	An act to amend section 135 of the Code, relating to appeals to the supreme court..... Took effect by publication, March 15, 1876.	.....	.....	32
79	An act to authorize the sale of lands and town lots for taxes, in certain cases, for an amount less than the taxes, interest and costs due thereon.. Took effect July 4, 1876.	.....	.....	216
80	An act to repeal sub-division 24 of section 303, chapter 2, title IV, of the Code, to allow board of supervisors to make additional appropriation			

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
	for county bridges, and enact a substitute in lieu thereof Took effect July 4, 1876.		Amended; 18 G. A., ch. 46....	72
81	An act to establish uniformity throughout the state in regard to grace upon sight-bills of exchange Took effect July 4, 1876.			587
84	An act to provide for the transfer of moneys raised by special levy to county fund for general purposes Took effect by publication, March 16, 1876.			77
89	An act to amend section 2049, of chapter 1, title XIV, of the Code, in relation to the weight of a bushel of oats Took effect July 4, 1876.			576
91	An act to amend section 1617, chapter 3, title XII, of the Code Took effect by publication, March 16, 1876.			469
94	An act to enlarge the powers of the trustees of the Soldiers' Orphans' Homes, and provide for other indigent children of the state, and for making provision for industrial pursuits therein Took effect July 4, 1876.	1-9 10		472 470
95	An act to amend section 500, chapter 10, title IV, of the Code Took effect by publication, March 16, 1876.			126
100	An act to repeal chapter 8, of title XIV, of the Code, and providing for mechanics' liens Took effect July 4, 1876.			596
101	An act to amend section 1507, chapter 4, title XI, of the Code Took effect July 4, 1876.		Amended; 17 G. A., ch. 124. Repealed; 18 G. A., ch. 47.	417
102	An act to define the crime of swindling, and to punish the same Took effect July 4, 1876, (publication being in one paper only, and therefore insufficient.)			1031
103	An act to amend section 1160, chapter 4, title IX, of the Code, relating to the number of members of mutual associations Took effect by publication, March 24, 1876.			297
106	An act in relation to hedges on division lines between adjoining land-owners Took effect by publication, March 25, 1876.			418
107	An act empowering cities to levy a special tax for sewerage purposes Took effect by publication, March 24, 1876.			118
109	An act to amend section 1725 of chapter 9, title XII, of the Code, relating to the formation of sub-districts Took effect by publication, March 24, 1876.			494
110	An act empowering township clerks to administer oaths Took effect July 4, 1876.			91

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING	PAGE.
111	An act in relation to the construction of cattle-ways across the public highway..... Took effect July 4, 1876.	.....	.....	245
112	An act to amend sections 1745 and 1751, chapter 9, title XII, of the Code, relative to report of treasurers of school districts..... Took effect July 4, 1876.	1 2	....	498 499
113	An act to authorize the auditor of state to cause to be paid back to counties entitled thereto, any excess on revenue paid into the state treasury.. Took effect by publication, Mar. 25, 1876.	.....	.....	235
114	An act providing for the publication of propositions to amend the constitution, and for other purposes connected therewith..... Took effect July 4, 1876.	.....	.....	1247
116	An act relating to cities organized and existing under special charters, conferring additional powers and amending the charters of such cities. Took effect by publication, Mar. 30, 1876.	12	.....	111
118	An act to authorize the relocation of railroads ... Took effect July 4, 1876.	.....	Amended; 17 G. A., ch. 152...	353
119	An act to amend clause 4, section 1606, chapter 3, of the Code..... Took effect by publication, April, 1876. (Date of publication not being given.)	.....	.....	466
121	An act to amend section 1821, title XII, chapter 9, of the Code..... Took effect by publication, Mar. 25, 1876.	.....	.....	517
122	An act to amend Chapter 69 of the public acts of the Fifteenth General Assembly, in relation to game..... Took effect July 4, 1876.	....	Repealed; 17 G. A., ch. 156.	1020
123	An act to enable townships and incorporated towns and cities to aid in the construction of railroads Took effect by publication, Mar. 30, 1876.	.....	Amended; 17 G. A., ch's 157 and 173; 18 G. A., ch's 28 and 144.	369
125	An act to amend an act entitled an act to amend section 289 and section 290 of the Code of 1873. Took effect July 4, 1876.	1 2	Amended; 17 G. A., ch. 154...	64 64
129	An act to establish and maintain a school for the instruction and training of teachers of common schools..... Took effect by publication, Mar. 28, 1876.	.....	Amended; 17 G. A., ch. 142, § 2.	485
130	An act to provide for condemning, surveying and platting cemeteries, and authorizing all transfers of lots therein to be filed with and recorded by the township clerk..... Took effect by publication, Mar. 29, 1876.	.....	.....	95
131	An act to regulate circuses and other public shows Took effect by publication, Mar. 28, 1876.	.....	.....	232

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
132	An act to repeal sections 35, 36, 37, 38, 39 and 40 of chapter 3, title I, of the Code, and to enact a substitute therefor. Took effect by publication, Mar. 29, 1876.	.....	Amended; 17 G. A., ch. 132...	8
133	An act for the relief of certain railroad companies their officers, agents, and employes. Took effect by publication, Mar. 24, 1876.	.....	.....	364
136	An act to define who may hold the offices of county school superintendent and school director in the state of Iowa. Took effect by publication, Mar. 28, 1876.	.....	.....	492
137	An act to provide for the continuation of the work on the additional penitentiary, and to make an appropriation therefor. Took effect by publication, April 13, 1876.	.....	Amended; 17 G. A., ch. 81....	1058
140	An act amending sections 1207, 1212 and 1216 of chapter 2, title X, of the Code in relation to drains, ditches and water-courses. Took effect July 4, 1876.	1	.....	324, 326
		2	.....	325
		3	.....	326
		4, 5	.....	327
142	An act making an appropriation for the payment of state and judicial officers, and for other purposes hereinafter named, and to amend section 120 of chapter 8, of the Code of Iowa. Took effect by publication, Mar. 30, 1876.	8	.....	25
143	An act to provide for establishing superior courts in cities of a certain grade. Took effect by publication, Mar. 22, 1876.	.....	.....	140
145	An act to amend section 900, of chapter 2, title VI, of the Code, relating to sale of land for taxes, and the interests acquired thereunder by purchasers of United States, state, municipal university, agricultural college, swamp and township lands, burial grounds, fair grounds, public square, public ornamental grounds, and the property of school districts. Took effect July 4, 1876.	.....	Substitute; 17 G. A., ch. 101...	229
146	An act to provide for the changing of the names of unincorporated towns and villages. Took effect July 4, 1876.	.....	.....	77
147	An act to repeal section 1587, chapter 2, title XII, of the Code, relating to the State University, and to enact a substitute therefor. Took effect July 4, 1876.	.....	.....	461
148	An act to diminish liability to railroad accidents, and to punish interference with, and injury to the property of railroad companies. Took effect July 4, 1876.	.....	.....	985
149	An act to amend section 1381, title XI, chapter 1, of the Code. Took effect July 4, 1876.	.....	.....	385
152	An act to provide for the organization and support of an asylum at Glenwood, in Mills county, for feeble minded children. Took effect by publication, Mar. 30, 1876.	1	Repealed; 18 G. A., ch. 164..	473
		2-15	.....	473

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SIXTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
153	An act to amend chapter 5, title X, of the Code in relation to railways..... Took effect by publication, Mar. 29, 1876.	.....	.....	362
155	An act to amend sections 1815, 1816, 1817, 1818, 1819 and 1820, chapter 9, title XII. of the Code of Iowa, and to provide for the organization of district townships..... Took effect July 4, 1876.	.....	.....	515
156	An act to repeal section 4783 of the Code, and enact a substitute therefor..... Took effect by publication, Mar. 29, 1876.	.....	Repealed; 17 G. A., ch. 167...	1152
159	An act in relation to the reports of public officers and institutions, and to provide for printing and distributing public documents, amendatory of chapter 9, title II, of the Code, relating to the general regulations of the executive department; also of title VIII, chapter 1, in relation to the militia; and also of title XII, chapter 3, relating to the Agricultural College..... Took effect by publication, Mar. 29, 1876.	.....	.....	28
161	An act providing for the taxation of mutual loan and building associations..... Took effect July 4, 1876.	.....	.....	196
164	An act to repeal section 1158 of the Code, and enact the following in lieu thereof..... Took effect by publication, Mar. 29, 1876.	.....	.....	297
167	An act to amend section 978 of the Code, relating to the appointment of road supervisors..... Took effect by publication, Mar. 29, 1876.	.....	.....	249

SEVENTEENTH GENERAL ASSEMBLY (1878).

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
3	An act to amend section 432, and to repeal section 433, of chapter 10, title IV, of the Code, and to provide a substitute therefor, in relation to cities and towns..... Took effect by publication, Feb'y 12, 1878.	1 2	.....	101 101
9	An act to repeal section 511 and 512, chapter 10, title IV, of the Code, and to enact substitutes therefor..... Took effect July 4, 1878.	.....	.....	129
12	An act to amend section 591, title V, chapter 1, of the Code, relating to terms of office of township trustees..... Took effect July 4, 1878.	.....	.....	158
14	An act to amend section 521 of the Code, title IV, chapter 10, Of cities and incorporated towns... Took effect by publication, Feb'y 24, 1878.	.....	.....	132

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
19	An act to repeal section 4420, of chapter 27, title XXV, of the Code, relating to the trial of an issue of fact in an indictment, and enacting a substitute in lieu thereof. Took effect July 4, 1878.			1090
20	An act to amend sections one and two, of chapter 33, of the laws of the Sixteenth General Assembly, in relation to the election of certain officers in certain cities of the first class, and to revive that portion of section 534 of the Code thereby repealed. Took effect by publication, Feb'y 27, 1878.			137
22	An act to legalize and establish certain courts organized under chapter one hundred and forty-three, of the laws of the Sixteenth General Assembly. Took effect by publication, Feb'y 28, 1878.			143
23	An act to repeal sections 1060 and 1064, chapter 1, title IX, of the Code, relating to corporations for pecuniary profit, and enact substitutes in lieu thereof. Took effect July 4, 1878.			270
26	An act to repeal section 3751, chapter 1, title XXII, of the Code, relating to depositions, and and to enact a substitute therefor. Took effect July 4, 1878.			941
33	An act to vest title in the heirs, devisees, or assignees of deceased patentees, additional to Code, title XVI, "Of the estates of decedents." Took effect July 4, 1878.			658
35	An act to amend section 4117, title XXV, chapter 4, of the Code, "Of security to keep the peace." Took effect July 4, 1878.			1039
37	An act to amend chapter 26 of the laws of the Sixteenth General Assembly, in "relation to support of the poor". Took effect July 4, 1878.			382
39	An act to require fire insurance companies doing business in this state to cancel policies in certain cases. Additional to Code, chapter 4, title IX: "Of insurance companies". Took effect July 4, 1878.			297
40	An act to provide for the construction and maintenance of county bridges on county line roads, where site of bridge is wholly within one or the other county. Additional to Code, chapter 3, title VII: "Of ferries and bridges". Took effect July 4, 1878.			73
41	An act to amend chapter 64, laws of the Sixteenth General Assembly, amending section 1793, chapter 9, title XII, of the Code, providing for the county superintendent as arbitrator in case of disagreement of the boards of directors, determining where children shall attend school. Took effect July 4, 1878.			508

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
42	An act to amend section 2049 of chapter 1, title XIV, of the Code, and fixing the weight of a bushel of charcoal. Took effect July 4, 1878.	.....	.....	576
45	An act to establish a central station of the "Iowa Weather Service," and for the appointment of a director thereof. Took effect by publication, Mar. 19, 1878.	.....	.....	465
47	An act to define investments of life insurance companies, and amendatory of sections 1169 and 1179, chapter 5, title IX, of the Code of Iowa. Took effect by publication, Mar. 16, 1878.	.....	.....	305 308
50	An act to amend section 798, and to repeal section 799, of title VI, chapter 1, of the Code, relating to exemptions for planting and cultivating forest trees. Took effect by publication, Mar. 22, 1878.	1 2	....	191 191
52	An act to amend section 990, chapter 2, title VII, of the Code of 1873. Took effect July 4, 1878.	.....	.....	251
54	An act to amend section 1, chapter 57, of public laws of the Fifteenth General Assembly, in relation to holding normal institutes. Took effect July 4, 1878.	...	.....	502
55	An act to repeal section 3889, of chapter 3, title XXIV, of the Code, in relation to setting out fires, and to enact a substitute therefor. Took effect July 4, 1878.	.....	.....	982
56	An act requiring that officers in certain cities may receive a fixed compensation, and that all fees now allowed such officers shall be paid into the treasuries of such cities. Took effect by publication, Mar. 19, 1878.	.....	.....	145
57	An act authorizing the establishment of a depository or depositories in the city of Des Moines for the collection of drafts, checks and certificates of deposit received by the treasurer of state on account of state dues. Took effect by publication, Mar. 22, 1878.	.....	.....	18
58	An act to authorize counties, cities and towns to refund outstanding bonded debt at a lower rate of interest, and to provide for the payment of the same. Took effect by publication, Mar. 22, 1878.	.....	.....	65
59	An act to provide for the assessment and taxation of telegraph lines within the state of Iowa. Additional to Code, title X, chapter 6: "Of telegraphs." Took effect by publication, Mar. 23, 1878.	.....	.....	375
65	An act to amend section 4171, of the Code, relating to fugitives from justice. Took effect by publication, Mar. 23, 1878.	.....	.....	1047

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
67	An act making it unlawful for officers of state institutions to contract indebtedness in excess of the appropriations, or divert funds from purposes for which the same were appropriated and providing a punishment therefor. Additional to Code. title II, chapter 9	.....	.....	30
	Took effect by publication, Mar. 26, 1878.			
68	An act to amend chapter 39 of the public acts of the Fifteenth General Assembly, in relation to dividing counties into supervisor districts	.....	.....	69
	Took effect by publication, Mar. 23, 1878.			
71	An act to amend chapter 3, title 5 of the Code, regulating the election of supervisors of highways, and of township assessors, in certain cases	.....	.....	163
	Took effect July 4, 1878.			
72	An act to amend sections 1672 and 1676 of the Code, relating to support of the blind	1 2	..... Amended; 18 G. A. ch. 165. .	481 481
	Took effect July 4, 1878.			
73	An act to fix the salaries of the register of the State Land Office and his deputy	.....	.....	913
	Took effect July 4, 1878.			
74	An act to repeal section 3771 of the Code, and to enact a substitute therefor, in relation to compensation of the clerk of the supreme court, and fixing the amount of fees in certain cases, and providing for their collection and payment into the state treasury, and repealing section 3772 of the Code	1	.....	947
	Took effect July 4, 1878.	2	.....	947
75	An act to amend section 3762 of the Code, relating to salary of the state librarian	.....	.....	944
	Took effect July 4, 1878.			
76	An act for the endowment and support of the State University. Additional to Code, title XII, chapter 2, "Of the State University"	.....	.....	464
	Took effect July 4, 1878.			
77	An act to repeal chapter 68, acts of the Fifteenth General Assembly, and provide for the establishment of a board of railroad commissioners, and defining their duties and term of office	.....	.....	364
	Took effect by publication, March 25, 1878.			
80	An act entitled "an act to promote fish culture in the State of Iowa, and to amend and consolidate the enactments heretofore passed for that purpose, amending chapter 70, acts of the Sixteenth General Assembly	.....	.....	410
	Took effect by publication, March 30, 1878.			
81	An act to amend chapter 137, of the acts of the Sixteenth General Assembly, relating to support of convicts in the additional penitentiary	.....	.....	1158
	Took effect by publication, March 27, 1878.			

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
83	An act to amend section 4785, chapter 2, title XXVI, of the Code, in relation to the support of convicts ..... Took effect by publication, March 27, 1878.	.....	.....	1152
84	An act to amend chapter 2, title XI, section 1427, of the Code, relating to the support required by counties for the support of the insane ..... Took effect by publication, March 27, 1878.	.....	.....	396
89	An act to repeal section 166, chapter 5, title III, of the Code, in relation to special terms of court, and enact a substitute therefor..... Took effect by publication, March 29, 1878.	.....	.....	39
91	An act to amend section 3829, chapter 3, title XXIII, of the Code, in relation to attorney's fees for defending persons charged with crime ..... Took effect by publication, April 3, 1878.	.....	.....	965
92	An act to regulate the per diem and mileage of trustees of state institutions, members of visiting committees to hospitals for insane, and regents of the State University ..... Took effect by publication, March 29, 1878.	.....	.....	965
97	An act to amend chapter 21, laws of the Fifteenth General Assembly, relative to support of reform schools ..... Took effect July 4, 1878.	.....	.....	480
98	An act to amend sections 1692 and 1693, chapter 7, title XII, of the Code, in relation to support of the deaf and dumb institution..... Took effect July 4, 1878.	.....	Amended; 18 G. A., ch. 203..	483
100	An act to amend sections 1384 and 1390, chapter 2, title XI, of the Code, in relation to the care of the insane ..... Took effect July 4, 1878.	{ 1 { 2	....	383 387
101	An act to amend chapter 145, of the acts of the Sixteenth General Assembly, in relation to taxing, and the sale of public lands for taxes..... Took effect July 4, 1878.	.....	.....	229
102	An act to repeal section 1580, chapter 1, title XII, of the Code, relating to the fees of superintendent of public instruction..... Took effect July 4, 1878.	.....	.....	460
10[illegible]	An act to prohibit defendants convicted of murder being admitted to bail. Amending section 4107, chapter 1, title XXV, of the Code..... Took effect July 4, 1878.	.....	.....	1037
10[illegible]	An act to repeal section 1160, chapter 4, title IX, of the Code of 1873, and to enact a substitute therefor, to require mutual insurance companies to make annual reports..... Took effect July 4, 1878.	.....	.....	297
106	An act for the protection of cemeteries in the state of Iowa..... Took effect by publication, April 2, 1878.	.....	.....	96

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
107	An act in relation to vacancies in offices whose incumbents are chosen by the general assembly, amending section 782, chapter 10, title V, of the Code. Took effect by publication, April 1, 1878,	1 2, 3		186 188
110	An act to repeal chapter 35, of the private, local and temporary acts of the Fifteenth General Assembly, and chapter 97 of the acts of the Sixteenth General Assembly, and to provide for the leasing the convict labor of the state..... Took effect by publication, April 2, 1878.	.....	Repealed; 18 G. A., ch. 149...	1156
111	An act to prevent the making and publication of false or deceptive statements in relation to the business of fire insurance. Additional to Code, title IX, chapter 4..... Took effect, July 4, 1878.	.....	.....	293
113	An act amendatory of section 1802 of the Code of Iowa ..... Took effect July 4, 1878.	.....	Repealed; 18 G. A. ch. 143...	510
114	An act to tax sleeping and dining cars, amending section 1318, chapter 5, title X, of the Code.... Took effect July 4, 1878.	.....	.....	362
115	An act to prevent the use of the funds of the State University for support of the preparatory department after July 1, 1879..... Took effect July 4, 1878.	.....	.....	465
116	An act to amend section 80, of chapter 4, title II, of the Code of 1873..... Took effect July 4, 1878.	.....	.....	18
118	An act to amend section 2590, chapter 5, title XVII, of the Code, limiting the number of changes of the place of trial in civil cases..... Took effect July 4, 1878.	.....	.....	691
119	An act to prohibit, regulate and punish the sale of malt or vinous liquors within two miles of the corporate limits of any municipality, and within two miles of where an election is held, and to extend the powers and jurisdiction of said municipality and its officers. Additional to Code, title IV, chapter 10: "Of cities and incorporated towns." Took effect July 4, 1878.	.....	.....	439
121	An act to provide for opening drains to be constructed through two or more adjoining counties. Amendatory of chapter 2, title X, of the Code ..... Took effect July 4, 1878.	.....	Amended; 18 G. A, ch. 85....	327
122	An act to amend section 914 and repeal section 915, of chapter 3, title VI, of the Code; also, to amend subdivision 5, of section 3793, of chapter 2, title XXIII, of the Code, relating to the payment of money into the state treasury..... Took effect July 4, 1878.	1, 2 3	..... Repealed; 18 G. A., ch. 184, § 2	234 955

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
123	An act amendatory to chapter 132, laws of the Sixteenth General Assembly, relating to the publication and distribution of the laws. ..... Took effect by publication, April 3, 1878.	.....	.....	8
124	An act to amend chapter 101, laws of the Sixteenth General Assembly, in relation to fences..... Took effect July 4, 1878.	.....	Repealed; 18 G. A., ch. 47....	417
125	An act to provide for the organization of the state militia, and entitled the "Military Code of Iowa." and fixing the salary of certain officers. Repealing title VIII, of the Code ..... Took effect by publication, April 5, 1878.	.....	Repealed; 18 G. A., ch. 74....	260
126	An act to amend section 1241 of the Code, title X, chapter 4, relating to taking private property for works of internal improvement..... Took effect by publication, Mar. 30, 1878.	.....	.....	333
129	An act in relation to liens on real estate of judgments in the district and circuit courts of the United States. Amending Code, title XVII, chapter 9, "Of trial and judgment."..... Took effect July 4, 1878.	1 2–4	....	772 773
132	An act to enable school districts to issue bonds for the purpose of funding judgment indebtedness now existing. Additional to Code, title XII, chapter 9, "Of the system of common schools."..... Took effect July 4, 1878.	.....	.....	518
133	An act to provide for the sub-division of independent school districts. Additional to Code, title XII, chapter 9, "Of the system of common schools."..... Took effect July 4, 1878.	.....	Amended; 18 G. A., ch. 131..	516
136	An act to provide for the re-building of the institution for the deaf and dumb, and to provide for the government of the same, and to repeal a portion of section 1685, chapter 7, title XII, of the Code..... Took effect by publication, Mar. 29, 1878.	1,2,4 5	....	484 482
142	An act making appropriation for the maintenance of the Normal School at Cedar Falls and amending chapter 129 of acts of Sixteenth General Assembly..... Took effect July 4, 1878.	2	.....	486
143	An act to repeal section 1766, chapter 9, title XII, of the Code, relating to examination of teachers, and issuing certificates; and enacting a substitute therefor..... Took effect July 4, 1878.	.....	.....	511
144	An act to prevent trustees and other officers of state institutions from furnishing supplies to or being interested in contracts with such institutions, and to punish the violation of the same.. Took effect July 4, 1878.	.....	....	31

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
145	An act entitled an act relating to the trial of equitable actions. Amending section 2742, chapter 9, title XVII; "Of Trial and Judgment."	.....	.....	733
	Took effect July 4, 1878.			
149	An act providing for the employment of one guard for every eight prisoners at the Anamosa penitentiary	.....	.....	1159
	Took effect by publication, April 4, 1878.			
152	An act to exempt certain railroads from the operation of section 7, of chapter 118, of the laws of the Sixteenth General Assembly	.....	Amend d; 18 G. A., ch. 164..	354
	Took effect by publication, April 4, 18.8.			
154	An act to amend chapter 125, acts of the Sixteenth General Assembly, relating to the bonding of county indebtedness	.....	Amended; 18 G. A., ch. 183..	64
	Took effect by publication, Mar. 28, 1878.			
155	An act entitled an act for the better security of the revenue, regulating the duties of county treasurers, boards of supervisors and state treasurer in relation to the same, and amending section 912, chapter 3, title VI, of the Code	.....	.....	233
	Took effect July 4, 1878.			
156	An act to repeal sections 4048, 4049, 4050 and 4051, chapter 11, title XXIV of the Code; chapter 69 of the public laws of the Fifteenth General Assembly, and chapter 122 of the laws of the Sixteenth General Assembly, in relation to the protection of game, and to enact a substitute in lieu thereof	.....	Amended; 18 G. A., ch. 193 .	1020
	Took effect by publication, Mar. 28, 1878.			
157	An act amendatory to section 2, chapter 123, of the acts of the Sixteenth General Assembly, relating to townships and incorporated towns and cities, to aid in the construction of railroads	.....	.....	371
	Took effect by publication, Mar. 28, 1878.			
162	An act to authorize cities of the first class to provide for the construction of sewers. Additional to Code, chapter 10, title IV, concerning "Cities and Incorporated Towns."	.....	....	119
	Took effect by publication, Mar. 28, 1878.			
164	An act to legalize the acknowledgments of deeds by deputy clerks of court, county auditors and deputy county auditors	.....	....	556
	Took effect July 4, 1878.			
165	An act to repeal section 3849, chapter 2, title XXIV, of the Code, and to enact a substitute therefor, and to restore capital punishment	1 2, 3 4–20	Am.; 18 G. A., ch. 2. " " "	970 972 972
	Took effect July 4, 1878.			
166	An act to amend section 1381, chapter 1, title XI, of the Code, providing for the payment of the tuition of pauper children	.....	.....	385
	Took effect by publication, April 5, 1878.			

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SEVENTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
167	An act to repeal chapter 156, of the laws of the Sixteenth General Assembly, and to enact a substitute therefor..... Took effect by publication, Mar. 30, 1878.	.....	Amended; 18 G. A., ch. 200..	1152
168	An act in relation to evidence in criminal actions. Amending sections 3636 and 4421, and repealing section 4237, and part of section 4556, of the Code ..... Took effect July 4, 1878.	1 2 3	....	917 1057 1112 1091
169	An act to amend chapter forty-seven, laws of the Sixteenth General Assembly, in relation to empowering cities to extend their corporate limits. Additional to Code, chapter 10, title IV, "Of Cities and Incorporated Towns." Took effect July 4, 1878.	.....	.....	102
171	An act to amend section 4374, of chapter 24, title XXV, of the Code of 1873..... Took effect by publication, Mar. 30, 1878.	.....	Repealed; 18 G. A., ch. 9.....	1082
172	An act to authorize cities, towns and townships to regulate the sale of coal oil..... Took effect by publication, April 11, 1878.	.....	.....	447
173	An act to amend chapter 123, of the laws of the Sixteenth General Assembly, relating to taxes in aid of railroads, which is entitled "an act to enable townships and incorporated towns and cities to aid in the construction of railroads"..... Took effect by publication, April 3, 1878.	.....	.....	372
176	An act to confer certain powers upon any Home for the Friendless, incorporated under the laws of Iowa, in relation to the control and disposition of minor children who become inmates thereof..... Took effect by publication, April 6, 1878.	.....	.....	632
183	An act to amend section 1428, chapter 2, title XI, of the Code, relating to insane expenses..... Took effect July 4, 1878.	1 2-4	....	397 397
184	An act to amend section 240, of chapter 10, title III, of the Code..... Took effect July 4, 1878.	.....	.....	53
186	An act amendatory to section 4773, of chapter 2, title XXVI, of the code, relating to the furnishing of supplies for the penitentiary..... Took effect by publication, April 4, 1878.	1 2	....	1150 1159
187	An act to amend chapter 40, of the acts of the Sixteenth General Assembly, relating to the additional penitentiary at Anamosa..... Took effect by publication, April 2, 1878.	....	Amended; 18 G. A., ch. 154...	1158
188	An act to provide for the construction and maintenance of fishways to enable fish to pass over dams across the rivers and streams of the State of Iowa..... Took effect by publication, April 6, 1878.	.....	.....	411

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EIGHTEENTH GENERAL ASSEMBLY (1880).

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
2	An act to amend sections 1, 2 and 3 of chapter 165 of the *public* acts of the Seventeenth General Assembly of the State of Iowa, in relation to capital punishment	1		970
	Took effect by publication, February 12, 1880.	2, 3		972
5	An act to amend section 2372 of the Code, relative to the non-liability for the debts of deceased persons of money made payable by mutual aid and benevolent societies			643
	Took effect July 4, 1880.			
6	An act to amend section 1120 of the Code of 1873, in relation to publication and distribution of the reports of the State Horticultural Society			282
	Took effect by publication, February 24, 1880.			
7	An act to amend sections 1719 and 1808 of the Code of 1873, in relation to a tie vote of the electors at an election of school directors	1		492
	Took effect by publication, February 24, 1880.	2		512
8	An act to amend the law governing the election of directors and the powers of boards of directors of independent school districts: Amendatory of Code, title XII, chapter 9			512
	Took effect by publication, February 28, 1880.			
11	An act for the punishment of persons for attempting to break and enter buildings with intent to commit a public offense: Additional to chapter 3, title XXIV, Code, concerning "Offenses against property."			984
	Took effect July 4, 1880.			
12	An act in relation to loaning and management of the permanent school fund	1–3		528
		4		525
	Took effect by publication, March 1, 1880.	5		531
		6, 7		528
13	An act to amend chapter 28 of the public acts of the Fifteenth General Assembly, in relation to the assessment of taxes			189
	Took effect by publication, March 3, 1880.			
15	An act to repeal chapter 65 of the public laws of the Fifteenth General Assembly, and section 1260 of the Code, and enact a substitute therefor, relating to the taking of private property for works of internal improvement			340
	Took effect by publication, March 2, 1880.			
21	An act amendatory to section 2049 of the Code of 1873, in relation to weights of Hungarian grass and millet seed			576
	Took effect July 4, 1880.			
22	An act further defining the duties of county officers			87
	Took effect July 4, 1880.			
25	An act to protect keepers of livery and feed stables, and herders and feeders of stock, and to give them a lien			609
	Took effect July 4, 1880.			

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING	PAGE.
26	An act to repeal section 520 of chapter 10, of title IV, of the Code of Iowa, in relation to cities and incorporated towns, and to provide a substitute therefor Took effect July 4, 1880.			131
27	An act to repeal section 3769 of the Code and enact a substitute therefor, relating to salaries of judges of the supreme court Took effect July 4, 1880.			946
28	An act to repeal section eight, chapter 123, of the *public* acts of the Sixteenth General Assembly, in relation to the payment of taxes voted in aid of the construction of railroads, and enacting a substitute therefor Took effect by publication, Mar. 12, 1880.			372
31	An act to amend section 2094 of title XIV, chapter three, of the Code, relating to holidays Took effect by publication, Mar. 15, 1880.			588
32	An act granting to street railway companies organized under the laws of this state, the right of way over certain public highways Took effect by publication, Mar. 15, 1880.			34[illegible]
36	An act in relation to highway taxes Took effect July 4, 1880.			248
38	An act to repeal section 12, chapter 2, title I, of the Code in relation to compensation and mileage of members of the general assembly, and compensation of officers and employes of the same, and to enact a substitute therefor Took effect July 4, 1880.			3
39	An act to protect the dairy interests and for the punishment of fraud connected therewith Took effect July 4, 1880.			1013
40	An act extending the right to hold the office of county recorder to women Took effect July 4, 1880.			81
45	An act requiring boards of supervisors in certain cases to pay to cities of the first class a portion of the county bridge fund Took effect by publication, Mar. 17, 1880.			73
46	An act to amend section 1, chapter 80, of the acts of the Sixteenth General Assembly, in relation to powers and duties of boards of supervisors Took effect July 4, 1880.			72
47	An act repealing chapter 101, acts of Sixteenth General Assembly, and chapter 124, acts of Seventeenth General Assembly, and relating to barbed wire fences, amending section 1507 of the Code of 1873 Took effect July 4, 1880.			417
50	An act to amend section 925, title VII, chapter 1, of the Code, relating to the vacation of public highways Took effect July 4, 1880.			237

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
51	An act to enable school districts or district townships to issue bonds for the purpose of funding judgment indebtedness now existing; additional to Code, title XII, chapter 9, Of the system of common schools. Took effect July 4, 1880.			518
52	An act to amend section 488 of the Code of 1873, in relation to the use of the highway tax of incorporated towns and cities in certain cases. Took effect July 4, 1880.			122
53	An act to provide that lands to be laid out into town or city lots shall be free from incumbrance, or that security shall be given against such incumbrance, and that such lots, when thus laid out, shall be accurately described relative to some established corner of the congressional division of which they are a part, and repealing chapter 25 of the laws of the Fifteenth General Assembly, and chapter 63 of the laws of the Sixteenth General Assembly. Took effect by publication, March 20, 1880.			152
55	An act authorizing the construction of sewers for state buildings through streets and alleys of incorporated cities, or cities acting under special charter. Took effect by publication, March 20, 1880.			120
56	An act to provide for the extension of the limits of cities of the first or second class. Took effect by publication, March 23, 1880.			99
57	An act to relieve corporations engaged in manufacturing from double taxation in certain cases. Took effect July 4, 1880.			197
58	An act to amend section 2975 of the Code, relating to garnishment proceedings. Took effect July 4, 1880.			794
59	An act to amend section 1822, chapter 9, title XII, of the Code of 1873. Took effect July 4, 1880.			517
60	An act to provide for the stereotyping, publishing and sale of the supreme court reports, and to repeal sections 155, 156, 157 and 160, chapter 4, title III, of the Code, and to fix the salary of the supreme court reporter. Took effect by publication, March 23, 1880.			35
62	An act to amend section 277, chapter fourteen, title III, of the Code, relating to the administration of oaths. Took effect by publication, Mar. 22, 1880.			60
63	An act to amend section 1717 of the Code, to provide for the transfer of funds in the school-house fund unappropriated to either of the other funds. Took effect July 4, 1880.			491

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
69	An act to amend chapter thirteen, title XII of the Code, in relation to the State Library Took effect by publication, Mar. 25, 1880.	.....	.....	534
71	An act to amend section 1900 of the Code, in relation to the State Historical Society Took effect July 4, 1880.	.....	.....	536
74	An act to provide a military code, and for the organization, government and support of the state militia, and to repeal chapter 125, laws of Seventeenth General Assembly Took effect by publication, Mar. 26, 1880.	.....	.....	260
75	An act to regulate the practice of pharmacy, and the sale of medicines and poisons Took effect by publication, Mar. 31, 1880.	.....	.....	448
76	An act to define and punish frauds upon hotel, inn, boarding and eating-house keepers Took effect July 4, 1880.	.....	.....	1033
77	An act in relation to jury trial in cases for violation of ordinances of cities of second class and incorporated towns Took effect by publication, Mar. 29, 1880.	.....	.....	121
79	An act to amend section 421, chapter ten title IV, of the Code of 1873, relative to incorporated towns Took effect by publication, Mar. 29, 1880.	.....	.....	97
82	An act to prohibit the furnishing, or giving, or offering to give intoxicating liquors, including ale, wine and beer, to voters at or within one mile of the polls on election day Took effect July 4, 1880.	.....	.....	441
83	An act to amend section No. 2741 of the Code, in relation to the trial and appeal of ordinary actions Took effect by publication, Mar. 25, 1880.	.....	.....	732
84	An act to amend chapter 9, title XII, of the Code of 1873, by addition thereto, providing for calling in certain contingencies, meetings of school districts Took effect by publication, Mar. 25, 1880.	.....	.....	491
85	An act to amend chapter 121, acts of Seventeenth General Assembly, section 1212, Code of 1873, relating to drains in two or more counties Took effect by publication, Mar. 31, 1880.	1–7 8	....	327 326
88	An act to give county boards of supervisors the right to improve the highways in certain cases. Took effect July 4, 1880.	.....	.....	73
89	An act to authorize cities of the first and second class to acquire and dispose of real property in certain cases Took effect by publication, Mar. 26, 1880.	.....	.....	114

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
92	An act to amend section 10, chapter 70, acts of the Sixteenth General Assembly, "Relating to the propagation of fish." Took effect July 4, 1880.	.....	.....	410
109	An act to amend section 831, chapter 1, title VI, of the Code of Iowa, in relation to boards of equalization. Took effect by publication, April 1, 1880.	1 2 3	....	202 200 202
111	An act to repeal section 1798 of the Code, and enacting a substitute therefor. Took effect July 4, 1880.	.....	.....	509
115	An act to repeal sections 3788 and 3789 of chapter two, title XXIII, of the Code, and to enact a substitute therefor, in relation to the compensation of sheriff. Took effect July 4, 1880.	.....	.....	953
120	An act to repeal section 531, chapter 10, title 4, of the Code, and to enact a substitute therefor, in relation to mayors of cities of the second class. Took effect by publication, Mar. 31, 1880.	.....	....	135
123	An act to provide for the further enforcement of chapters 80 and 188 of the acts of the Seventeenth General Assembly in relation to the construction and attachment of fishways to dams. Took effect by publication, April 6, 1880.	.....	.....	412
124	An act to legalize the service of original notices by publication in cases where the petition has not been filed until after the publication of the original notice. Took effect July 4, 1880.	.....	.....	703
128	An act to authorize railroad companies organized in other states to extend their railroads into this state. Took effect July 4, 1880.	.....	.....	353
130	An act to amend sections 4248 and 4273, and to repeal sections 4289 and 4293 of the Code, and enact substitutes therefor, in relation to evidence before grand juries. Took effect by publication, April 1, 1880.	1 2 3 4 5, 6	....	1059 1063 1066 1067 1067
131	An act repealing section 1, chapter 133, of the acts of the Seventeenth General Assembly, and enacting a substitute therefor. Took effect by publication, April 1, 1880.	.....	.....	516
132	An act to authorize independent school districts or district townships to fund their outstanding bonded indebtedness, and to provide for the payment of the same. Took effect by publication, April 3, 1880.	.....	.....	518
133	An act to repeal section 1361 of the Code, and to enact a substitute therefor in relation to the support of the poor. Took effect by publication, April 1, 1880.	.....	.....	382

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
137	An act to prevent fraud in the sale of lard in certain cases Took effect by publication, April 2, 1880.			1019
139	An act in relation to the formation of independent school districts Took effect July 4, 1880.			509
142	An act to amend sections 1971 and 1974, chapter 6, title XIII, of the Code, relating to the duties of county auditors Took effect by publication, April 3, 1880.			557
143	An act to repeal chapter 113 of the acts of the Seventeenth General Assembly, and amend section 1802, as amended by chapter 27, acts of the Fifteenth General Assembly Took effect by publication, April 1, 1880.			510
144	An act to amend section 2 of chapter 123 of the acts of the Sixteenth General Assembly, relative to the time for publishing notices of election for voting aid to railways Took effect by publication, Mar. 31, 1880.			371
146	An act to repeal section 512, chapter 9, laws of the Seventeenth General Assembly, and enact a substitute therefor, and to amend sections 489 and 493 of the Code, as re-enacted by chapter 9, laws of the Seventeenth General Assembly Took effect by publication, April 5, 1880.	1 2 3		129 122 124
147	An act to amend section 1114 of the Code, prohibiting gambling, horse-racing, and the sale of intoxicating liquors at agricultural fairs, so as to apply to state fairs Took effect July 4, 1880.			281
149	An act to provide for leasing the convict labor at the penitentiary of the state, and to repeal chapter 110 of the acts of the Seventeenth General Assembly Took effect by publication, April 9, 1880.			1156
150	An act to repeal section 1579 of the Code, and enact a substitute therefor to provide for the publication and distribution of the school laws Took effect by publication, April 5, 1880.			460
151	An act to establish a state board of health in the State of Iowa, to provide for collecting vital statistics, and to assign certain duties to local boards of health, and to punish neglect of duties Took effect by publication, April 3, 1880.			451
152	An act providing for appeals from the findings of the commissioners of insanity, and to amend section 1401 of chapter 2, title XI of the Code Took effect July 4, 1880.			390
153	An act to protect depositors in banks and banking institutions, and to punish fraudulent banking Took effect by publication, April 3, 1880.			458

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING	PAGE.
154	An act to equalize the good time that may be earned by convicts at the penitentiaries, amendatory of section 4754 of the Code, and of chapter 43 of the general and public laws of the Fourteenth General Assembly, chapter 40 of the acts of the Sixteenth General Assembly, and chapter 187 of the acts of the Seventeenth General Assembly	.....	.....	1156
	Took effect by publication, April 2, 1880.			
156	An act to provide for an assistant fish commissioner	.....	.....	411
	Took effect July 4, 1880.			
161	An act to further amend section 391 [591], chapter one, title V, of the Code, relating to the election of township officers	.....	.....	158
	Took effect July 4, 1880.			
162	An act relating to conveyances of real estate by foreign executors and trustees, and to amend section 2352 of the Code of Iowa	.....	.....	640
	Took effect by publication, April 7, 1880.			
163	An act limiting the amount on which appeal may be taken on trials before justices of the peace to the circuit court in civil cases	.....	.....	907
	Took effect July 4, 1880.			
164	An act to amend section 1, chapter 152, of the laws of the Sixteenth General Assembly, relative to asylum for feeble-minded	1	.....	473
	Took effect by publication, April 3, 1880.	2	.....	475
165	An act to amend chapter 72, laws of the Seventeenth General Assembly, relating to support of the blind	.....	.....	481
	Took effect July 4, 1880.			
167	An act to repeal section 93 of the Code of 1873, and to enact a substitute therefor	.....	.....	21
	Took effect July 4, 1880.			
169	An act to facilitate business with railroad and sleeping-car companies running or operating sleeping-cars on lines terminating in this state	.....	.....	374
	Took effect by publication, April 3, 1880.			
176	An act to repeal section 1722 of the Code of 1873 and to provide a substitute therefor in relation to the meetings of boards of school directors in district townships	.....	.....	493
	Took effect July 4, 1880.			
181	An act defining the rights and liabilities of hotel, inn, and eating-house keepers	.....	.....	610
	Took effect July 4, 1880.			
182	An act to amend chapter 9, of title XXIV, of the Code, by repealing section 4017 and enacting a substitute therefor, and by enacting section 4019½, providing for the protection of sepulchres and the bodies of deceased persons	2	.....	1012
	Took effect July 4, 1880.	3	.....	1013

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE.
184	An act to amend chapter 154 of the acts of the Seventeenth General Assembly, and section 289 of the Code, relating to the bonding of county indebtedness Took effect by publication, April 2, 1880.			64
184	An act to repeal sections 3784, 3793 and 3798 of the Code, and section 3, chapter 122, laws of Seventeenth General Assembly, and enacting substitutes therefor, relating to salaries of clerk of district and circuit courts, county treasurer and county auditor, and defining certain of their duties Took effect July 4, 1880.	1 2 3 4, 5		951 955 956 956
185	An act to regulate and limit the amount of attorney's fees that may be taxed in suits on written contracts stipulating for attorney's fees in certain cases Took effect July 4, 1880.			785
186	An act to require railroad companies holding lands by grant, to place evidence of their title to such lands on record Took effect July 4, 1880.			550
188	An act amending section 6, of chapter 70, of the laws of the Fifteenth General Assembly, relating to the liability of owners of stock for damage done by domestic animals running at large; and for the punishment of persons unlawfully relieving stock from distraint Took effect July 4, 1880.			404
189	An act in relation to the jurisdiction of mayors of cities of the second class and incorporated towns, with reference to violation of city ordinances Took effect by publication, April 2, 1880.			128
19.	An act to amend section 798, of title 6, chapter 1, of the Code, relating to exemptions for planting and cultivating forest and fruit trees Took effect by publication April 6, 1880.			191
191	An act to provide for the condemnation of real estate for channels and ditches for the drainage and better protection of the right-of-way and road-bed of railroads Took effect by publication, April 7, 1880.			339
192	An act relating to taxes voted in aid of the construction of railways under chapter 123 of the acts of the Sixteenth General Assembly, and chapter 157 of the acts of the Seventeenth General Assembly of the State of Iowa, and supplemental thereto Took effect by publication April 6, 1880.			373
193	An act to amend chapter 156, laws of the Seventeenth General Assembly, relative to the protection of game Took effect July 4, 1880.			1021

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EIGHTEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SEC.	SUBSEQUENT ACTS, REPEALING OR AMENDING.	PAGE
194	An act making appropriations for the Iowa State Library..... Took effect July 4, 1880.	.....	.....	536
195	An act to amend sections 181 and 3777 of the Code, relating to duties and compensation of shorthand reporters..... Took effect July 4, 1880.	1 2	.....	42 943
200	An act to repeal part of section 4783 of chapter 167 of the *public* acts of the Seventeenth General Assembly, and enacting a substitute therefor, fixing the compensation of the officers of the penitentiary..... Took effect by publication, April 6, 1880.	.....	.....	1152
201	An act to amend chapter 6 of the laws of the Sixteenth General Assembly, and providing for one or more assessors, not to exceed three, in incorporated cities having ten thousand inhabitants or over..... Took effect by publication, April 3, 1880.	.....	.....	90
202	An act to regulate mines and mining, and to repeal an act therein named..... Took effect July 4, 1880.	.....	.....	43
203	An act to amend sections one and two, chapter 98, laws of the Seventeenth General Assembly, relating to the Institution for the Deaf and Dumb..... Took effect by publication, April 9, 1880.	.....	.....	483
206	An act to consolidate the office of the register of the State Land Office with the office of secretary of state..... Took effect July 4, 1880.	.....	.....	21
207	An act to repeal section 3818 of the Code, in relation to the payment of witnesses for the defendant in criminal cases, and to enact a substitute therefor..... Took effect July 4, 1880.	.....	.....	962
208	An act to amend chapter one, of title nine, of the Code of 1873, creating double liability of stockholders or shareholders in corporations organized under said chapter one aforesaid, for the purpose of transacting a banking business, buying or selling exchange, receiving deposits of money or discounting notes..... Took effect by publication, April 6, 1880.	.....	.....	275
209	An act to repeal section 2831 of the Code of 1873, and enact a substitute therefor..... Took effect July 4, 1880.	.....	.....	754
210	An act to secure policy-holders in fire insurance companies from unjust forfeitures of policies..... Took effect July 4, 1880.	.....	.....	299
211	An act relating to insurance and fire insurance companies..... Took effect July 4, 1880.	.....	.....	300

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INDEX.

THIS index covers Code, subsequent Session Laws, Constitution and Notes of Decisions.

The references are to section and page, separated by a semicolon, the number of the page being that upon which the first section referred to commences.

References to the notes are indicated by an "n." preceding the number of the section which they follow.

Abandonment.
- Of special charter by city, §§ 434–439; 102.
- Of right of way by railway company, §§ 1260, 1261; 340.
- Of homestead, what amounts to, n. § 1914; 564.
- Of husband or wife by the other:
  - Management of property, §§ 2207–2209; 614.
  - Custody of children, § 2215; 616.

Abatement.
- OF ACTION:
  - Not caused by death of party, § 2525; 669.
  - Not to result from transfer of interest, § 2561; 684.
  - By death, costs in case of, § 2939; 784.
  - For divorce, n. § 2229; 619.
- Pleas in, allowable, n. § 2507; 666.
- Matter in, how pleaded, § 2732; 731.
- Verdict and judgment to distinguish, in case of matter pleaded in, § 2851; 764.
- Plaintiff permitting, must pay costs, § 2934; 784.
- Of proceedings on appeal, not effected by death of party, § 3211; 848.
- OF NUISANCE:
  - In civil actions, § 3331; 871.
  - In criminal actions, §§ 4092–4096; 1035.

Abduction.
- Of female child under fifteen years, § 3865; 977.
- Of child under twelve years, § 3866; 977.

Abortion.
- Punishment for procuring, § 3864; 977.
- Person causing death in attempt to procure, guilty of murder, n. § 3848; 970.

Absconding Debtor.
- Attachment of property of, § 2951; 787.
- Property of, exempt in hands of wife and children, § 3078; 817.

Absence from State.
- Prevents statute of limitations from running, § 2533; 676.

Abstract.
- Of census:
  - By county auditor, § 114; 24.
  - By secretary of state, § 116; 25.
- Of votes at elections:
  - By county canvassers, §§ 636–640; 166.
  - For state officers, and members of general assembly, §§ 645, 646; 167.
  - By state canvassers, §§ 653, 654; 168.
  - For presidential electors, § 663; 170.
- Of title, to be attached to pleading in action to recover real property, § 3251; 858.
- In supreme court, what sufficient to secure trial *de novo*, n. § 3184; 841.

Abuttals.
- Description of property by, § 2726; 729.

Academical Institutions.
- May confer degrees, § 1094; 276.

Acceptance.
- Of offer to compromise, notice of, §§ 2900, 2901; 777.
- Of referee, to be entered of record, § 2828; 753.

Accessory.
- Before the fact, to be treated as principal, § 4314; 1073.
- After the fact, may be punished, though principal is not tried, § 4315; 1073.

Accident Insurance Companies.
- Register and report of, § 1141; 289.

Accidents.
- Upon railways, investigation of by commissioners, 17 G. A., ch. 77, § 14; 368.
- In coal mines, notice of, 18 G. A., ch. 202, § 2; 443.

Accomplice.
- Competent witness for state, n. § 3636; 917.
- Testimony of, must be corroborated, § 4559; 1113.

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Account.
To be kept of purchases and sales of liquors, § 1533; 425.
Money of, § 2075; 579.
Interest on money due on, § 2077; 580.
May be assigned, § 2087; 586.
For mechanic's lien, filing of, 16 G. A., ch. 100, § 6; 598.
Cause of action upon, accrues when, § 2531; 675.
Copy of, failure to attach to petition, ground of demurrer, § 2648; 710.
Bill of particulars in pleading founded upon, § 2713; 727.
In action upon verified petition, with bill of particulars, taken as true upon default, 16 G. A., ch. 36; 727.
Reference in matters of, § 2816; 751.
Books of, as evidence, § 3658; 923.

Accounting.
By general partners of limited partnership, § 2164; 605.
By guardian, §§ 2254, 2255; 624.
By administrators, §§ 2469–2478; 660.
———for profits of real property, § 2404; 648.

Accused.
Rights of, in criminal prosecutions, Const., Art. 1, § 10; 1218.

Acknowledgment of Debt.
What sufficient to revive, n. § 2539; 677.

Acknowledgment of Instruments.
By commissioners in other states, § 271; 58.
Who authorized to take, § 277; 59.
By police judge § 543; 139.
Of plats, § 560; 148.
Of tax deeds, § 897; 225.
Of certificates of insurance companies, § 1122; 282.
Of instrument conveying personal property, § 1923; 542.
Necessary to entitle to record, § 1942; 549.
Of deeds, §§ 1955–1965; 552.
———legalized, §§ 1966–1968; 555.
Of assignment for benefit of creditors, § 2117; 593.
Of certificate of limited partnership, § 2151; 604.
Of instrument adopting child, § 2309; 631.
Not necessary in case of patent to lands, 16 G. A., cn. 10; 925.
Entitles instrument to be received in evidence, § 3656; 923.
Does not prove genuineness of signature, n. § 1958; 553.

Acknowledgment of Service.
What sufficient, § 2603; 697.
By superintendent of hospital for insane, in action against patient, § 2616; 700.

Acquittal
In one county having jurisdiction, bars prosecution in another, § 4164; 1046.
Bars another prosecution for same offense, §§ 4364, 4365; 1031, and Const. Art. 1, § 12; 1219.
May be ordered by court, n. § 4440; 1095.
Judgment of, § 4495; 1104.

Acre.
Measure of, § 2041; 574.

Actions.
Against officer failing to account, §§ 70–72; 16.
In court, to redeem from tax sale, § 893 222.
For recovery of property sold for taxes limitation of, § 902; 230.
Against stockholder, for corporate debt, § 1084; 274.
Against life insurance companies to recover penalties, § 1178.; 307.
To test proper settlement of pauper, §§ 1359, 1360; 381.
For damages caused by intoxication, §§ 1556, 1557; 437.
For rent, enforcement of landlords' liens in, § 2018; 570.
By person claiming easement, § 2035; 573.
On notes and bills, § 2083; 585.
On open account, § 2087; 586.
Against guarantor, § 2091; 587.
Against principal, by or at request of surety. §§ 2108–2110; 591.
To enforce mechanic's lien, 16 G. A., ch. 100, § 12; 602.
Against limited partnerships, § 2160; 605.
By husband or wife against the other, for possession of property, § 2224; 613.
Prosecuted by husband or wife during the absence or imprisonment of the other, § 2208; 614.
By or against married women, § 2211; 614.
For divorce, and annulling marriages, petition and prodeedings in, §§ 2220–2236; 617.
By or against minor, prosecuted or defended by guardian, § 2250; 624.
On guardian's bond, §§ 2251, 2252; 624.
To question validity of guardian's sale, limitation of, § 2265; 626.
For recovery of real property sold by executor, limitation of, § 2401; 647.
Against decedent, how prosecuted, § 2416; 649.
Against heirs and devisees, costs in, § 2485; 661.
Against administrator for penalty, § 2482; 651.

GENERAL PROVISIONS:
Civil, defined, § 2505; 665.

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Actions.

GENERAL PROVISIONS:—*Continued.*

Forms of abolished; how divided, § 2507; 666.
To be by equitable proceedings, when, § 2508; 666.
Upon bond or note secured by mortgage, § 2509; 666.
On mechanic's lien, by equitable proceedings; no joinder in, § 2510; 666.
For divorce, by equitable proceedings, § 2511; 666.
By sureties, occupying claimants, and on lost bill or note, by ordinary proceedings, § 2512; 666.
To be by ordinary proceedings unless otherwise provided, § 2513; 667.
Error as to kind of, how corrected, §§ 2514–2516; 667.
Equitable issues in, how tried, § 2517; 667.
Court may direct kind of proceedings, § 2518; 668.
Error as to kind of proceedings in, waived, § 2519; 668.
Provisions of Code applicable to all, § 2520, 668.
On judgments, within what time to be brought, § 2521; 668.
Judgment in, not to be annulled by equitable proceedings, § 2522; 669.
For discovery, when allowable, § 2523; 669.
Successive, when allowable, § 2524; 669.
Survival of, § 2525; 669.
Right of civil, not merged in public offense, § 2526; 670.
By or against decedent, continued in name of personal representative, § 2527; 670.

LIMITATIONS:

Periods of, § 2529; 671.
In cases of fraud, mistake, trespass or open account, when accrue, §§ 2530, 2531; 674.
What deemed commencement of, § 2532; 675.
Time of non-residence, §§ 2533, 2534; 676.
In case of minors and insane persons, § 2535; 676.
In case of death of party, § 2536; 677.
New suit brought within six months, not barred, § 2537; 677.
Provisions not applicable to bank bills, § 2538; 677.
Revival of causes of, § 2539; 677.
Counter-claim as defense, although barred, § 2540; 678.
Not to apply when stayed by injunction, etc., § 2541; 678.
Not applicable in case of school fund, § 2542; 678.

Actions.—*Continued.*

PARTIES:

In whose name brought, §§ 2543, 2544; 678.
Joinder of plaintiffs or defendants, §§ 2545, 2547, 2548; 680.
By assignee of thing in action, § 2546; 680.
May be prosecuted or defended by one for many, § 2549; 681.
On joint or several obligations, § 2550; 681.
New parties brought in, § 2551; 682.
Upon bond for public security, § 2552; 682.
By or against partnership, § 2553; 683.
By foreign corporations, § 2554; 683.
By unmarried female, for seduction, § 2555; 683.
By father or mother, for injury or death of minor, § 2556; 683.
Where name of defendant is unknown, § 2557; 684.
Against parties to written instrument, § 2558; 684.
Against prisoner, § 2559; 684.
By the state, security not required, § 2560; 684.
Not to abate by trasfer of interest, § 2561; 684.
By or against married women, §§ 2562–2564; 684.
By or against minor, how brought or defended, §§ 2565–2568; 685.
By or against insane person, how brought or defended, §§ 2569–2571; 686.
For recovery of personal property, interpleader in, §§ 2572–2575; 686.

PLACE OF BRINGING, §§ 2576–2589; 687.
CHANGE IN PLACE OF TRIAL OF, §§ 2590–2594; 691.
MANNER OF COMMENCING, §§ 2599–2629; 694.
Discontinued for failure to file petition in time, § 2600; 696.
Against county, not to be brought until claim is presented, § 2610; 699.
Affecting real property, notice to third persons, §§ 2628, 2629; 705.
JOINDER OF, §§ 2630–2634; 706.
Technical forms of, abolished, § 2644; 708.
Pendency of another, ground for demurrer, § 2645; 710.
Pleading matter arising subsequent to commencement of, § 2733; 731.
Consolidation of, on motion of defendant, § 2734; 731.
ISSUES IN, HOW TRIED, §§ 2737–2747; 731.
CONTINUANCES, §§ 2748–2760; 735.
REFERENCE OF, §§ 2815–2830; 750.
WHEN TO BE TRIED, §§ 2744, 2745; 735.

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Actions.—*Continued.*
Dismissal of, §§ 2844–2848; 763.
For failure to give bond for costs, § 2928; 782.
On attachment bond, §§ 2961, 3017; 790.
To enforce lien of attachment upon partnership property, §§ 2973, 2974, 3054; 793.
Upon delivery bond in attachment, § 2998; 801.
Appellate jurisdiction in, § 3163; 835.
For recovery of specific personal property:
How brought, §§ 3225–3228; 8 2.
Bond, seizure of property, §§ 3229–3231; 854.
Execution of order, stay of proceedings, §§ 3232–3237; 854.
Judgment and execution, §§ 3238–3244; 855.
When before justice, where brought, § 3561; 899.
In justice's courts, § 3605; 913.
For recovery of real property:
How brought, §§ 3245–3249; 857.
Pleadings, trial, §§ 3250–3267; 858.
New trial, §§ 3268–3272; 860.
To quiet title, §§ 3273–3276; 861.
For partition, §§ 3277–3306; 863.
To foreclose chattel mortgages, § 3307; 867.
To foreclose mortgages on real property, §§ 3319–3330; 868.
For nuisance, waste and trespass, §§ 3331–3344; 871.
To test official and corporate rights, §§ 3345–3367; 872.
On official securities, §§ 3368, 3369; 875.
For fines and forfeitures, §§ 3370–3372; 876.
Of Mandamus, §§ 3373–3385; 876.
For Injunction, §§ 3386–3402; 879.
Submission of Controversies in, §§ 3408–3415; 884
Against Boats and Rafts, §§ 3432–3448; 888.
Before Justices:
Where brought, §§ 3509–3514; 899.
Commencement of, §§ 3516–3523; 900.
Upon undertaking of bail, where brought, § 4599; 1121.

Acts of General Assembly.
To be deposited with secretary of state, § 31; 6.
When to take effect, §§ 32–34; 6.
Printing of, §§ 35–37; 6.
Titles of, to contain references to Code, § 38; 7.
To be kept by secretary of state, § 61; 14.
Taking effect of, Const. Art. 3, § 26; 1227.
To embrace but one subject, expressed in title, Const. Art. 3, § 29; 1228.
Local or special not to be passed, Const. Art. 3, § 30; 1228.

A. D.
How construed, § 45, ¶ 11; 10.

Additional Security and Discharge of Sureties.
In case of public officers, §§ 772–780; 184.

Adit Levels.
Drainage of lead mines by, § 1229; 330.

Adjournment.
Of Supreme Court for failure of judges to attend, §§ 141, 142; 33.
Of District or Circuit Court:
For failure of judge to attend, §§ 167–169; 39.
Effect of, §§ 170–172; 39.
After trial begun, § 2796; 747.
While jury is out, § 2798; 747.
During deliberation of jury, § 4458; 1098.
In Justices' Courts:
When granted, §§ 3526–3529; 902.
In actions of forcible entry and detainer, § 3618; 914.
Of General Assembly:
By governor, in case of disagreement, Const., Art. 4, § 13; 1232.
Either house of, by less than quorum, Const., Art 3, § 8; 1225.
——— to regulate its own, Const., Art. 3, § 9; 1226.
By either house of, without consent of the other, Const., Art. 3, § 14; 1226.
Of tax sales, § 883; 218.

Adjutant General of Militia.
Report of, 16 G. A., ch. 159, § 1; 28.
Rank, duties and compensation of, 18 G. A., ch. 74, § 12; 262.
Office of, clerical assistance in, 18 G. A., ch. 74, § 42; 267.
Salary of, § 3761; 944.

Admeasurement of Dower.
Proceedings, etc., for, §§ 2443–2451; 655.

Administration.
To whom granted, special, general, limited, foreign, §§ 2354–2369; 640.

Administration of Oaths.
Who authorized to make, § 277; 59.
Affirmation, § 278; 60.

Administrators.
Jurisdiction for appointment of, § 2312; 634.
Administration granted:
Whom appointed, united, bond, oath, letters notice, limitation, foreign, §§ 2354–2369; 640.
Special, appointment and duties of, §§ 2357–2361; 641.
Settlement of the estate:
Inventory to be filed by, § 2370; 642.
May compound with debtor of estate, § 2382; 644.

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Administrators.
SETTLEMENT OF THE ESTATE:—*Continued.*
Sale of property by, §§ 2386–2401; 645.
To take charge of real estate of decedent, §§ 2402–2404; 647.
May be authorized to prosecute business of decedent, § 2407; 648.
Service upon, of notice of claim. § 2408; 648.
Approval and payment of claims by, §§ 2408–2428; 648.
Referees to examine accounts of, § 2412; 649.
To be substituted for decedent in actions, § 2416; 649.
Temporary, when to be appointed, § 2417; 649.
Manner of payment of legacies by, §§ 2429–2435; 651.
Payment of distributive shares by, § 2437; 653.
ACCOUNTING BY, §§ 2469–2478; 660.
Not to derive profit or be accountable to loss from administration, § 2473, 660.
To furnish clerk with list of heirs, § 2491; 662.
Complete record to be kept of sales of real estate by, § 2492; 662.
Compensation of, §§ 2494, 2495; 662.
Removal of, §§ 2496–2503; 663.
Commitment of for failure to obey order of court, § 2502; 663.
May sue in their own names, § 2544; 679.
Cannot bring action as to title of real estate unless authorized, n. § 2388; 645.
See, also, ESTATES OF DECEDENTS, and EXECUTORS.

Administrator de bonis non.
May be appointed after five years § 2367; 641.

Administrator de son tort.
Proceedings against, n. § 2379; 644.

Admission of attorneys.
Requirements for, §§ 208–210; 47.

Admission of Debt.
By husband alone, will keep alive mortgage upon homestead, n. § 1990; 561.
Revives cause of action upon contract, § 2539; 677.

Admissions in Pleading.
Of allegations otherwise deemed controverted, how made, § 2712; 726.
In one defense not to affect another defense, n. § 2710; 726.

Admonition of Jury.
By court upon separation:
In civil cases, § 2792; 746.
In criminal cases, § 4435; 1094.

Adopted Child.
May inherit from natural parents, n. § 2310; 631.

Adoption of Children.
Method of, §§ 2307–2311; 631.
In orphans' homes, § 1634; 471.
In homes for the friendless, 17 G. A. ch. 176, § 5; 633.

Adoption of the Constitution.
Method and effect of, Const., Art. 12; 1244.

Adulterated Liquors.
Sale of, punished, § 4040; 1018.

Adulteration.
Of food or liquors punished, § 4036; 1017.
Of drugs or medicines, punished, § 4037; 1017.
Of milk, cheese, or butter, penalty for, § 4042; 1018.

Adultery.
Cause for divorce, § 2223; 617.
Punishment of, § 4008; 1009.
Limitation of prosecution for, § 4163; 1046.

Advancement to Heir.
Effect of, § 2459; 658.

Adverse Possession.
Does not prevent sale of interest, § 1932; 545.
Evidence as to easement claimed by virtue of, § 2031; 572.
Easement on light and air not acquired by, § 2032; 573.
Foot-way not acquired by, § 2033; 573.
Notice to prevent the acquisition of easement by, §§ 2034, 2035; 573.
What sufficient, to bar action to recover real property, n. § 2529; 671.

Advertisement.
Of tax sales, §§ 872–874; 214.
——— use of figures in, § 889; 216.
——— copy of, to be filed in auditor's office, § 881; 217.
Of estrays, §§ 1468–1471; 406.
Of stray vessels, ratts, or lumber, §§ 1509, 1513; 418.
Of lost goods, money, or notes, §§ 1515, 1516; 420.
Of unclaimed property by warehousemen, carriers, etc. § 2179; 607.
Fees for, when not otherwise provided, § 3838; 966.

Affidavit.
For change of place of trial, §§ 2591, 2592; 692.
Of return of service of notice, § 2609; 699.
For service of original notice by publication, § 2618; 701.
Of publisher as to publication of original notice, § 2620; 702.

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Affidavit.—*Continued.*
Verification of pleadings by, what sufficient, §§ 2669–2673; 717.
For continuance for failure to answer interrogatories, § 2696; 725.
Verifying interrogatories attached to pleadings, § 2698; 725.
Of party filing interrogatories with pleading, effect of, § 2699; 725.
For continuance, must state what, §§ 2750, 2752; 736.
Of referee, § 2826; 753.
Of merits, to set aside default, § 2871; 768.
Of defense, on motion for security for costs, § 2927; 781.
For attachment, amendment of, § 3021; 805.
Of redeeming creditor as to amount due, § 3118; 825.
Perpetuating testimony by, § 3700; 932.
Of posting or serving notice or paper, § 3698; 932.
As to fact of publication, § 3697; 932.
False, by master of boat, to defraud insurer, punished, § 4085; 1030.

Affidavits.
Defective, may be corrected, § 248; 55.
Commissioners in other states empowered to take, §§ 267–271; 58.
In support of motion for more specific statement, § 2720; 729.
As to bill of exceptions signed by bystanders, § 2835; 755.
Upon application for new trial, § 2838; 761.
Upon application for receiver, § 2903; 778.
Upon motion for an order, § 2913; 780.
As to proceedings in foreclosure of chattel mortgage, §§ 3314, 3315; 867.
As evidence; defined; how procured, §§ 3689–3700; 931.
Fee for drawing and certifying to, § 3819; 962.

Affinity.
Degrees of, how computed, § 45, ¶ 24; 11.

Affirmance of Judgment upon Appeal.
For failure to file transcript or assign errors, §§ 3181–3183; 840.
Effect of, n. § 3194; 845.

Affirmation.
May be taken in place of oath, § 278; 60.

Affirmative of issue.
Who has, n. § 2779; 741.

Affray.
Defined and punished, § 4065; 1026.

Agency of Company or Individual.
Place of bringing action in transactions connected with, § 2585; 689.
Service upon person employed in, § 2613; 700.

Agent.
Responsible for tax of property of principal under his control, § 817; 197.
Penalty for sale of liquors by, § 1540; 427.
With whom contract is made may sue in his own name, n. § 2544; 679.
Of corporation, service of notice upon, §§ 2611–2613; 699.
Verification of pleadings by, § 2672; 718.
Affidavit of, for continuance, § 2750; 736.
Of non-resident, service on, of notice of action to recover real property, § 3249; 858.
Appearing for party in justices' court, showing of authority by, § 3524; 902.
Embezzlement by, § § 3909; 989.

Agents of Insurance Companies.
Must procure certificate of authority, § 1145; 292.
Who deemed to be; advertisements by, § 1148; 293.
Who held to be soliciting agents, 18 G. A., ch. 211, § 1; 300.

Agents of Life Insurance Companies.
Appointment, authority, etc., §§ 1164–1166; 302.
Acting without certificate, liable to penalty, § 1177; 307.

Agreements.
As to walls in common, § 2030; 572.
Of apprenticeship, how executed, §§ 2281, 2282; 628.
As to change of place of trial, § 2330; 691.
To arbitrate must be specially pleaded in abatement, n. § 2718; 728.
For continuance, effect of, § 2758; 738.
Of parties to majority verdict or struck jury, § 2778; 740.
For judgment, § 2861; 766.
For submission of controversies, §§ 3408–3415; 884.
For submission to arbitration, §§ 3417–3419; 885.
How construed when terms understood in different sense, § 3652; 922.

Agricultural College.
See STATE AGRICULTURAL COLLEGE, §§ 1604–1622; 465.

Agricultural Societies.
Duration and dissolution of, §1070; 271.
Associations for incorporation of, § 1091; 276.
Of state, district, or county, § 1103–1116; 279.

Air.
No easement in, § 2032; 573.

Alibi.
What sufficient proof of, to acquit, n. § 4428; 1092.

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Alien.
Property rights of, §§ 1908, 1909; 539, and Const. Art. 1, § 22; 1223.
Non-resident, rights of widow in property of, § 2442; 655.
May take distributive share in personal property, n. § 2453; 657.
Naturalization of, p. 1184.

Alienation after commencement of action.
Not to affect actions to recover real property, § 3255; 859.

Alimony.
Temporary and permanent, when granted, §§ 2226–2229; 618.
Suit for, entertained in equity without divorce, n. § 2229; 619.
In case of annulling marriage, § 2236; 621.

Allegations.
Variance between, and proof, when deemed material; effect of, §§ 2686–2688; 721.
Material, when to be taken as true, § 2712; 726.
Of corporate, partnership, or representative capacity, how made and controverted, §§ 2716, 2717; 728.
Alternative, to be attacked by motion and not by demurrer, n. § 2720; 729.

Alleys.
Laying out, grading, etc. of, §§ 464, 465; 108.
Improvement of, 15 G. A., ch. 51; 110.
Improvement of at expense of adjacent property, § 466; 111.

Allowance.
Of claims against estates of decedents:
By executor or administrator, §§ 2408–2423; 648.
Special administrator not authorized to make, § 2360; 641.
To widow and children out of estate, §§ 2375, 2377; 643.
To administrators as compensation, § 2495; 663.
To posthumous children and others, notwithstanding will, § 2335; 637.

Alteration of Instrument.
Deemed forgery, § 3917; 991, 965.

Alteration of Stamp or Brand.
Punished, § 4078; 1029.

Alternative Allegations.
To be attacked by motion and not demurrer, n. § 2648; 710.

Amendment.
Of special charters of cities, §§ 548–550; 144.
OF PLEADINGS:
Time to plead to, §§ 2636, 2639; 707.
To petition, without leave, filed before answer, § 2647; 710.
Failure to file deemed joinder in demurrer, § 2652; 713.

Amendment.
OF PLEADINGS:—*Continued.*
Failure to file after demurrer sustained, § 2654; 713.
Permitted without verification, § 2680; 719.
How made, do not entitle to continuance, §§ 2686–2692; 721.
When considered as substitute, n. § 2692; 724.
Allowed by referee, § 2820; 751.
Default for failure to file, § 2869; 767.
Of return of service by sheriff, § 2606; 698.
Of bill of particulars, § 2713; 727.
Of application for continuance, § 2753; 738.
Of motion for new trial, n. § 2838; 761.
Of pleading, bond or proceeding in attachment, § 3021; 805.
Of abstract in real action, or in action for partition, §§ 3251, 3279; 858.
Of petition in injunction, n. § 3386; 879.
Of return of justice on appeal, §§ 3585, 3586; 909.

Amendments.
To school laws, publication of, 18 G. A., ch. 150, § 2; 460.
To constitution:
How proposed and submitted, Const., Art. 10, §§ 1, 2; 1241.
Method of submission of, 16 G. A., ch. 114; 1247.

Anamosa.
Penitentiary at, acts relative to; pp. 1157–1159.

Ancillary Administration.
Allowance of claims under, n. § 2352; 639.
May be granted after five years, n. § 2367; 641.

Animals.
Regulations as to transportation of, § 4032; 1016.
See, CRUELTY TO ANIMALS, also, DOMESTIC AND OTHER ANIMALS.

Annexation.
Of contiguous territory to city or town, §§ 426–431; 98.
Of city or town to another city or town, §§ 432, 433; 100.

Annual Interest.
Interest upon, n. § 2077; 580.

Annuities.
Listing of for taxation, § 813; 195.

Answer.
Of master to complaint of apprentice, §§ 2290; 629.
Of apprentice to complaint against him, § 2295; 629.
Not necessary to claim against estate, § 2410; 649.
When to be filed, §§ 2635, 2636; 707.

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Answer.—*Continued.*
When to be filed to amendment to petition, § 2647, 710.
Objections not appearing on face of petition to be taken advantage of by, § 2650; 712.
May be filed to portion of causes of action in petition, § 2651; 713.
May be filed on overruling of demurrer, § 2653; 713.
REQUISITES OF, §§ 2655–2658; 713.
By guardian, § 2656; 715.
Equitable division of, into paragraphs, § 2660; 716.
Demurrer to, § 2664; 716.
Reply to, § 2665; 717.
In action for damages, may set forth mitigating circumstances, § 2682; 719.
Interrogatories may be attached to, § 2693; 724.
To interrogatories attached to pleadings:
May be read as deposition; may contain what, §§ 2693, 2694; 724.
How compelled, § 2700; 726.
May be quashed for failure to answer interrogatories, § 2700; 726.
Divisions of, how numbered, § 2705; 726.
Sham or irrelevant, stricken out, § 2707; 726.
Inconsistent defenses may be stated in, § 2710; 726.
Allegations of, deemed controverted, § 2712; 726.
Supplemental, when allowed, § 2731; 730.
Matter in abatement may be stated in, § 2732; 731.
OF GARNISHEE:
Pleading controverting need not be verified, § 2675; 718.
How taken, §§ 2980–2982; 796.
How controverted, § 2987; 797.
What sufficient to warrant judgment, n. § 2988; 798.
In proceedings before a justice, §§ 3607, 3608; 913.
In proceedings to subject property to payment of judgment, § 3151; 850.
In actions to recover real property, § 3252; 858.
In actions for partition, § 3282; 864.
In habeas corpus proceedings, §§ 3478–3481; 893.

Apothecaries.
Selling poisons, to label and keep record; penalty for failure, 18 G. A., ch. 75, § 9; 450, and § 4038; 1017.
See, also, PHARMACY.

Apparatus.
Purchase of, for schools, § 1729; 494.

Appeal Bond.
Does not discharge delivery bond in attachment, n. § 2994; 800.
Judgment upon, §§ 3195, 3196; 846.

Appeals.
From orders removing or suspending attorney, § 223; 50.
From superior courts of cities, 16 G. A., ch. 143, § 17; 143.
From action of city council as to damages from change of grade of street, § 469; 112.
From police courts, § 546; 140.
From court for contesting elections, §§ 716, 717; 177.
From board of equalization, § 831; 202.
In proceedings for establishment of highways, §§ 959–963; 242.
From appraisement of damages for taking private property for mill-dams and races, § 1194; 322.
In proceedings for location of drains, ditches and water-courses, § 1216; 327.
From assessment of damages by drainage of marsh lands, § 1223; 329.
From assessment of damages for taking private property for works of internal improvement, §§ 1254–1259; 338.
From finding of commissioners of insanity, 18 G. A., ch. 152; 391.
From action of township trustees in assessing damages caused by stock, § 1455; 405.
From assessment of damages for taking property for school-house site, § 1827; 520.
From decisions of school officers, §§ 1829–1836; 521.
From judgment against master or apprentice, §§ 2292, 2299; 629.
In proceedings to send child to home for friendless, 17 G. A., ch. 176, § 3; 632.
From appointment of special executors, effect of, § 2358; 641.
Right to amend after reversal on, n. § 2689; 721.
What evidence to go to supreme court in case of, § 2741; 732.
From order granting or refusing continuance, § 2755; 738.
Effect of, upon liens of judgments, n. § 2882; 772.
From judgments by confession, n. § 2897; 776.
From order as to security for costs, n. § 2927; 781.
Bill of costs in case of, § 2945; 785.
From judgments in garnishment proceedings, § 2993; 800.
From order discharging attachment, §§ 3019, 3020; 805.
No stay allowed in case of judgment upon, § 3061; 813.
Not allowed after stay, § 3063; 814.
Waive right of redemption, § 3102; 822.
From proceedings to vacate judgments, n. § 3154; 831.
TO SUPREME COURT, IN CIVIL CASES:
When allowed, §§ 3163–3177; 835.

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Appeals.
To Supreme Court, in civil cases: —*Continued.*
Notices of, and filing of transcripts, §§ 3178–3185; 840.
Suspend proceedings in court below, n. § 3178; 840.
Not to be dismissed, if taken in good faith, 15 G. A., ch. 56; 841.
Stay of proceedings, §§ 3186–3193; 843.
Trial and judgment in, §§ 3194–3200; 845.
Re-hearing, §§ 3201, 3202; 847.
General provisions, §§ 3203–3215; 847.
In certiorari proceedings, § 3223; 851.
By state, in mandamus proceedings, § 3385; 879.
From judgments on awards, § 3429; 887.
From judgments in actions against boats or rafts, § 3442; 889.
Not to lie, from order to punish for contempt. § 3499; 897.
From judgments of justices in civil cases:
When allowed; how prosecuted, §§ 3575, 3596; 907.
Change of place of trial not allowed in, § 2590; 691.
In actions of forcible entry and detainer. § 3624; 915.
In actions of forcible entry and detainer, suspend execution, § 3623¼; 915.
In prosecutions for murder, stay of execution by, 17 G. A., ch. 165, §§ 16, 17; 974.
Not to be allowed from order transferring criminal cause, § 4387; 1084
To Supreme Court in Criminal Cases:
Amount of bail for, to be fixed in judgment. § 4511; 1107.
By whom and how taken, §§ 4520–4524; 1108.
Transcript in, § 4525; 1109.
By co-defendants; by state, §§ 4526, 4527; 1109.
Bail upon, §§ 4528–4530; 1109.
Stay of execution upon, § 4528; 1109.
By state not to stay execution, § 4529; 1109.
Docketing of, §§ 4531, 4532; 1109.
Trial, §§ 4533–4545; 1109.
Bail bond given upon, §§ 4587, 4588; 1118.
By prosecuting witness from judgments for costs upon information before justice. § 4691; 1134.
From Judgments of Justices in Criminal Cases:
How taken, bail, witnesses bound over, §§ 4697–4701; 1135.
Trial of, in district court, §§ 4702–4706; 1136.

Appeals.—*Continued.*
From judgments of district court on appeals from justices in criminal cases, § 4705; 1137.

Appearance.
Of defendant after service, at what time required. § 2602; 696.
To action, how made, effect of, § 2626; 704.
Of member of general assembly to civil action, during session, not required, § 2626; 704.
To civil action not required on holidays, § 2626; 704.
Default for want of, how taken, § 2870; 765.
In attachment proceedings, giving bond for release of property deemed, § 2994; 800.
In action against boat or raft, what deemed, § 3448; 890.
To action before justice, §§ 3517, 3521, 3525; 900.

Appearance Docket,
To be kept by clerk of court, §§ 197–201; 44.
Entry in, of filing of pleading, effect of, § 2613; 708.
Entry of motion in, § 2914; 780.

Appearance Term,
In equitable actions, n. § 2742; 733.

Appellant.
Who styled as, § 3171; 838.
Failure of, to file transcript, § 3181, 3182; 840.
When to give security for costs on appeal. § 3210; 848.

Appellee.
Who styled as, § 3171; 838.
Dismissal or affirmance, on motion of, for failure of appellant to file transcript or assign errors, §§ 3181–3185; 840.
May move for discharge of defective appeal bond, § 3188; 844.
Court may award damages to, § 3196; 846.
May move to dismiss where appellant has no right to prosecute appeal, § 3212; 848.
May plead facts showing the appeal to be improper, § 3213; 849.

Apples.
Weight of per bushel, § 2049; 575.

Application.
For insurance, copy of to be attached to policy, 18 G. A., ch. 211, § 2; 300.
By guardian of minor for leave to sell property, §§ 2257, 2258; 624.
For sale of real property belonging to estate, jurisdiction as to, § 2312; 634.
By administrator for sale of property, §§ 2386, 2388; 645.

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Application.—*Continued.*
——— should be within time limited for proving up claims, n. § 2388; 645.
For admeasurement of dower by referees, § 2444; 655.
For change of place of trial, §§ 2591, 2592; 692.
For continuance, §§ 2748–2753; 735.
For new trial, § 2838; 761.
For new trial after term, § 3155; 832.
To set aside default, § 2871; 768.
For appointment of receiver, § 2903; 778.
To re-tax costs, § 2944; 785.
For writ of certiorari, § 3219; 850.
For pension or bounty, clerk to certify to, § 3782; 950.

Appointment.
Of notaries public, §§ 258–260; 56.
Of officers to fill vacancies, § 785; 187.
Of guardians for minors, §§ 2242–2246; 623.
Of foreign guardians, § 2267; 626.
Of guardian *ad litem*, §§ 2566–2568; 685.

Apportionment.
Of school fund by auditor of state, § 66, ¶ 12; 16.
Of school taxes by treasurer, § 868; 212.
Of rent, on death of tenant or *cestui que vie*, § 2011; 568.
Of costs, §§ 2933, 2934, 2940; 783.
——— on appeal from judgment of justice, n. § 3592; 910.
Of senators of general assembly, Const., Art. 3, § 34; 1230.

Appraisers.
To appraise damages from establishment of highways, §§ 949–945; 240.
Of property of decedent, how appointed, etc., §§ 2373, 2374, 2378; 643.
Compensation of, § 3813; 961.
To assess damages from establishment of highway, are not a jury, n. Const., Art. 1, § 9; 1216.

Appraisement.
Of damages from change of grade of street, § 469; 112.
Of damages for taking property for works of internal improvement, §§ 1245–1253; 336
Of estrays, § 1467; 406.
Of sixteenth section school lands, § 1845; 524.
Of property offered as security for loans from school-fund, § 1863; 528.
Of property sold on execution in favor of state or county, § 1912; 540.
In actions by occupying claimants, §§ 1978, 1981; 559.
Of property of insolvent, § 2118; 593.
Of personal property of decedent, §§ 2373, 2374; 643.
Of real property of decedent, § 2390; 646.

Appraisement.—*Continued.*
As evidence of value of property as against executor, § 2472; 660.
Of partnership property in case of attachment, § 2973; 793.
Of property released on delivery bond in attachment, § 2997; 801.
Of partnership property levied on under execution, § 3053; 811.
Of personal property levied on under execution, § 3109; 821.
Of property in replevin, § 3236; 855.
Law giving right of, impairs obligation of contract, n. Const., Art. 1, § 21; 1222.

Apprenticeship.
Of inmates of House of Refuge, § 540; 139.
Of children by Home for the Friendless, 17 G. A., ch. 156, § 5; 633.
See, also, MASTER and APPRENTICE, §§ 2280-2306; 628.

Appropriation.
Debts not to be contracted to exceed, 17 G. A., ch. 67; 30.
For militia, 18 G. A., ch. 74, § 51; 268.
In aid of agricultural societies, § 1112; 280.
To State Horticultural Society, § 1121; 282.
For State Board of Health, 18 G. A., ch. 151, § 12; 453.
For teachers' institutes, § 1584; 460.
For State University, 17 G. A., ch. 76; 464.
For Orphan's Homes, § 1630; 471.
For Asylum for Feeble Minded Children, 16, G. A., ch. 152, § 7; 474.
For Reform School, 15 G. A., ch. 21; 480.
For College for the Blind, §§ 1675, 1676; 481.
For Institution for Deaf and Dumb, §§ 1692, 1693, 1696; 483.
For State Library, § 1899; 536.
For State Historical Society, § 1900; 536.
For penitentiary at Fort Madison, §§ 4783–4787; 1152.
For penitentiary at Anamosa, 14 G. A., ch. 108; 15 G. A., ch. 137; 1157.
For standing army, not to be made for longer time than two years, Const., Art. 1, § 14; 1220.
Money not to be drawn from state treasury except upon, Const., Art. 3, § 24; 1227.
Of public money for local or private purposes, Const., Art. 3, § 31; 1229.

Approval.
Of bills by governor, § 28; 5.
Of official bonds, § 680; 173.
Of proceedings of clerk in probate matters in vacation, § 2316; 635.

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Approval.—*Continued.*
By court, of conveyance by commissioner § 2890; 774.
Of sale of property, by judge in vacation, § 2893; 774.
Of appeal bonds, §§ 3186, 3187; 843.
Arbitration.
Submission of controversies to, § 3416–3431; 885.
Arbitrators.
Proceedings before, §§ 3420–3425; 886.
Compensation of, § 3834; 966.
Bribery of, or attempt to bribe, or acceptance of bribes by, punished, §§ 3944–3946; 997.
Argument.
On application for continuance, § 2754; 738.
Who entitled to open and close, n. § 2779; 741.
To jury by attorneys, order of, §§ 2780–2782; 742.
Court may restrict time of, § 2783; 742.
On re-hearing in supreme court, § 3202; 847.
In supreme court, oral or written, § 3204; 847.
On appeal in criminal cases, defendant to close, § 4536; 1110.
Army.
Not to be kept in time of peace, Const., Art 1, § 14; 1220.
Arraignment of defendant.
Upon indictment, §§ 4327–4336; 1075.
On information, § 4667; 1132.
Arrest.
On warrant of coroner, §§ 361–364; 85.
Of debtor in summary proceedings, § 3148; 829.
Of defendant in habeas corpus proceedings, §§ 3464, 3470; 892.
Upon preliminary information, §§ 4185–4190; 1049.
By whom and how made, §§ 4197–4218; 1052.
Proceedings before magistrate upon, §§ 4219–4225; 1054.
On bench warrant after conviction, § 4502; 1105.
Of defendant, by bail, § 4594; 1120.
Upon information triable before justice, § 4665; 1131.
Electors privileged from, on day of election, Const., Art. 2, § 2; 1224.
Members of general assembly, privileged from, Const., Art. 3, § 11; 1226.
Arrest of Judgment.
Motion in, when allowable, § 2650; 712.
By reason of non-averment of material fact, §§ 2842, 2843; 762.
Motion in, not allowed in justice's court, § 3550; 905.
In criminal cases, §§ 4491–4494; 1104.

Arrest of Judgment.—*Continued.*
Ground of, may be urged as cause against judgment, §§ 4504, 4506; 1106.
Arson.
Assault with intent to commit, punished, § 3874; 979.
Degrees of, §§ 3880–3883; 981.
Provisions as to, applicable to married women, § 3887; 982.
Articles of Incorporation.
Adoption and recording of, § 1060; 269.
Must fix limit of indebtedness, § 1061; 270.
Changes in, must be recorded and published, § 1065; 271.
Failure to comply with, penalty for, § 1071; 272.
Of corporation not for pecuniary profit, § 1092; 276.
Fee for recording, § 3819; 962.
Assault.
Punishment for, § 3878; 980.
With intent to murder, § 3872; 979.
With intent to commit rape, § 3873; 979.
With intent to maim, rob, steal, etc., § 3874; 979.
With intent to inflict great bodily injury, § 3875; 980.
With intent to commit felony, § 3876; 980.
With intent to commit rape, limitation of prosecution for, § 4166; 1046.
Assault and Battery.
Punishment for, § 3878; 980.
Assembly.
Right of, guaranteed, Const., Art. 1, § 20; 1222.
See, also, GENERAL ASSEMBLY.
Assessment.
Of damages for taking property by city, § 476; 116
OF SPECIAL TAXES UPON PROPERTY IN CITIES:
How enforced, §§ 478, 479; 117.
May be certified to auditor, § 481; 118.
For sewers, 17 G. A., ch. 162; 119.
OF TAXES:
Levy, amount of, § 796; 189.
Exemptions, §§ 797–800; 189.
Enumeration and listing, §§ 801–816; 192.
Upon banking associations, §§ 818–820; 197.
Classification of property for, § 821; 198.
Duty of assessor, §§ 822–828; 199.
Equalization by township board, § 829; 201.
——— by county board, §§ 832, 833; 203.

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Assessment.
OF TAXES.—*Continued.*
——— by state board, §§ 834–836; 204.
Auditor to transmit, §§ 837, 838; 204.
Levy of, how made, §§ 839–841; 205.
Tax book and list, §§ 842–844; 205
Duty of treasurer, §§ 845–853; 206.
By county treasurer, in case of omitted property, §§ 851, 852; 207.
To wrong person, effect of, § 904; 231.
Erroneous, injunction not proper remedy against, n. § 3386; 879.
OF DAMAGES:
For taking property for works of internal improvement, §§ 1244–1253; 334.
For condemnation of ways to mines or quarries, 15 G. A., ch. 34; 344
For which stock is distrained, §§ 1454, 1455; 404.
How made on judgment by default, §§ 2872, 2873; 769.

Assessment and Taxation.
Of railways, §§ 1317–1323; 360.
Of sleeping and dining cars, 17 G. A., ch. 114; 362.
Of telegraph lines, 17 G. A., ch. 59; 375.

Assessor.
Census to be taken by, §§ 113–115; 24.
Election of, in townships containing cities, §§ 389, 390; 89.
When to be elected, 18 G. A., ch. 161; 158.
To make list of voters, § 594; 159.
Method of voting for, 17 G. A., ch. 71; 163.
Listing and assessment of property by, §§ 822–828; 199.
To return list of persons subject to military duty, 18 G. A., ch. 74, § 2; 260.
To make enumeration of soldiers' orphans, §§ 1635–1637; 471.
Compensation of, § 3810; 960.

Assets.
Of estate of insolvent, how divided, § 2122; 594.
Property of estate, not subject to execution, not deemed, §§ 2371, 2372; 643.
Of estate of decedent, discovery of, §§ 2379–2381, 644.

Assignee.
Of purchaser at judicial sale, has color of title, § 1982; 559.
Of usurious contract may recover against usurer, § 2081; 584.
Of non-negotiable instrument, or account, action by, §§ 2084–2087; 585.
Action of, against guarantor, § 2091; 587.
Of contract payable in property, tender to, § 2099; 589.
Of insolvent debtor, duties of, §§ 2118–2128; 593.
Of cause of action, may sue in his own name, n. § 2543; 678.
Action by, upon thing in action, § 2546; 680.
Of defendant, right of redemption by, § 3123; 826.

Assignment.
Of note, carries mortgage as incident, n. § 1941; 547.
Of lease, carries with it landlord's lien, n. § 2017; 569.
Of non-negotiable instruments, §§ 2084, 2086; 585.
Of open account, § 2087; 586.
FOR BENEFIT OF CREDITORS:
How made, validity of, etc., §§ 2115–2128; 592.
Priority of taxes under, 16 G. A., ch. 14; 596.
Of mechanics' lien, 16 G. A., ch. 100, § 13; 602.
Of insolvent limited partnership, § 2166; 605.
OF DOWER:
Concurrent jurisdiction in matter of, n. § 2444; 655.
When action for barred, n. § 2529; 671.
Of thing in action, action in case of, § 2546; 680.
Of causes, by clerk, § 2747; 735.
Of judgment, setting aside of, § 2868; 767.
Of action, costs in case of, § 2943; 785.
Of judgment, what sufficient in case of garnishment, § 2976; 795.
What sufficient notice of, in case of garnishment, n. § 2991; 799.
Of judgments, bank bills, etc., by officer seizing under execution, § 3046; 809.
Of certificate of purchase at execution sale, §§ 3120, 3123; 826.
OF ERRORS:
Dismissal of appeal for failure to file, § 3183; 841.
Form of, § 3207; 848.
Not necessary in criminal cases, § 4535; n. § 4538; 1110.
Of causes in supreme court, § 3203; 847.
To junior mortgagee in foreclosure proceedings, § 3323; 869.

Assignor.
Of non-negotiable instrument, notice to not required, § 2088; 586.

Assistant Fish Commissioner.
Appointment, etc., of, 18 G. A., ch. 156; 411.

Assisting Prisoner to Escape.
Punishment for, §§ 3956–3958; 999.

Asylum for Feeble-minded Children.
Establishment and government of, 16 G. A., ch. 152; 473.

Attachment and Garnishment.
ATTACHMENT.
Petition for, §§ 2949–2955; 787.
For debts not due, §§ 2956–2958; 789.
Bond for, §§ 2959–2961; 790.
Mode of, §§ 2962–2972; 791.
Of partnership property, §§ 2973, 2974; 793.

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Attachment and Garnishment.—*Continued.*
GARNISHMENT.
Notice of, §§ 2975–2979; 794.
Answers in, §§ 2980–2987; 796.
Judgment, §§ 2988–2993; 798.
Release of property, §§ 2994–2998; 800.
Sale of perishable property, § 2999; 801.
Specific attachments, §§ 3000–3004; 802.
For indebtedness due the state, §§ 3005–3009; 802.
Return of officer, § 3010; 803.
General provisions, §§ 3011–3024; 803.

Attachment of Property.
By township collector, for taxes, § 405; 92.
To enforce landlord's lien, § 2018; 570.
In actions for divorce, § 2227; 619.
Against married women, how enforced, § 2562; 684
Sheriff holding under, may have party claiming property, substituted as defendant in action for, § 2573; 686.
By landlord, action to recover property held under, how brought, § 2575; 687.
Action aided by, where brought, § 2580; 688.
Under execution, § 3050; 811.
Earnings of debtor exempt from, § 3074; 817.
Appeal from order granting or refusing, § 3164; 835.
Recovery of property erroneously seized under, n. § 3225; 852.
Actions for, before justices, where brought, § 3511; 899.
In actions before justices, §§ 3606–3610; 913.
In proceedings against father of illegitimate child, § 4718; 1140.

Attachment of the Person.
Against witnesses to prove acknowledgments, § 1965; 555.
Against assignee of estate of insolvent debtor, § 2123; 594.
By referee against witnesses, § 2820; 751.
For contempt, to enforce judgment or order, § 3026; 806.
To compel return of writ of certiorari, § 3221; 851.
For contempt in habeas corpus proceedings, §§ 3476, 3477, 3489; 893.

Attempt to break and enter.
Punishment for, 18 G. A., ch. 11; 984.

Attendance of Members of General Assembly.
How enforced, Const., Art. 3, § 8; 1225.

Attorney.
Admission of, §§ 208–210; 47.
Duties and powers of, §§ 211, 213; 47.
Disbarment of, § 212; 48.
May be required to show authority, § 214; 48.

Attorney.—*Continued.*
Lien of, when allowed, § 215; 48.
Release of lien of, § 216; 49.
Revocation or suspension of license of, §§ 217–223; 50.
Failure to pay over money punished, §§ 224–226; 50.
Not liable to jury duty, § 228; 51.
Sheriff not to act as, § 342; 82.
Verification of pleadings by, § 2672; 718.
Affidavit of, for continuance, § 2750; 736.
Party entitled to appear by, § 2782; 742.
Argument by, may be restricted, when, § 2783; 742.
Is not proper person, as by-stander, to sign bill of exceptions, n. § 2835; 765.
Improper statements by, in argument, ground for new trial, n. § 2837; 756.
Default during illness of, set aside, n. § 2871; 768.
Summary proceeding, by client against, § 2906; 779.
Service of motion upon, § 2918; 780.
Not to be received as surety on bond, § 2931; 782.
Service of notice of appeal on, § 3178; 840.
Person assuming to be, without authority, punishable for contempt, § 3492; 895.
License of, not to be revoked as punishment for contempt, n. § 3493; 896.
Not to testify as to privileged communications, § 3643; 920.
Service upon, of notice to take depositions, § 3732; 938.
Appointed to defend criminal, compensation of, §§ 3829–3831; 965.
Selected to prosecute information for selling liquors, fees of, § 3829; 965.
Not personally liable for fees of officers, n. § 3837; 966.
County officer not to occupy office of, § 3844; 967.
Stirring up controversies by, punished, § 3964; 1001.

Attorneys and Counselors.
See ATTORNEY; *supra.*

Attorney's Fee.
In suits to collect school fund, § 1873; 531.
Stipulation for, not usury, n. § 2079; 580.
Not to be recovered on usurious contract, n. § 2080; 582.
What sufficient bringing of action to entitle to, n. § 2595; 665.
Is part of costs, to be recovered on default, though pleadings do not claim specific amount for, n. § 2872; 769.
Recovery of, 18 G. A., ch. 185; 785.
In action on attachment bond, § 2961; 790.

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Attorney's Fee.—*Continued.*
When to be allowed in action upon injunction bond, n. § 3395; 882.
In prosecutions for violation of game laws, 17 G. A., ch. 156, § 11; 1022.
Attorney-General.
Office, duties, etc., of, §§ 150–153; 34.
Election of, § 581; 157.
Bond of, § 678; 172.
To examine and approve certificate of insurance company, §§ 1122, 1123; 282.
May bring action to close up insurance company, § 1149; 293.
May bring proceedings against life insurance company, § 1171; 306.
May bring proceedings against savings bank, 15 G. A., ch. 60, § 25; 318.
Shall be member of State Board of Health, 18 G. A., ch. 151, § 1; 451.
To bid in property for state, § 1911; 540.
May demand payment or security, or issue attachment for indebtedness due the state, §§ 3005, 3006; 802.
Compensation of, § 3770; 946.
Election and term of, Const., Art. 5, § 12; 1235;
Attorney in Fact.
Execution of instrument by, how acknowledged, § 1962; 554.
Power of, recorded, how revoked, § 1969; 556.
Husband or wife may be, for the other, § 2210; 614.
Warrant of, to confess judgment, not valid, n. § 2896; 775.
Attornment.
Of tenant to stranger, void, § 2013; 568.
Auctioneers.
Licensing of by city, § 462; 108.
Auctions.
Regulation of by city, § 463; 108.
Auditor.
(See CITY AUDITOR, also COUNTY AUDITOR.)
Auditor of State.
To draw warrant for salary and mileage of members of general assembly, 15 G. A., ch. 3, § 1; 3.
Duties of as to distribution of laws, §§ 40–42; 7.
Office, duties, etc., of, § 66–74; 14.
To draw warrant in favor of state printer, § 99; 22.
To draw warrant in favor of state binder, § 110; 24.
To advertise for sealed proposals for paper and stationery, § 121; 26.
Not to draw warrant in favor of officer until oath is filed, § 128; 28.
May administer oaths, § 277; 59.
Registry of county bonds with, § 293; 65.
Election of, § 581; 157.
Auditor of State.—*Continued.*
Bond of, § 678; 172.
May be clerk of court for trial of contested state elections, when, § 720; 178.
Appointment of deputy by, §§ 766–768; 183.
To publish revenue laws, § 828; 201.
To allow interest on warrants only when receipted, § 910; 232.
To transmit county treasurer's account to county auditor, § 916; 234.
To draw warrant for excess due county, 16 G. A., ch. 113; 235.
DUTIES OF, AS TO INSURANCE CO.'S:
Approval of certificates, § 1123; 283.
Examination of assets, § 1131; 285.
Inquiries by, § 1142; 291.
Examination of companies, § 1149; 293.
Mutual companies, auditor to bring proceedings against, when, § 1151; 295.
Revocation of certificate of foreign company, § 1152; 295.
To furnish forms for statements, § 1157; 296.
To publish statements, § 1158; 296.
Examination of form of policy, 17 G. A., ch. 39; 297.
DUTIES OF, AS TO LIFE INSURANCE COMPANIES:
Inquiries proposed, § 1168; 305.
Calculation of value of policies, § 1169; 305.
Issuance of certificate, § 1170; 305.
Examination of companies, § 1172; 306.
Report as to condition of companies, to general assembly, 1176; 307.
Examination of banking associations, 15 G. A., ch. 60, § 23; 317.
To issue warrant for damages for property condemned by state, § 1272; 343.
To issue warrant for expenses of Hospital for the Insane, § 1390; 387.
To charge counties with amount due Hospital for Insane, § 1428; 396.
May require banking associations to report and bring proceedings against, §§ 1571, 1572; 456.
To issue warrant for educational journal, § 1581; 460.
To audit and allow mileage of regents of University, § 1602; 464.
Duties of, as to school fund, §§ 1842–1844, 1882, 1883; 523.
To be notified of escheats, § 2461; 658.
Salary and fees of, § 3757; 943.
To account for fees, § 3778; 948.
Collection by, of debts due on account of penitentiary, § 4788; 1153
Election, term and duties of, Const., Art. 4, § 22; 1233.
Authentication.
Of certificate of acknowledgment, §§ 1956, 1957; 552.
Of judicial records, §§ 3712–3715; 934.

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Avoirdupoise Weight.
Standard, § 2042; 574.

Award.
Submission to and judgment upon, n. § 3417; 885.
Of arbitrators, §§ 3423–3425; 886.
Hearing before arbitrators, §§ 3426–3431; 887.

Baggage.
Liability of common carriers for injuries to, § 2183; 609.

Bail.
May be taken, or increased or diminished, in habeas corpus proceedings, § 3486; 894.
Not allowed in cases of treason, § 3845; 969.
When defendant is entitled to, § 4107; 1037.
Upon arrest of fugive from justice, § 4177; 1048.
Amount of, to be fixed in warrant of arrest, § 4189; 1050.
On arrest upon preliminary information, §§ 4192–4194; 1050.
On arrest by peace officer, § 4222–4223; 1054.
Upon preliminary examination, §§ 4245, 4246; 1058.
Amount of, to be fixed in the order upon the indictment, § 4319; 1074.
Upon arrest on bench warrant, § 4325; 1075.
Recommitment of defendant after giving, upon appearance for trial, § 4451; 1097.
Forfeiture of, for failure to appear for judgment, § 4498; 1105.
After sentence, § 4511; 1107.
Upon appeal; stay of proceedings by, § 4530; 1109.
Upon being held to answer, §§ 4573–4580; 1115.
Upon indictment, before conviction, §§ 4582–4586; 1117.
Upon appeal to supreme court, §§ 4587, 4588; 1118.
Deposit of money instead of, §§ 4589–4592; 1119.
Surrender of defendant by, §§ 4593–4595; 1119.
Forfeiture of, §§ 4596–4600; 1120.
Recommitment of defendant after giving, §§ 4601–4605; 1122.
Undertakings of, when liens, §§ 4606–4608; 1123.
Exonerated upon discharge of prisoner, § 4616; 1125.
Right to, guaranteed, Const., Art. 1, § 12; 1219.
Allowance of, to defendant charged with murder in second degree, n. Const., Art. 1, § 12; 1219.
Excessive, not to be required, Const., Art 1, § 17; 1220.

Bail Bond.
Lien of, §§ 4606–4608; 1123.

Bailiffs.
How appointed, § 341; 82.

Ballot-box.
For election precinct, § 614; 162.
For highway supervisors and township assessors; 17 G. A., ch. 71, 163.

Ballots.
Form of, in election for re-location of county seat, § 286; 62.
How cast, §§ 616, 617; 162.
Rejection of, in canvass of votes, §§ 623–625; 163.
Setting aside of election for excess of, § 627; 164.
Preservation of, after counting, § 630; 165.
In elections for presidential electors, § 660; 169.
Elections shall be by, Const., Art. 2, § 6; 1224.

Band.
In militia, 18 G. A., ch. 74, § 14; 263.

Bank bills.
How levied on and sold or assigned under execution, § 3046; 809.
Forgery and counterfeiting of, punished, §§ 3920–3928; 992.

Bank Notes.
Depreciated, assessment of, § 813; 195.
Circulating as money, not barred by statute of limitations, § 2538; 677.
Of foreign banks, circulation of punished, § 4047; 1020.

Banking Associations.
Counties, cities, or towns not to be interested in, § 553; 145.
Taxation of moneys and credits of, § 812; 195.
Taxation of shares in, § 818–820; 197.
Double liability of stockholders in, 18 G. A., ch. 208; 275.
Not to advertise as savings banks, 15 G. A., ch. 60, § 20; 317.
Statements required from, 15 G. A., ch. 60, § 22; 317.
Quarterly statements of, § 1570; 456.
Additional reports of, § 1571; 456.
Appointment of receivers of, § 1572; 457.
Forfeiture of franchises, penalties for false statement, § 1573–1575; 457.
Amount of capital required, § 1576; 457.
Penalty for receiving deposits when insolvent, 18 G. A., ch. 153; 458.
Political or municipal corporations not to be stockholders in, Const., Art. 8, § 4; 1237.
Act creating, to be submitted to popular vote; Const. Art. 8, § 5; 1237.
Security of currency of, Const., Art. 8, § 8; 1238.

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Banking Associations—*Continued.*
Responsibility of stockholders of, Const., Art. 8, § 9; 1238.
Preference of bill-holders in case of insolvency of, Const., Art. 8, § 10; 1238.
Suspension of specie payments by, prohibited, Const., Art. 8, § 11; 1238.

Bankrupt Law.
Does not supersede state insolvent laws, n., § 2115; 592.

Bankruptcy of Limited Partnership.
Effect of, § 2169; 606.

Bar, matter in.
How pleaded, § 2732, 731
To be distinguished from matter in abatement, § 2851; 764.

Bar to second Prosecution.
Conviction or acqittal in county having jurisdiction is, § 4164; 1046.
Order setting aside indictment is not, § 4344; 1078.
What constitutes, §§ 4364–4366; 1081.
Order dismissing action is, when, § 4619; 1125.

Barley.
Weight of, per bushel, § 2049; 575.

Barrel.
Standard contents of, § 2045; 575.

Bastards.
Become legitimate by marriage of parents, § 2200; 612.
Children of void marriage are, § 2234; 621.
Inheritance by and from, §§ 2465–2468; 659.
Proceedings against putative father of, §§ 4715–4722; 1139.

Battery.
Punishment for, § 3878; 980.

Beans.
Weight of, per bushel, § 2049: 575.

Beer.
Manufacture and sale of, not prohibited, § 1555; 437.
Sale of, within two miles of limits may be regulated by city, 17 G. A., ch. 119, § 1; 439.
Sale or giving of, on day of election, within two miles of polls, prohibited, 17 G. A., ch. 119, § 1; 439.
Giving or offering to voter, on election day, within one mile of polls, punished, 18 G. A., ch. 82; 441.
Sale of, within three miles of Agricultural College, prohibited, § 1620; 469.
See, also, INTOXICATING LIQUORS.

Beggars.
Deemed vagrants, § 4130; 1041.
Punishment of, 16 G. A., ch. 69; 1043.

Bench Warrant.
When to issue, form and service of, §§ 4318–4324; 1074.

Bench Warrant.—*Continued.*
Against defendant failing to appear for arraignment, §§ 4330, 4331; 1076.
For arrest of defendant after conviction, §§ 4498–4502; 1105.

Bequeath.
Term included in "devise," § 2336: 637.

Bequest.
To charitable or religious corporation, how far valid, § 1101; 278.

Betting.
Punishment for, § 4028; 1015.
Contracts void, § 4029; 1015.

Bias of Juror.
What sufficient to constitute cause of challenge, n. § 2772; 739.

Bible.
Not to be excluded from schools, § 1764; 501.

Bigamy.
Punishment of, §§ 4009–4011; 1010.
Jurisdiction of offense of, § 4163; 1046.

Bill of Attainder.
Shall not be passed, Const., Art. 1, § 21; 1222.

Bill of Costs.
Re-taxation of, § 2944; 785.
In case of appeal, § 2945; 785.

Bill of Exceptions.
To instructions, § 2789; 743.
Before referee, § 2823; 752.
How taken, signed, etc., §§ 2831–2836; 753.
What sufficient to warrant setting aside verdict as against weight of evidence, n. § 2837; 756.
Not necessary in equitable actions tried upon written evidence, n. § 3184; 841.
Reference in, to notes of short-hand reporter, § 3777; 947.
In criminal cases, §§ 4479–4486; 1101.

Bill of Particulars.
When to be attached to pleading, § 2713; 727.
In action upon account, taken as true upon default, 16 G. A., ch. 36; 727.

Bill of Rights.
Const., Art. 1, §§ 1–25; 1214.

Bill of Sale.
Under chattel mortgage, §§ 3313–3315; 867.

Bills of Exchange.
Entitled to grace, 16 G. A., ch. 81; 587.
Damage for non-acceptance or non-payment of, § 2096; 588.
Protest of, by notary public, as evidence, § 3668; 928.
See, also, NOTES AND BILLS, §§ 2082–2096, 584.

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Bills of Lading.
False affidavits or protests of, punished, § 4085; 1030.
Bills of the Legislature.
Approval or return of, by Governor, §§ 28–30; 5.
May originate in either house, Const., Art. 3, § 15; 1226.
Approval of by Governor, passage over veto, Const., Art. 3 § 16; 1226.
Not to pass except by assent of majority of members, Const., Art. 3, § 17; 1226.
See, also, ACTS OF GENERAL ASSEMBLY.
Binder.
See STATE BINDER.
Binding.
To be done by state binder, § 108; 23.
Binding over to keep the Peace.
See security to keep the peace, §§ 4115–4129; 1039.
Birds.
Destruction of, punished, § 4063; 1025.
Birth of Child.
Revokes previous will, n., § 2329; 636.
Births.
Report and registry of, 18 G. A., ch. 151, §§ 3–8; 452.
Blackberries.
Weight of, per bushed, § 2049; 575.
Blind Asylum.
See COLLEGE FOR THE BLIND, §§ 1664–1684; 480.
Blue-grass Seed.
Weight of, per bushel, § 2049; 575.
Board of Canvassers.
For municipal elections, § 503; 127.
Of county, who constitute, canvass by, § 635; 165.
——— canvass of votes for presidential electors by, § 662; 169.
Of state, who constitute, canvass by, §§ 647–655; 167.
——— canvass of votes for presidential electors by, § 664; 170.
At special elections, §§ 792, 793; 188.
Action of mandamus against, n. § 3373; 876.
Board of Curators.
Of State Historical Society, §§ 1901–1906; 536.
Board of Directors.
OF SCHOOL DISTRICT: Organization, election of officers of, § 1721; 492.
Meetings of, § 1722; 492.
Powers and duties of, §§ 1723–1738; 493.
To certify and apportion school tax, §§ 1777, 1778; 503
Have no jurisdiction over independent district, § 1792; 507.
May divide township into sub-districts, § 1796; 508.
Board of Directors.—*Continued.*
May restore territory to proper township, § 1798; 509.
OF INDEPENDENT DISTRICT:
Election of, § 1802; 510.
Levy of school tax by, § 1804; 510.
shall publish accounts, § 1813; 514.
Appeals from to county superintendent, §§ 1829–1834; 521.
Board of Directors.
Of State Normal School, 16 G. A., ch. 129; 485.
Board of Education.
Const., Art. 9, ch. 1; 1238.
Board of Equalization.
Township trustees shall constitute, § 393; 90.
Of township, duties, etc., of, §§ 829–831; 201.
Of county, who to constitute, duties of, § 832; 203.
Of state, who to constitute, duties of, §§ 834–836; 204.
Review of proceedings of, by *certiorari*, n., § 3216; 849.
Board of Health.
Of township, township trustees to constitute, § 393; 90; and 18 G. A., ch. 151; 453.
——— powers and duties of, §§ 415–420; 94.
Of city, city council may establish, § 525; 133.
——— who to constitute, powers, duties, etc., 18 G. A., ch. 151, §§ 13–24; 453.
Of state, see State Board of Health, 18 G. A., ch. 151: 451.
Board of Railway Commissioners.
Appointment, duties, etc., of, 17 G. A., ch. 47; 364.
Board of Regents of State University.
Membership of, §§ 1587, 1588; 461.
Meetings of, § 1590; 462.
Executive committee, secretary, treasurer, §§ 1591–1593; 462.
Enactment of laws and appointment of officers, § 1596; 463.
Report to superintendent of public instruction, § 1601; 464.
Compensation of, § 1602, 464.
Board of Registration.
In townships, §§ 595–598; 159.
In cities, § 599; 160.
In new townships, § 601; 160.
Board of Supervisors.
Shall provide place for holding court, § 173; 40.
Action of, as to re-location of county seat, §§ 285–287; 62.
Liability of members of, for voting to issue bonds in excess of limit, 16 G. A., ch. 125, § 2; 64.
Levy of tax to pay bonds, § 291; 64.

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Board of Supervisors.—*Continued.*
Funding of county bonds, 17 G. A., ch. 58; 65.
Levy of tax to pay funding bonds, 17 G. A., ch. 58, § 3; 66.
GENERAL PROVISIONS:
Election and meetings of, §§ 294–299; 68.
Division of county into supervisor districts, 15 G. A., ch. 39; 69.
Organization and powers of, §§ 300–303; 69.
Publication of proceedings, § 304; 74.
Vote of majority of, when necessary, § 305; 74.
Selection of newspaper for publication of county notices, §§ 306, 307; 74.
Records of, § 308; 75.
Submission of questions to vote of people, §§ 309–319; 75.
May authorize transfer of special tax to general fund, 16 G. A., ch. 84; 77.
May change names of towns and villages, 16 G. A., ch. 146; 77.
Records of to be kept by county auditor, § 320; 79.
May divide counties into townships and alter boundaries of same, § 379; 88.
May divide township containing city or town, §§ 382–385; 88.
May order election of township collector, § 411; 93.
Change of name of township by, §§ 412–414; 94.
Levy of tax to pay expenses of township board of health, § 420; 95.
May allow and assess expenses of platting land, § 568; 150.
Division of township into election precincts, §§ 603, 604; 160.
Shall provide ballot-boxes, § 614; 162.
Canvass of election returns by, §§ 634–648; 165.
Allowance for deputies, § 771; 184.
May require officer to give new bond, § 773; 184.
Resignations to and by, § 782; 186.
Annual levy of taxes, § 796; 189.
Rebate of taxes; § 800; 191.
Classification of property for taxation, § 821; 198.
As county board of equalization, § 832; 203.
Levy of taxes, how made, § 839; 205.
——— to pay bonded indebtedness, limit of, § 840; 205.
Remission of penalty on taxes not brought forward by treasurer, 15 G. A., ch. 29; 206.
May order refund of erroneous or illegal tax, § 870; 212.
May only allow interest on warrants when receipted, § 910; 232.
Settlement with treasurer and report to auditor of state, §§ 913, 917; 233.
General supervision over highways, § 920; 236.

Board of Supervisors.—*Continued.*
May fix width of highway, § 921; 236.
Establishment of highways, §§ 946–948; 240.
——— through two or more counties, §§ 955, 956; 242.
May establish consent highways, §§ 957, 958; 242.
May order re-survey of highway, §§ 964–966; 244.
May grant license for erection of toll-bridge, §§ 1003–1010; 254.
May grant license and make regulations for ferry, §§ 1011–1018; 255.
May designate location, approve plans and allow construction of railway and toll-bridges over certain rivers, §§ 1031–1033; 258.
May give aid to county agricultural society, § 1111; 280.
May locate and construct drains, ditches and water courses, §§ 1207–1214; 324.
To declare length of railway track within taxing districts, § 1321; 362.
May order removal of poor person to county of settlement, § 1357; 380.
May appoint overseers of the poor, § 1361; 381.
May limit amount of relief to poor persons, § 1363; 382.
May contract for support of poor persons, §§ 1369–1371; 383.
May establish and maintain poor-house, §§ 1372–1382; 384.
Shall levy insane tax, § 1428; 396.
May relieve estates of insane persons from expense of support, § 1433; 398.
May submit to vote question as to stock running at large, § 1450; 403.
Shall procure book for marks and brands of animals, § 1479; 408.
Duties as to construction of fish-ways, 18 G. A., ch. 123; 412.
Granting of permits to sell liquors, §§ 1529, 1530; 424.
Shall revise list of soldiers' orphans, § 1636; 472.
Shall control orphan fund and levy tax for, §§ 1638, 1639; 472.
To appoint and fill vacancies in board of trustees of county high school, and levy tax therefor, §§ 1699, 1703, 1711; 487.
Levy of school tax by, §§ 1777–1780; 503.
Shall levy school tax to pay money borrowed from school fund, § 1788; 507.
Not to change boundary of township so as to divide school district, § 1799; 509.
May levy tax to pay school bonds, 18th G. A., ch. 132, § 6; 519.
Duties of as to school fund; see SCHOOL FUND, §§ 1837–1884; 522.
May sell and convey real estate belonging to county, §§ 1917, 1918; 541.

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Board of Supervisors.—*Continued.*
May have county records transcribed, §§ 1971–1973; 557.
May procure standard weights and measures, and appoint county sealer, § 2057; 577.
Shall appoint inspector of lumber and shingles, § 2069; 578.
Service on chairman of, § 2610; 699.
Presentation of unliquidated demand to, § 2610; 699.
Injunction to restrain, how granted, § 3391; 881.
To furnish justices of the peace with dockets, § 3635; 916.
May allow compensation to clerk in probate matters, § 3783; 950.
May allow additional compensation to clerk, § 3784; 950.
Compensation of members of, § 3791; 954.
To have examination made of books and accounts of officers failing to report fees, 18 G. A., ch. 184; 956
May allow additional compensation to auditor, § 3798; 956.
Shall furnish county offices with stationery, fuel and lights, § 3844; 967.
Member of, voting to erect public building without submitting question to vote of people, guilty of misdemeanor, n. § 3966; 1001.
May direct disposition of unclaimed stolen property, § 4658; 1130.

Board of Trustees.
Of Hospital for the Insane, §§ 1383–1390; 385.
Of Agricultural College, §§ 1604–1618; 465.
Of Asylum for Feeble-minded Children, 16 G. A., ch. 152; 473.
Of Soldiers' Orphans' Home, §§ 1623–1634; 470.
Of State Reform School, §§ 1644–1652; 476.
Of College for the Blind, §§ 1664–1668; 480.
Of Institution for the Deaf and Dumb:
Powers and duties of, §§ 1685–1687; 482.
Election and term of, 17 G. A., ch. 136, § 1; 484.
Of State Library, §§ 1885–1887; 534.

Boards of Trustees of State Institutions.
Reports of, 16 G. A., ch. 159, § 1; 28.
Vacancies in, how filled, 17 G. A., ch. 107; 188.
Compensation and mileage of, 17 G. A., ch. 92; 965.

Boards.
Inspection of, § 2072; 579.

Boats.
Taking up of, when lost, §§ 1512, 1513; 419.

Boats.—*Continued.*
Actions against, §§ 3432–3444; 888.
Burning of, punished, §§ 3880–3885; 981.
Maliciously injuring or cutting loose, punished, § 3980; 1004.
Taking of wood by persons in charge of, punished, § 3988; 1006.
Destroying, to defraud insurer, §§ 4082, 4083; 1030.
May be abated as houses of, ill-fame, n. § 4091; 1034.
Jurisdiction of offenses upon, § 4161; 1045.

Body.
Disposition to be made of, by coroner, § 366; 86.

Bodies of the Dead.
See DEAD BODIES.

Bond.
Does not imply seal, § 45, ¶ 20; 10.
Required by law, to whom to be given, § 247; 54.
Defective, not to prejudice party, § 248; 55.
In case of dispute as to walls in common, § 2029; 572.
Assignment of, § 2084; 585.
Lost, action on, by ordinary proceedings, § 2512; 666.
Intended for security of public or individuals, suit on, by whom brought, § 2552; 682.
Of public officer, action on, where brought, § 2579; 687.
Party suing on must notice conditions and allege breach, § 2728; 729.
And mortgage, separate actions upon, § 3320; 868.
To convey, foreclosure of, §§ 3329, 3330; 870.
Of trustees of corporations, §§ 3361, 3362; 875.
Of public officer, action on, §§ 3368, 3369; 875.

Bonds in Actions, Proceedings, and Legal Relations.
Of contestants of county elections, § 697; 175.
Of assignees of estates of insolvents, § 2118; 593.
To discharge mechanics' liens, 16 G. A., ch. 100, §§ 7, 8; 599.
OF GUARDIANS OF MINORS.
Giving, renewal, breach, §§ 2246, 2247, 2251; 623.
On application to sell property, § 2261; 625.
Foreign, §§ 2268, 2270; 626.
Of parent by adoption, § 2311; 632.
In probate matters, filing and approval of, § 2321; 635.
Of executors, failure to give, creates vacancy, § 2347; 638.

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Bonds in Actions, Proceedings and Legal Relations.—*Continued.*
Of Administrators, §§ 2362, 2364; 641.
To prevent sale of real property of decedent, execution of; liability on, §§ 2396, 2397; 646.
Executor may be exempted from giving, § 2406; 648.
Of administrators and guardians, recording of, § 2493; 662.
Of receivers, § 2904; 779.
In case of orders made in vacation, § 2925; 781.
For costs, §§ 2927–2932; 781.
In Attachment:
To be filed before issuance of writ, § 2959; 790.
Action upon, § 2961; 790.
For release of property, § 2994–2998; 800.
To release property under specific attachment, § 3 04; 802.
Not required in actions by the state, §§ 3007, 3008; 803.
To be returned with the writ, § 3010. 803.
Defendant's remedy upon, § 3017; 804.
Amendment of, § 3021; 805.
Of debtor arrested in summary proceedings, § 3149; 829.
Upon Appeal to Supreme Court:
To stay proceedings, §§ 3186–3193; 843.
Judgment on, §§ 3195, 3196; 846.
To stay proceedings upon *certiorari*, § 3218; 850.
In action to recover personal property, § 3229; 854.
For delivery of property in actions for recovery of personal property, § 3235; 855.
Of defendant in action to recover personal property, judgment upon, § 3242; 857.
To stay execution in action for recovery of real property, § 3265; 860.
Of referees in partition proceedings, § 3298; 866.
For injunction, §§ 3395–3397; 882.
For appearance of party charged with violating injunction, § 3405; 884.
For discharge of boat, § 3438; 889.
In action against boat or raft, execution of, deemed appearance, § 3448; 890.
On appeal from justice of the peace, § 3580; 908.
On writ of error from justice of the peace, § 3601; 912.

Bonds of State, County, or Municipal Corporation.
Of state, interest on, how paid, § 82; 18.
For funding county indebtedness, §§ 289–293; 63.

Bonds of State, County, or Municipal Corporation.—*Continued.*
Of counties, cities and towns, refunding of, 17 G. A., ch. 58; 65.
Issued to railway companies, as capital stock, void, § 554; 147.
———former recovery on, not to bar defense in subsequent action, § 555; 147.
Of county, to fund indebtedness, tax to pay, § 840; 205.
Of independent districts; §§ 1821–1823; 517.
Of school districts and district townships, 18 G. A., ch. 51; 518.
Of independent district, or district township, to fund indebtedness, 18 G. A., ch. 132; 518.
Issued in excess of lawful indebtedness, lien of, upon property of corporation, 15 G. A., ch. 23; 603.
In excess of legal indebtedness, void, n. Art. 11, § 3; 1242.

Bonds of Public Officers.
Security to be given by, § 246; 54.
To whom given, § 247; 54.
Defect in, may be remedied, § 248; 55.
Sureties upon, qualifications and affidavits, §§ 249, 250; 55.
Of notaries public, § 259; 56.
Of county officers may be required by board of supervisors, § 303, n. 10; 70.
Of township collectors, § 401; 91.
Of municipal officers, § 504; 127.
Of civil officers elected by people, §§ 674–690; 171.
When new ones may be required, §§ 772–780; 184.
Of superintendent of weights and measures, § 2052; 576.
Of inspectors of shingles and lumber, § 2070; 579.
Provisions as to suit by surety, not applicable to, § 2111; 592.
Action on, where brought, § 2579; 687.
Action on, how brought, §§ 3368, 3369; 875.
Of special constables, § 3630; 916.
Fee for recording, § 3797; 955.

Books.
Of corporation, production of compelled, § 1087; 275.
——— to be delivered to trustees, § 3364; 875.
Of science and art, as presumptive evidence, § 3653; 922.
Of account, as evidence, § 3658; 923.
And papers to be delivered by defendant in *quo warranto*, § 3354; 874.
———, production of in evidence, how compelled, §§ 3685–3688; 931.

Boundaries.
Of the state:
Defined, § 1; 1, and Preamble to Const.; 1214.
May be enlarged, Const., Art. 11, § 4; 1244.

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Boundaries.—*Continued.*
Of townships, board of supervisors may change, § 379; 88.
—— to be recorded, § 381; 88.
Of wards, may be changed by city council, § 520; 131.
Of sub-districts, how changed, § 1738; 496.
Of counties how changed, Const., Art. 3, § 30; 1228.

Bounties.
On scalps of wild animals may be offered by board of supervisors, § 303, ¶ 19; 71.
——, amount of; how obtained, §§ 1487, 1488; 409.

Boxes for Hops.
Standard size of, § 2051; 576.

Boys.
Under twelve years of age not allowed to work in coal mines, 18 G. A., ch. 202, § 13; 445.

Bran.
Weight of, per bushel, § 2049; 575.

Brands.
Of domestic animals, §§ 1479–1481; 408.
Counterfeiting of, punished, § 3935; 995.
Falsely altering, counterfeiting, or using with intent to defraud, punished, §§ 4078–4080; 1029.

Breach.
Of bond given for security of public, suit on, by whom brought, § 2552; 682.
Of contract to be performed in particular place, suit on, where brought, § 2581; 688.
Of bond, facts constituting, to be alleged in action on, § 2728; 729.

Breaking and Entering.
Punished, § 3894; 983.
Attempt punished, 18 G. A., ch. 11; 984.
By officer to make arrest, §§ 4206, 4207, 4213; 1052.

Bribery.
Of public officers, §§ 2939–3941; 996.
Of jurors, referees, etc., §§ 3944–3946; 997.
Of sheriff, etc., § 3948; 998.
Of electors, § 3993; 1007.
Of officers of elections, § 4001; 1008.

Bridge Fund.
Use of, for improvement of highways, 18 G. A., ch. 88; 73.
Transfer of, to city, 18 G. A., ch. 45; 73.

Bridges.
Board of supervisors may provide for erection and repair of, § 303, ¶ 18; 71.
Vote on proposition to erect, § 303, ¶ 24; 71.
Liability of county for failure to erect or repair, n. § 303, ¶ 18; 72.
On county line roads, 17 G. A., ch. 40; 73.

Bridges.—*Continued.*
Voting special tax to aid in construction of, § 309; 75.
Within city, who to construct and keep in repair, § 527; 134.
Part of highway, § 1001; 254.
Penalty for fast driving over, § 1002; 254.
Toll, §§ 1003–1010, 1019–1028, 1031–1037; 254.
Of railways, to be examined by railway commissioners, 17 G. A., ch. 77, § 3; 364.
Private property may be taken for the construction of, § 1269; 342.
Damages for taking timber for repair of, § 3336; 871.
Burning of, punished, § 3884; 981.
Malicious injury to, punished, § 3979; 1003.

Brigadier Generals.
Election and duties of, 18 G. A., ch. 74, § 12; 262.

Broom-corn Seed.
Weight of per bushel, § 2049; 575.

Buckwheat.
Weight of per bushel, § 2049; 575.

Building Associations.
See, MUTUAL BUILDING ASSOCIATIONS, §§ 1184–1187; 310.

Building Commissioner.
In cities of first class, 16 G. A., ch. 33; 136.

Buildings.
OF COUNTY:
To be built, repaired and insured by board of supervisors, § 303, ¶¶ 5, 6; 70.
Proposition for erection of to be submitted to vote, when, § 303, ¶ 24; 71.
In which liquors are unlawfully kept and sold, declared nuisances, § 1543; 429.
Mechanic's lien attaches to; sale and removal of, 16 G. A., ch. 100, § 9; 600.
PUBLIC:
Mechanics' liens cannot be enforced against, 16 G. A., ch 100, § 3; 596.
Bonds issued for erection of, in excess of constitutional limit, may be enforced against, 15 G. A., ch. 23; 603.
Exemption of from execution, § 3048; 810.
Defacing walls of, punished, § 3986; 1005.
Burning of, punished, §§ 3880–3885; 981.
Maliciously injuring or defacing, punished, § 3985; 1005.

Burden of Proof.
As to execution of instruments, n. § 2730; 730.

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Burden of Proof.—*Continued.*
Rests upon whom, n. § 2779; 741.
Party having, entitled to open and close, §§ 2779–2781; 741.

Burglar's Tools.
Having in possession with intent to commit burglary, punished, 15 G. A., ch. 13; 983.

Burglary.
Assault with intent to commit, punished, § 3874; 979.
Defined; punished, §§ 3891–3893; 983.

Burials of the Dead.
Power of city to regulate, § 458; 107.

Burning.
Of buildings, boats, etc:
Punishment for, §§ 3880–3886; 981.
To injure insurers, punishment for, § 3888; 982.
Of prairie or timber-land, punished, §§ 3889, 3890; 982.

Burying Grounds.
See CEMETERIES.

Bushel.
Standard, § 2046; 575.
Of various articles, weight of, § 2049; 575.

Business.
Minor engaging in as adult, § 2239; 622.
Of decedent, may be prosecuted by administrator, § 2407; 648.

Butter.
Not made exclusively from milk, sale of regulated, 18 G. A., ch. 39; 1018.

By-laws.
Of cities and towns, method of passage; recording of, §§ 492, 493; 123.
Corporations may establish, § 1058; 269.
Of corporations, to be kept posted up, § 1076; 272.

By-standers.
Signing of bill of exceptions by, in civil cases, § 2835; 755.
——— in criminal cases, § 4483; 1102.

Calendar.
How kept by clerk, printed copies to be distributed, § 2747; 735.

Camp-meeting.
Sale of liquors at or near, punished, §§ 4024, 4025; 1014.

Canada Thistles.
Highway supervisor to cause destruction of, § 995; 252.
Person or supervisor allowing to mature, punished, § 4062; 1025.

Canal.
Mechanic's lien upon, 16 G. A., ch. 100, § 5; 598.
Malicious injury to, punished, § 3978; 1003.

Canal Company.
Place of bringing action against, § 2582; 689.

Cancellation of Will.
§§ 2329, 2330; 636.

Canvass of Votes.
At municipal election, § 503; 127.
By judges of election, §§ 622–633; 163.
By board of supervisors, §§ 634–648; 165.
By executive council. §§ 647–658; 167.
For presidential electors, §§ 662–664; 169.
At special elections, §§ 792, 793; 188.

Capacity.
Measures of, §§ 2044–2047; 574.

Capital.
Of insurance companies:
Amount required, § 1124; 283.
Foreign, amount required, § 1144; 291.
To be stated, 17 G. A., ch. 111; 298.
Of banking associations, amount required, § 1576; 457.
Of limited partnerships, §§ 2148, 2150, 2161, 2162; 604.

Capital of the State.
Location of, Const., Art. 11, § 8; 1244.

Capital Stock.
Of corporations, statement of amount of, subscribed and paid in, to be kept posted, § 1077; 273.
Of insurance companies, increase of, § 1135; 287.
Of life insurance companies, amount and investment of, §1162; 301.

Care and Propagation of Fish.
To belong to owners of premises, 16 G. A., ch. 70; 409.
Penalty for catching at certain seasons, 16 G. A., ch. 70, §§ 6, 10; 410.
Fish commissioner, appointment, duties and compensation of, 17 G. A., ch 80; 410.
Obstructing free passage of fish prohibited, 17 G. A., ch. 80, §§ 5, 6; 411.
Assistant fish commissioner, 18 G. A., ch. 156; 411.
Construction of fish-ways, 17 G. A., ch. 188; 18 G. A., ch. 123; 411.
Fishing with seine or net prohibited, 15 G. A., ch. 50; 1023.

Care of the Insane.
Hospital for the insane, §§ 1383–1394; 385.
Commissioners of insanity, §§ 1395–1411; 388.
Insane prisoners, §§ 1412–1414; 394.
Restraint and custody of insane persons, §§ 1415, 1416; 394;
Expense, treatment and discharge of insane patients, §§ 1417–1428; 395.
Collection of insane tax, 17 G. A., ch. 183; 397.

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Care of the Insane.—*Continued.*
General provisions, §§ 1429–1434; 397.
Visiting committee of hospital, §§ 1435–1441; 397.
Discharge of person illegally restrained, §§ 1442–1445; 400.
Carnal Knowledge.
By means of stupor or imbecility, punishment for, § 3863; 976.
Carriage Hire.
In conveying prisoner, allowed as fees, § 3820; 962.
Carrying Concealed Weapons.
Punishment for, § 3879; 980.
Castor Beans.
Weight of, per bushel, § 2049, 575.
Cattle, Texas.
See TEXAS CATTLE.
Cattle-guards.
Duty of railways to construct, § 1268; 342, and § 1288; 1349.
Cattle-ways.
Construction of, 16 G. A., ch. 111; 245.
Causes.
When to be tried, § 2744; 735.
Not to lose place on account of application for continuance, § 2748; 735.
When continued, to remain for all purposes except trial of facts, § 2759; 738.
Docketing of, on appeal, § 3171; 838.
Causes of Action. SEE ACTIONS.
When statute of limitations commences to run against; when barred, §§ 2529–2542; 671.
On contract, how revived, § 2539; 677.
Joinder of, §§ 4630–2634; 706.
When available as counter claims, § 2659; 715.
Cemetery Associations.
Duration and dissolution of, § 1070; 271.
Cemeteries.
Township trustees to have charge of, § 993; 96.
Platting and conveying of lots in, 16 G. A., ch. 130, §§ 1, 2; 95.
Taking property for, 16 G. A., ch. 130, §§ 3, 4; 96.
Improvement and control of; penalty for trespassing upon, 17 G. A., ch. 106; 96.
City may purchase or condemn land for, § 470; 114.
Exemption of, from taxation, § 797; 189.
Highways not to be established through, § 925; 237.
Wilfully destroying tombs, fences, trees, etc., in, punished, § 4021; 1013.
Census.
Blanks and directions for, to be prepared by executive council, § 112; 24.

Census.—*Continued.*
When and how taken, §§ 113–118; 24.
To be taken as basis of population in determining compensation of county officers, 18 G. A., ch. 184, § 4; 956.
Of state, when to be taken, Const., Art. 3, § 33; 1230.
Certificate.
OF ELECTION:
By joint convention of general assembly, § 25; 5.
Of county officer, § 641; 166.
Of state officer, §§ 655, 656; 168.
Of representative in congress, § 658; 169.
Of presidential elector, § 665; 170.
Of treasurer as to taxes due on property, §§ 848–850; 207.
Of labor on highway, receivable in payment of taxes, § 854; 208.
——— to be given by supervisor, § 984; 249.
Of publication of notice of tax sale, § 881; 217.
Of purchase at tax sale, §§ 887, 888; 219.
——— action for recovery of real property not to be brought against holder of, n. § 3246; 857.
——— holder of, may recover damages for waste or trespass, § 3343; 872.
Of redemption from tax sale, § 891; 221.
Of incorporation of corporations not for pecuniary profit, § 1095; 276.
Of insurance company, to be approved and recorded, §§ 1122, 1123; 282.
Of auditor as to insurance company to be published, § 1155; 296.
To be issued to life insurance company by auditor, § 1170; 305.
Life insurance company doing business without, liable to penalty, § 1177; 307.
Of land-grant title to be recorded, 18 G. A., ch. 186; 550.
OF ACKNOWLEDGMENTS:
Of instrument affecting real property, §§ 1956–1964; 552.
Not conclusive evidence, § 3662; 925.
In case of limited partnership, §§ 2150–2157; 604.
Of warehouseman or wharfinger, effect of; when to issue, §§ 2171, 2172, 2174; 606.
Of marriage, by whom given; return of, §§ 2194–2196; 612.
Of probate of will, § 2342; 638.
Of deposit, action on, may be brought where issued, n. § 2581; 688.
Of judge, what sufficient to entitle to trial *de novo*, n. § 2742; 733.
Of sale under execution, § 3101; 822.
Of redemption of judgment, § 3110; 824.
Of purchase, assignment of, to redeeming creditor, § 3120; 826.

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Certificate.—*Continued.*
Of judge or clerk, what sufficient to entitle to review on appeal, § 3170; 837.
Of judge as to question involved in appeal, § 3173; 838.
Of tax sale, owner of may recover for waste or trespass, §§ 3343, 3344; 872.
Of judge of refusal to grant injunction, § 3392; 881.
Of public officers as to search for papers, § 3708; 933.
Of register or receiver of land office as evidence, §§ 3709, 3710; 933.
Of public officer, signature to, deemed genuine, § 3711; 934.
Of officer taking deposition, § 3737; 939.
Of purchase at tax sale, fees of officers for, §§ 3793, 3797; 954.
Fee for giving, § 3819; 962.

Certiorari.
Proceedings by, §§ 3216–3224; 849.
In proceedings to punish for contempt, § 3499; 897.

Cestui que vie.
Recovery of portion of rent from tenant upon death of, § 2011; 568.

Chain.
Standard length of, § 2040; 574.

Chainmen.
How appointed and sworn, § 377; 87.

Chairman of Board of Supervisors.
To bring suit against officer failing to have bond recorded, § 634; 173.
To be presiding officer of court to try contested county elections, and fix day for trial, §§ 695, 699; 175.
Service of notice on, § 2610; 699.

Challenge.
To fight duel, sending or accepting, punished, §§ 3853–3855; 974.

Challenge of Voters.
How made, proceedings upon, §§ 619, 620; 162.

Challenges to Jurors.
For having served within a year, § 239; 53.
IN CIVIL CASES:
Defined, kinds and trial of, §§ 2762–2774; 738.
To panel, §§ 2762–2767; 738.
Severance in, § 2763; 738.
To individual jurors, kinds of; how taken, §§ 2768, 2769; 739.
Peremptory, §§ 2770, 2771; 739.
For cause, grounds of, trial of, §§ 2772–2774; 739.
IN JUSTICE'S COURT, § 3548; 905.
OF GRAND JURY, §§ 4258–4266; 1061.
OF TRIAL JURY IN CRIMINAL CASES:
Kinds of; § 4398; 1086.
By joint defendants, § 4399; 1086.
To panel, §§ 4400–4403; 1086.
To individual jurors, §§ 4404–4410; 1086.

Challenges to Jurors.
OF TRIAL JURY IN CRIMINAL CASES:
—*Continued.*
Peremptory, §§ 4411–4413; 1088.
Order of, §§ 4414–4417; 1088.
Bias waived, § 4418; 1089.
BEFORE JUSTICES, IN CRIMINAL CASES: §§ 4677, 4678; 1133.

Chancery.
Jurisdiction of supreme court in, Const., Art. 5, § 4; 1233.
Jurisdiction of district court in, Const., Art. 5, § 6; 1234.

Change.
Of county seat, proceedings for, §§ 279–288; 61.
Of grade of streets, compensation for damage from, § 469; 112.
In articles of incorporation of city, how made, § 1065; 271.
Of name of railway company, § 1273; 345.
Of line of railway, 16 G. A., ch. 118; 353.
Of homestead by owner, § 2000; 565.
In order as to alimony, § 2229; 618.
In kind of proceedings, § 2514; 667.
Of residence of defendant after suit brought, effect of, § 2588; 690.
In time of commencement of term not to affect notice, § 2599; 694.

Change of Place of Trial.
In proceedings before mayor, n. § 506; 128.
In proceedings before superior court of city, 16 G. A., ch. 143, § 7; 141.
Where suit is brought in wrong county, § 2589; 690.
Not allowed on appeals from justices, § 2590; 691.
In civil actions, §§ 2590–2598; 691.
Notice of motion for, in vacation, n. § 2914; 780.
In proceedings for new trial, n. §§ 3155, 3158; 832.
Not allowable in action before justice brought in wrong county, n. § 3509; 899.
In actions before justice, § 3533; 903.

Change of Venue.
In proceedings for security to keep the peace, § 4117; 1039.
In preliminary examinations, § 4223; 1056.
In district court, §§ 4368–4388; 1082.
In case of trial upon information before justice, §§ 4670, 4671; 1132.
In proceedings before police court in criminal case, n. 4707; 1137.

Changing Names of Persons.
Proceedings for, §§ 3502–3506; 897.

Chaplain of Penitentiary.
Appointment and duties of, § 4757; 1148.

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Character.
Need not be shown in civil action for seduction, n. § 2555; 683.
May be shown by way of mitigation in action of slander, n. § 2682; 719.
Of witness may be shown to effect credibility, § 3649; 921.
Meaning of term in definition of crime of seduction, n. § 3867; 977.

Charcoal.
Weight of, per bushel, § 2049; 575.

Charge of Court.
To trial jury, §§ 2784–2789; 742.
To grand jury, § 4270; 1063.

Charges.
For transportation of freight and passengers, maximum rates of, §§ 1304, 1305; 307.
Of warehousemen, carriers, etc., lien for, §§ 2177–2180; 607.
Of last sickness and funeral, how paid, § 2418; 650.

Charitable Associations.
Incorporation of, §§ 1095–1102; 276.

Charters.
Of cities under special charter, amendment of, §§ 548–550; 144.
Of municipal corporations not to be amended by special act, n. Const., Art. 3, § 30; 1228.

Charts, Public.
As presumptive evidence, § 3653; 922.

Chaste Character.
Need not be shown in civil action for seduction; n. § 2555; 683.

Chastity.
Words imputing want of, actionable, n. § 2681; 719.
Presumption as to, in prosecution for seduction, n. § 3867; 977, and n. § 4428; 1092.

Chastity and Decency, Offenses Against.
Adultery, § 4008; 1009.
Bigamy, §§ 4009–4011; 1010.
Lewdness, § 4012; 1010.
Keeping or leasing house of ill-fame, §§ 4013–4015; 1011.
Enticing female to house of ill-fame, § 4016; 1011.
Violating sepulchre, § 4017; 1011.
Disposal of dead bodies, §§ 4018–4020; 1012.
Injuring monuments or tomb-stones, § 4021; 1013.
Selling obscene books and pictures, § 4022; 1013.
Disturbing religious worship, § 4023; 1013.
Selling liquors near camp-meetings, §§ 4024, 4025; 1014.
Keeping gambling houses and gaming, §§ 4026–4029; 1014.

Chastity and Decency, Offenses Against.—*Continued.*
Incest, § 4030; 1015.
Cruelty to animals, §§ 4033–4034; 1016.

Chattel Mortgage.
See MORTGAGES.

Cheating.
By false pretenses, gross frauds and conspiracy, §§ 4073–4088; 1028.
Fraudulent conveyances, § 4074; 1028.
Suppression of will, § 4075; 1029.
Using false weights and measures, §§ 4076, 4077; 1029.
Altering or counterfeiting stamps or brands, §§ 4078–4080; 1029.
Gross frauds, § 4081; 1030.
Words charging person with, not actionable, n. § 4081; 1030.
Destroying or lading vessel with intent to defraud owner or insurer, §§ 4083–4085; 1030.
Conspiracy, §§ 4086, 4087; 1030.
Issuing false warehouse receipts, § 4088; 1031.
Swindling by three-card monte, etc., 16 G. A., ch., 102; 1031.
Frauds upon hotel keepers, 18 G. A., ch., 76; 1033.

Checks.
Action against parties to, § 2550; 681.

Cherries.
Weight of, per bushel, § 2049; 575.

Chief Justice of the Supreme Court.
Who shall be, Const., Art. 5, § 3; 1235.

Chief of Police.
Appointment of, in cities of the first class, § 534; 136.

Children.
Of poor person, may be compelled to support, § 1330; 377.
Where to attend school, § 1793–1795; 507.
Illegitimate, become legitimate by marriage of parents, § 2200; 612.
Education of, liability of husband or wife for, § 2214; 615.
Custody and removal of, § 2215; 616.
Illegitimate, of husband, as affecting right to divorce, § 2224; 618.
Custody and maintainance of, during proceedings for divorce, § 2226; 618.
Of void marriage, when illegitimate, § 2234; 621.
Of spendthrift, guardianship of, § 2272; 627.
Of intemperate or vicious parents, guardianship of, §§ 2301–2304; 630.
May be sent to Home for the Friendless, 17 G. A., ch. 176; 632.
Adoption of, §§ 2307–2311; 631.
Posthumous, inherit notwithstanding will, § 2334; 637.
Allowance to, out of estate of decedent, § 2375; 643.

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Children.—*Continued.*
Descent of property to, §§ 2453, 2454; 657.
Of half-blood, inheritance by, n. §2457; 657.
Illegitimate, inheritance by, from whom, §§ 2465–2468; 659.
Who may sue for damages resulting from injury or death of, § 2536; 683.
Punishment for enticing away, §§ 3865, 3866; 977.
Father or mother exposing, punished, § 3870; 978.
Not understanding obligation of oath, not competent as witnesses, n. Const., Art. 1, § 4; 1215.

Christmas.
Deemed holiday; provisions as to paper falling due on, § 2094; 587.

Churches.
Exemption of, from taxation; § 797; 189.
Associations for incorporation of, § 1091; 276.
May lease property granted by state or territory, § 1921; 542.

Cider.
Manufacture and sale of, not prohibited, § 1555; 437.

Circuit Court.
Jurisdiction of, § 162; 38.
To be court of record; seal of, § 184; 42.
Clerk of district court to be clerk of, § 191; 44.
Application to, for incorporation of city or town, §§ 421, 422; 97.
Proceedings in, for annexation of territory to city or town, §§ 426, 427; 98.
——— for annexation of territory by city or town, §§ 430, 431; 99.
——— for severance of territory from city or town, §§ 440–446; 103.
——— to condemn property for use of city, § 476; 116.
Appeal to, from action of board of equalization, § 831; 202.
——— in proceedings to establish highways, §§ 959–962; 242.
———from proceedings to assess damages for taking private property, § 1254; 338.
Proceedings in, as to crossing of highways by railways, § 1263; 341.
Proceedings in, to compel relatives to support poor person, §§ 1333–1339; 377.
To appoint and control guardians of minors, §§ 2242–2256; 623.
Proceedings before, for sale of property of minor, §§ 2257–2265; 624.
Appointment of foreign guardian by, §§ 2266–2271; 626.
May appoint guardian for children of intemperate or vicious parents, § 2301; 630.

Circuit Court.—*Continued.*
Authority of, as to adoption of child, § 2311; 632.
Jurisdiction, proceedings, etc. of, as court of probate, §§ 2312–2321; 634.
Probate of wills before, §§ 2341, 2342; 637.
Allowance by, for support of widow and children out of estate of decedent, §§ 2375, 2377; 643.
Proceedings before, in matter of claims against estate of decedent, §§ 2403–2417; 648.
Proceedings before, against administrator for non-payment of legacies, § 2430; 652.
Proceedings in, for setting off widow's share, §§ 2443–2451; 655.
May grant writ of *certiorari*, § 3217; 850.
Proceedings of, on appeal from justice of the peace, §§ 3593–3596; 919.
See, also, COURT, DISTRICT OR CIRCUIT.

Circuit Court of the United States.
Lien of judgment in, n. § 2882; 772 and 17 G. A., ch. 129; 773.

Circuit Judge.
See JUDGE OF CIRCUIT COURT:

Circuses.
License for, 16 G. A., ch. 131; 232.

City Auditor.
Election of, in cities of first class, § 535; 16 G. A., ch. 33; 136.

City Clerk.
Appointment, duties and fees of, §§ 522, 523; 132.
To keep register of elections, § 599; 160.
To be clerk of local board of health, 18 G. A., ch. 151, § 14; 454.

City Council.
May fund city indebtedness, 17 G. A., ch. 58; 65.
Proceedings by, as to annexation of territory, § 428; 99.
Extension of city limits by, 18 G. A., ch. 56; 99.
Submission of question of annexing territory by, § 430; 99.
Proceedings by, to annex city to another city, § 432; 100.
Members not to be appointed to office, nor interested in contract, § 490; 123.
Method of appointment of officers by, § 493; 124.
Compensation of members of, § 505; 127.
Election, powers and duties of, §§ 517–530; 130.
In cities of first class, appointment of officers by, 16 G. A., ch. 33; 136.
———powers of, § 537; 138.
May establish infirmary, house of refuge, workhouse and city prison, §§ 538–542; 138.

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City Council.—*Continued.*
May levy taxes to pay funding bonds, 17 G. A., ch. 58, § 3; 66.
Compose board of equalization, § 829; 201.
Right to preside over, n. § 3345; 872.

City Engineer.
In cities of first class, § 535 and 16 G. A., ch. 33; 136.

City Limits.
Extension of, 16 G. A., ch. 47; 101.
Regulation of, sale of liquors within two miles of, 17 G. A., ch. 119; 439.

City Marshal.
In cities of second class, election and duties of, §§ 532, 533; 135.
In cities of first class, election and duties of, §§ 535, 536; 16 G. A., ch. 33; 136.
Duties and fees of, in connection with superior court of city, 16 G. A., ch. 143, § 12; 142.

City Physician.
In cities of first class, 16 G. A., ch. 33; 136.

City Prison.
In cities of the first class, § 542; 139.

City Solicitor.
In cities of second class, § 532; 135.
In cities of first class, § 535, 16 G. A., ch. 33; 136.

City Treasurer.
In cities of second class, § 532; 135.
In cities of first class, § 535; 16 G. A., ch. 33; 137.

Cities and Incorporated Towns.
Papers relating to, kept by secretary of state, § 65; 14.
Refunding of bonded indebtedness of, 17 G. A. ch. 58; 65.
Election of assessors in, § 390; 89.
Organization of, §§ 421–425; 97.
Annexation of territory to, §§ 426–431; 98.
Annexation of, to other city or town, §§ 432–433; 100.
Extension of limits of, 16 G. A., ch. 47; 101.
Severance of territory of, §§ 440–446; 103.
Discontinuance of, §§ 447–453; 105.
General powers of, §§ 454–481; 106.
May be purchaser at execution sale, 18 G. A., ch. 89; 114.
Sewerage in, 16 G. A., ch. 107; 17 G. A., ch. 162; 18 G. A., ch. 55; 118.
May make ordinances, § 482; 120.
Enforcement of ordinances by fine or imprisonment, §§ 483–486; 121.
May compel labor upon highways, § 487; 121.
May aid in repair of highways leading thereto, § 488; 121.

Cities and Incorporated Towns.—*Continued.*
Method of adoption of ordinances of, § 489; 122.
Trustees or members of council of, not to be appointed to office nor interested in contract, § 490; 123.
Compensation of officers of, not to be changed, § 491; 123.
Publication and passage of by-laws and ordinances of, §§ 492, 493; 123.
Levy and collection of taxes of, §§ 495–499; 124.
May negotiate loans, § 500; 126.
Election, qualification and compensation of officers, §§ 501–506; 126.
Classes of, §§ 507–510; 128.
Shall make compensation for property destroyed to stop fire, 15 G. A., ch. 36; 145.
Not to appropriate money for sectarian schools, § 552; 146.
Not to become interested in banks, railways, etc., § 553; 146.
Bonds issued to railways by, void; action upon, §§ 554, 555; 147
Officers of, not to purchase or receive warrants at discount, § 556; 147.
Treasurer to indorse on warrant date of receipt and amount, § 557; 147.
Officers violating provisions as to funds, bonds, warrants, etc., punished, § 558; 147.
Registration of voters in, §§ 599, 602; 160.
May contract for use of railway or bridge as highway, 15 G. A., ch. 5; 259.
May take private property for streets, etc., § 1270; 342.
May vote taxes in aid of railways, 16 G. A., ch. 123; 369.
May regulate sale of ale, wine and beer within two miles of limits; 17 G. A., ch. 119; 439.
May become independent school districts, § 1800; 509.
Instruments affecting lots in, how recorded, § 1947; 559.
May appoint sealer of weights and measures, § 2059; 577.
Statute of limitations runs against, n. § 2529; 671.
Service of notice upon, § 2612; 699.
Judgments against, not liens upon public buildings, n. § 2882; 772.
Buildings of, exempt from execution, § 3048; 810.
Levy of tax to pay judgment against, § 3049; 810.
Ordinances of, how put in evidence, § 3720; 936.
Proceedings before police and city courts of, in criminal cases, § 4707; 1137.
Constitutionality of extension of limits of, n. Const., Art. 1, § 18; 1220.

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Cities and Incorporated Towns.—*Continued.*
Streets of, may be taken in construction of railways without compensation, n. Const., Art. 1, § 18; 1220.
Special acts for incorporation of, not allowable, Const., Art. 3, § 30; 1228.
INCORPORATED TOWNS:
Provisions applicable to, §§ 511–516; 129.
CITIES:
Election, powers and duties of mayor, §§ 517–519; 130.
Wards, how created or changed, § 520; 131.
Election of councilmen, § 521; 131.
City council, organization, powers and duties, §§ 522–524; 132.
——— may establish board of health, city police and fire companies, § 525; 133.
——— may regulate markets, § 526; 133.
——— shall have supervision of highways, bridges, etc., § 527; 134.
——— may establish and regulate wharves and docks, § 528; 134.
——— may license ferries, § 529; 135.
Removal from office of councilmen or officers; vacancies, how filled, § 530; 135.
Superior courts in, 16 G. A., ch. 143; 140.
CITIES OF THE SECOND CLASS:
Provisions as to officers of, §§ 531–533; 135.
CITIES OF FIRST CLASS:
Provisions as to officers of, §§ 534–537; 136.
Officers of, may receive salaries instead of fees, 17 G. A., ch, 56, 145.
May establish infirmary, house of refuge and city prison, §§ 538–542; 138.
Organization and jurisdiction of police court, §§ 542, 543; 139.
Fees of police judge, § 544; 140.
Proceedings in police court; mayor may hold, §§ 545–547; 140.
CITIES UNDER SPECIAL CHARTER:
Annexation of territory to, § 431; 100.
Organization of, under general incorporation law, §§ 434–437; 102.
Provisions applicable to, § 479; 117.
Collection of taxes in, § 495; 124.
Amendment of charters of, §§ 548–550; 144.
Acts affecting, not repealed by Code, § 551; 146.
Judicial notice to be taken of charters of, n. § 2716; 728.
Acts applicable only to, not unconstitutional, n. Const., Art. 3, § 30; 1228.
PLATS:
Description, dedication, acknowledgment and recording, §§ 559–561; 147.
Alteration or vacation of plat of street, §§ 562–567; 149.
Proceedings upon failure to plat, § 568; 150.
Penalty for failure to plat. § 572; 151.
Lots in, to be free from taxes and encumbrances, 18 G. A., ch. 53; 152.
Re-survey of, 15 G. A., ch. 54; 153.
Vacation of, 15 G. A., ch. 61; 154.

Civil Liability.
Not to excuse witness from testifying, § 3646; 921.

Claim of Right to Real Property.
What sufficient to be set up to bar action to recover, n. § 2529; 671.

Claims.
Against state, when to be presented, § 69; 16.
Against estate of insolvent, presentation, etc., of, §§ 2119–2122; 594.
———payment of, §§ 2122, 2126; 594.
———not due, disposition of, §§ 2126; 595.
For mechanics' liens, when to be filed, 16 G. A., ch. 100, § 6; 598.
———priority of, 16 G. A., ch. 100, § 9; 600.
For proceeds of unclaimed property, how prosecuted, § 2182; 609.
Against estates of decedent, allowance of; proceedings for payment of, §§ 2408–2428; 648.
———referred to referee, § 2415; 649.
Against county, presentation of, to board of supervisors, § 2610; 699.
Not provided for by pre-existing laws, not to be paid, Const., Art. 3, § 31; 1229.

Claimant of Office or Franchise.
Proceedings by or against §§ 3351–3353; 874.

Claimants.
See: OCCUPYING CLAIMANTS, §§ 1976–1987; 558.

Classification.
Of railroads, 15 G. A., ch. 68; 363.
Of property for purposes of taxation, § 821; 198.

Clergymen.
Not liable to jury service, § 228; 51.
May solemnize marriages; certificates of, §§ 2193, 2194; 612.
Not to testify as to privileged communications, § 3643; 920.

Clerk.
Of land department in office of secretary of state, 18 G. A., ch. 206; §§ 3, 4; 21.
Liable as principal for selling intoxicating liquors, § 1540; 427.

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Clerk.—*Continued.*
In office or corporation, personal service of notice on, § 2613; 700.
Of county treasurer to be paid by county, § 3793; 954.
Of House of General Assembly.
To receive and file certificates of election, § 7; 2.
Compensation of, § 12; 2.
Shall act as secretary of joint convention, § 21; 5.
Shall superintend printing and distribution of Journal, 16 G. A., ch. 159, §§ 4–8; 29.
Of municipal corporation, service of notice on, § 2612; 699.
Embezzlement by, § 3909; 989.
Of penitentiary, appointment, qualification and duties of, §§ 4752, 4753; 1146.

Clerk of Board of Supervisors.
Duties of, as to fish-ways, 18 G. A., ch. 143; 412.

Clerk of City.
See City Clerk.

Clerk of Courts.
Meaning of term "clerk," § 45, ¶ 25; 11.
May adjourn court on failure of judge to appear, § 167; 39.
Process issued by, date and attestation of, § 188; 43.
Office, duties, etc., of, §§ 193–204; 44.
To draw jurors, § 241; 53.
May administer oaths and take acknowledgments, § 277; 60.
When to be elected, § 589; 157.
Bond of, § 678; 172.
Bonds of auditor and justices to be kept in office of, § 682; 173.
Suspension of, from office, §§ 751, 756–758; 182.
May appoint a deputy, §§ 766, 768; 183.
To keep register of physicians and midwives, births, marriages and deaths, 18 G. A., ch. 151, §§ 3–5; 452.
Acknowledgment of instruments before, § 1955; 552.
Inventory of assignee filed with, § 2118; 593.
Action against, for accepting insufficient security, when barred, n. § 2529; 671.
May appoint guardian to bring action for insane person, § 2569; 686.
Shall transmit transcript of record, etc., in case of change of place of trial, § 2594; 693.
Not to amend or impair records without authority, § 2736; 731.
To keep calendar of causes and distribute printed copies, § 2747; 735.
To select jurors, § 2761; 738.
To enter judgment upon verdict, § 2857; 765.
Entry and satisfaction of judgment by, §§ 2864, 2865; 766.

Clerk of Courts.—*Continued.*
To make complete record in cases involving title to land, § 2866; 767.
To compute damages in case of judgment by default, § 2872; 769.
May enter judgment by confession, § 2897; 776.
Shall enter orders made out of court, § 2926; 781.
Taxation of costs by, §§ 2942, 2948; 784.
To make bill of costs on appeal, § 2945; 785.
Payment of costs to, by clerk of supreme court, §§ 2946, 2947; 785.
To issue attachment, § 2962; 791.
To receive and retain money attached, § 2971; 793.
To minute assignment of judgment upon docket, § 2976; 795.
To enter levy of attachment on encumbrance book, § 3022; 806.
To issue execution and make entry thereof; penalty for failure, §§ 3029, 3030; 807.
Liability of, for taking insufficient stay bond, n. § 3062; 814.
To take and record stay bond, and recall execution, §§ 3064, 3065; 814.
To make entry of redemption of judgment, § 3110; 824.
To make entry of redemption from sale and receipt of money, § 3119; 826.
To endorse death of plaintiff upon execution, § 3130; 827.
Mistake, neglect, etc., of, ground for vacating judgment, § 3154; 831.
Mistake of, not ground for appeal, § 3167; 836.
Certificate of, to entitle to review on appeal, § 3170; 837.
Service of notice of appeal upon, § 3178; 840.
To forward transcript upon appeal, § 3179; 840.
What to certify upon appeal, § 3184; 841.
May be required to perfect transcript, § 3185; 842.
To countermand execution upon filing of appeal bond, § 3192; 844.
To transmit original paper to supreme court upon order, § 3209; 848.
May grant writ of certiorari in vacation, § 3217; 850.
To issue writ of replevin, § 3230; 854.
As referee to report encumbrances in partition proceedings, § 3284; 864.
To enter satisfaction of mortgage foreclosed; compensation for, § 3328; 870.
To enter order of injunction, § 3394; 881.
May issue warrant for seizure of boat or raft, § 3433; 888.
To issue writ of *habeas corpus*, § 3456 891.
Justice to be regarded as, § 3632; 916.
To issue subpœnas, § 3671; 929.

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Clerk of Courts.—*Continued.*
Certificate of, to judicial record, §§ 3712–3714; 934.
To file cross interrogatories for taking depositions, § 3728; 937.
To keep account of, and report fees, 18 G. A., ch. 184; 956.
Compensation of, §§ 3781–3787; 949.
To certify to auditor fees of jurors, § 3811; 960.
To collect and pay over jury fee; § 3812; 960.
To be furnished with office, fuel, stationery, etc., § 3844; 967.
Stirring up controversies, punished, § 3964; 1001.
Failure of, to pay over fees, false entries as to fees, or appropriation of fees, punished, §§ 3970–3972; 1001
To report to supervisors forfeited recognizances, fines, etc., § 3974; 1002.

Clerk of the Circuit Court.
To give notice of result of election as to incorporation of city or town, § 423; 98.
Issuance by, of order for seizure of property of absconding parent, husband, or wife, § 1343; 378.
To be member and clerk of commissioners of insane, §§ 1395–1397; 388.
To issue marriage license, keep register of marriages, etc., §§ 2187–2192, 2197; 611.
Unlawfully issuing marriage license, guilty of misdemeanor, § 2192; 611.
To make record of proceedings in another county as to property of minor, § 2245; 623.
May bind minors to apprenticeship, § 2283; 629.
Consent of, to adoption of child, § 2308; 631.
Powers of, in vacation as to probate matters, § 2315; 634.
May appoint guardians in vacations, § 2315; 634.
To file and approve bonds in probate matters, § 2321; 635.
Wills may be deposited with, § 2331; 636.
To open and read will, § 2338; 637.
To give notice of probate of wills, § 2341; 637.
Issuance of letters of administration by, §§ 2365, 2366; 641.
Notification by, of appointment of appraisers of property of deceased, § 2374; 643.
May allow claims against estate of decedent, when, §§ 2408–2428; 648.
Duty of, as to escheats, § 2461; 658.
To keep records of proceedings in probate, §§ 2490–2493; 662.
To examine records as to property left by decedent, § 2491; 662.

Clerk of the Circuit Court.—*Continued.*
May appoint guardian *ad litem* for minor, § 2567; 685.
Filing of transcript of judgment in justices' court with, §§ 3567, 3568; 907.
May allow appeal from justice, §§ 3577–3579; 908.
To report fees to supervisors, § 3785; 951.
Fees of, § 3787; 951.
Fees as commissioner of insanity, § 3825; 964.

Clerk of District Court.
To record and publish order as to terms of court, § 165; 38.
To report criminal returns, § 203; 46, and 18 G. A., ch. 22, § 3; 87.
To assist auditor and sheriff in drawing jurors, §§ 240, 241; 53.
To file copy of commission of notary public, § 260; 57.
To keep and give copies of records of notary, §§ 264, 266; 57.
May designate newspaper for publishing notices of his office, § 306; 74.
Eligible to office of county auditor, § 325; 80.
To approve bond in dispute as to walls in common, § 2029; 572.
Payment of money to, as tender, § 2103; 589.
Statement for mechanic's lien filed with, 16 G. A., ch. 100, § 6; 598.
Bond discharging mechanic's lien filed with, 16 G. A., ch. 100, §§ 7, 8; 599.
Duty of, as to mechanic's lien, 16 G. A., ch. 100, § 14; 602.
Certificate of limited partnership filed with, § 2152; 604.
Notice of action or copy of judgment affecting real property filed with, 2629; 706.
To file and index transcript of judgment from another county, § 2885; 773.
To docket and index transcripts of judgments of federal courts, 17 G. A., ch. 129; 773.
Duty of, as to transcript of judgment in another county, § 3031; 807.
To file and record papers and order in *habeas corpus* proceedings before a judge, § 3490; 894.
Compensation of, §§ 3781–3784; 949.
To certify to applications for pension or bounty, § 3782; 950.
To report fees to supervisors, § 3785; 951.
Fees in proceedings as to estrays, § 3822; 963.
To forward transcript of change of venue in criminal case, §§ 4377, 4378; 1083.
Method of drawing trial jury by, in criminal cases, § 4390; 1085.

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Clerk of Police Court.
Election or appointment of, § 542; 139.

Clerk of Superior Court in Cities.
Who shall be; duties and compensation of, 16 G. A., ch. 143, § 1; 142.

Clerk of Supreme Court.
To be furnished with office, fuel and stationery, § 120; 25.
Office, duties, etc., of, §§ 146–149; 33.
To receive copy of supreme court reports, § 159; 35.
May administer oaths and take acknowledgments, § 277; 59.
When to be elected, § 583; 157.
Bond of, § 678; 172.
May be clerk of court of contested state election, when, § 720; 178.
Vacancy in office of, how filled, § 783; 186.
To pay costs to clerk of court below, § 2946; 785.
To docket and arrange causes and give notice of, § 3203; 847.
Compensation of, §§ 3771–3773; 946.

Clerk of Township.
See TOWNSHIP CLERK.

Clerks of Elections.
Appointment, qualification, etc., of, §§ 606–610; 161.
To keep tally list, § 626; 164.
Misconduct, or false entries, punished, §§ 4003–4006; 1008.

Clients.
Summary proceedings by, against attorneys, § 2906; 779.

Clover Seed.
Weight of, per bushel, § 2049; 575.

Coal Lands.
Drainage of, § 1228; 330.

Coal Mines.
See INSPECTION OF COAL MINES, 18 G. A., ch. 202; 443.

Coal Oil.
Regulation of sale of, 17 G. A. ch. 172; 447.

Code.
Amendatory statutes to contain references to, § 38; 7.
Effect and operation of, §§ 46–54; 11.
Provisions of, applicable to all actions, § 2520; 668.
How construed, § 2528; 670.
Publication and distribution of, p. 1163.

Co-defendants.
Appeal by portion of, in criminal case, § 4526; 1109.

Codicil.
Included in term "will," § 45, ¶ 17; 10.

Cohabiting.
Validates marriage, when, § 2201; 612.

Coin.
Counterfeiting of, punished, § 3925; 993.

Coin —*Continued.*
Counterfeit, having in possession or passing, punished, § 3926; 994.
Of foreign country, counterfeiting punished, § 3932; 995.

Coke.
Weight of, per bushel, § 2049; 575.

Collateral Security.
Person taking, not entitled to mechanic's lien, 16 G. A., ch. 100, § 2; 536.

Collection of Taxes.
By township collector, §§ 404, 405; 92.
What receivable in payment, §§ 854–856; 207.
By distress and sale, §§ 857–864; 209.
Tax, when due, lien, penalty, §§ 865, 866; 211.
Apportionment of tax, § 868; 212.
Accounts to be kept with separate funds, § 869; 212.
Refunding of tax, § 870; 212.
Tax sale, §§ 871–886; 213.
Certificate of purchase, §§ 887–889; 219.
Redemption, §§ 890–893; 220.
Execution of deed, §§ 894–896; 222.
Effect of deed, §§ 897, 898; 225
Sales wrongfully made, § 899; 229.
Sales of school or university lands, 17 G. A., ch. 101; 229.
Erroneous sale of property not subject to taxation, § 901; 230.
Limitation of actions, § 902; 230.
Validity of acts, evidence, etc., §§ 903–905; 231.
Peddlers, §§ 906, 907; 231.
Public shows, 16 G. A., ch. 131; 232.
For highways, §§ 975, 976; 247.

Collection Fee.
Recovery of, 18 G. A., ch. 185; 785.

Collector.
See, TOWNSHIP COLLECTOR.

College for the Blind.
Government of, §§ 1664–1674; 480.
Appropriations for, §§ 1675, 1676; 481.
Report of, § 1677; 481.
Clothing of pupils in, § 1678, 1679; 481.
Admission to, §§ 1672, 1680; 481.
Vacancy in board of trustees, how filled, § 1684; 482.

Colleges.
Exemption of, from taxation, § 797; 189.

Color of Title.
In occupying claimant, §§ 1976, 1982, 1983; 558.
What sufficient to entitle to set up statute of limitations, n. § 2529; 671.

Colored Persons.
Equality of rights of, n. Const., Art. 1, § 1; 1214.

Co-maker.
May avail himself by way of counter claim of debt due another co-maker, § 2661; 716.

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Commander-in-chief of Militia.
Record of acts of governor as, § 57; 13.
Powers of governor as, 18 G. A., ch. 74. §§ 43, 45; 267.
Governor to be, Const., Art. 4, § 7; 1231.

Commencement of Action.
On mechanic's lien, 16 G. A., ch 100, § 13; 602.
By proceedings in probate, jurisdiction, etc., §§ 2312–2321; 634.
Delivery of notice to sheriff, or service thereof deemed, § 2532; 675.
Manner of; notice, etc., §§ 2599–2629; 694.
In attachment proceedings, what is, n. § 2949; 787.
In injunction, what is, n. § 3386; 879.
Before justices, § 3517; 900.

Commencement of Term.
A change in, not to affect service of notice, § 2599; 694.

Commencement of Particular or Superior Estate.
How pleaded, § 2724; 729.

Commercial Paper.
See NOTES AND BILLS.

Commission.
To examine accounts of officers, §§ 759–765; 182.
To inquire into insanity of patient in hospital, §§ 1442–1445; 400.
May be appointed to take depositions in action for divorce, § 2222; 617.

Commission Merchants.
Taxation of property of, § 804; 194.
Lien of, for charges, §§ 2177–2180; 607.

Commissions.
To be countersigned by secretary of state, § 62; 14.
Of notary public, §§ 258–261; 56.
Of agent do not constitute usury, n. § 2079; 580.
Of administrators, § 2494; 662.
To fill vacancies in office, issued by governor, Const., Art. 4, § 10; 1231.
To be in name of state, signed and sealed, Const., Art. 4, § 21; 1233.

Commissioners.
IN OTHER STATES:
Appointment, powers, etc., of, §§ 267–276; 58.
Acknowledgment of instrument before, § 1956; 552.
Affidavits taken before receivable in evidence, § 3691; 931.
Of other states in this state, authority of, § 275; 59.
For laying out highways through two or more counties, appointment of, § 303, ¶ 13; 70.
For the incorporation of city or town, §§ 422–425; 97.

Commissioners.—*Continued.*
To adjust terms for severance of territory of city or town, §§ 443, 444; 104.
TO ESTABLISH HIGHWAYS:
Appointment and duties of, §§ 924–935; 237.
Compensation of, § 3824; 963.
To assess damages resulting from construction of drain, ditch or water course, § 1209; 325.
——— for drains in two or more counties, 17 G. A., ch. 121, § 2; 18 G. A., ch. 85; 327.
To assess damages for taking of private property, §§ 1244, 1245; 334.
To settle terms and rates of connecting railways, §§ 1293–1295; 355.
Of railways, see BOARD OF RAILWAY COMMISSIONERS, 17 G. A., ch. 77; 364.
OF INSANITY:
Organization, powers and duties of, §§ 1395–1411; 388.
Compensation of, § 3825; 964.
Of pharmacy, 18 G. A., ch. 75, §§ 3–6; 449.
Conveyance of real property by, §§ 2886–2893; 774.
To make permanent survey of lands, 15 G. A., ch. 8; 862.
For taking depositions, §§ 3723–3728, 3734–3738; 956.
To appraise damages, compensation of, § 3813; 961.

Commitment.
To State Reform School, §§ 1654–1661; 478.
For contempt, § 3494; 896.
Upon preliminary examination, § 4247; 1058.
To answer higher charge, §§ 4430, 4431; 1093.
Of defendant after commencement of trial, § 4451; 1097.
To jail of another county, § 4510; 1106.
After giving bail, §§ 4601, 4605; 1122.

Committee.
OF GENERAL ASSEMBLY:
May subpœna witnesses, § 17; 4.
To be furnished with stationery, 15 G. A., ch. 1; 26.
To visit hospital for the insane, see VISITING COMMITTEE.

Common Carriers.
Contracts limiting liability of, void, § 1308; 358.
Defense by, for loss of intoxicating liquors, n. § 1542; 428.
Bringing liquors within the state, penalty for, § 1553; 436.
Sale of unclaimed property by, §§ 2177–2180; 607.
Liability of, for damage to baggage, § 2183; 609.
Cannot limit liability by contract, § 2184; 609.

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Committee.—*Continued.*
Place of bringing action against, § 2582; 689.
Embezzlement or conversion by, punished, § 3910; 989.
Illegal transportation of game by, 17 G. A., ch. 156, § 8; 1022.

Common Counts.
Abolished, § 2644, 708.

Common Schools.
School districts, organization, meetings, etc., §§ 1713–1717½; 489.
Sub-districts, election of directors in, §§ 1718–1720; 491.
Board of directors, meetings, powers, duties, etc, §§ 1721–1738; 492.
President, powers and duties, §§ 1739, 1740; 496.
Secretary, powers and duties, §§ 1741–1746; 497.
Treasurer, powers and duties, §§ 1747–1751; 498.
Sub-director, powers and duties of, §§ 1752–1756; 499.
Teachers, employment and duties of, §§ 1757–1760; 500.
General provisions, §§ 1761–1764; 501.
County superintendent, §§ 1765–1776; 501.
Taxes, §§ 1777–1780; 503.
County auditor, §§ 1781–1783; 505.
County treasurer, §§ 1784, 1785; 506.
Miscellaneous, §§ 1786–1799; 506.
Independent districts, §§ 1800–1823; 509.
Funding indebtedness, 18 G. A., ch's 51 and 132; 518.
Industrial expositions in schools, 15 G. A., ch. 64; 519.

Communications.
Privileged, not receivable in evidence, §§ 3642–3644; 920.

Commutation of Sentence.
May be granted by governor, §§ 4712–4714; 1138, and Const., Art. 4, § 16; 1232.

Company.
Having office or agency, service of notice on, § 2613; 700.

Company in Militia.
Officers, etc. of, 18 G. A., ch. 74, § 15; 263.

Compelling to Marry.
Punishment for, § 3862; 976.
Jurisdiction of offense of, § 4162; 1045.

Compensation.
Of members, officers and employes of general assembly, § 12; 2.
——— method of payment of, 15 G. A., ch. 3; 3.
Of witnesses before general assembly, § 18; 4.
For publication of laws, how paid, § 44; 8.

Compensation.—*Continued.*
Of clerk of land department, 18 G. A., ch. 206, § 4; 21.
Of secretary of senate and clerk of house for preparation of journals, 16 G. A., ch. 159, § 8; 30.
Of reporter of supreme court, 18 G. A., ch. 60, § 9; 37.
Allowed to commissioners in other states, § 270; 58.
For services of county or township officers not otherwise provided, how fixed and paid, § 303, ¶ 14; 71.
Of witnesses before coroner's jury, § 356; 84.
Of physicians summoned by coroner, § 368; 86.
Of township collector, § 407; 93.
Of Officers of City or Town:
Not to be changed, § 491; 123.
Of council or trustees, § 505; 127.
Of subordinate officers of incorporated towns, § 514; 130.
Of marshal of incorporated towns, § 515; 130.
Of mayor of cities, § 519; 131.
Of city clerk, § 523; 132.
Of officers of cities, § 524; 132.
Of officers of cities of first class, 16 G. A., ch. 33; 136.
Of city marshal of cities of second class, § 533; 136.
Of marshal of cities of first class, § 536; 137.
Of police judge, § 544; 140.
Of judge of superior courts in cities, 16 G. A., ch. 143, § 13; 142.
Of officers of cities may be by salary instead of fees, 17 G. A., ch. 56; 145.
Of presidential electors, § 669; 170.
Of officers and witnesses, in trial of contested elections, § 706; 177.
Of judges for trial of contested county elections, § 710; 177.
Of judges for trial of contested state elections, § 726; 178.
Of commissioners to examine books of state officers, § 764; 183.
Of deputies of county officers, § 771; 184.
Of treasurer, for certificate as to taxes, § 848; 207.
Of deputy county treasurers appointed to collect taxes, § 859; 209
Of highway supervisors, § 986; 250.
Of militia under service, 18 G. A., ch. 74, §§ 7, 8; 261.
Of railway commissioners, 17 G. A. ch. 77, § 6; 366.
Of trustees of Hospital for the Insane, § 1384; 386.
Of coal mine inspector, 18 G. A., ch. 202, § 4; 444.
Of board of regents of State University, § 1602; 464.

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Compensation.—*Continued.*
Of trustees of Agricultural College, § 1608; 466.
Of trustees of Soldiers' Orphans' Home, § 1626; 470.
Of trustees of Asylum for Feeble-minded Children, 16, G. A. ch. 152, § 4; 474.
Of trustees of State Reform School, § 1646; 476.
Of trustees of College for the Blind, § 1668; 480.
Of trustees of county high-school, § 1712; 489.
Of secretary and treasurer of school district, § 1733; 495.
Of county superintendent, § 1776; 503.
Of attorney, in suit for school fund, § 1873; 531.
For transcribing records, § 1973; 557.
Of guardians, § 2256; 624.
For services, action by apprentice against master for, § 2293; 629
Of administrators, §§ 2494, 2495; 662.
Of receivers, n. § 2903; 778.
Of referees, taxation of, as costs, § 2942; 784.
Of officers, witnesses, etc., in preliminary proceedings against auditor, § 3147; 829.
Of clerk for entering satisfaction of mortgage upon foreclosure, § 3328; 870.
Of recorder for procuring copies of original entries, § 3703; 933.
Of Officers in General:
Of governor, § 3755; 943.
Of secretary of state and deputy, § 3756; 943.
Of auditor of state and deputy, § 3757; 943.
Of treasurer of state and deputy, § 3758; 943.
Of register of state land office and deputy, 17 G. A., ch. 73; 943.
Of superintendent of public instruction, and deputy, § 3760; 944.
Of adjutant general, 18 G. A., ch. 74, § 11; 261 and § 3761; 944.
Of state librarian, § 3762; 944.
Of superintendent of weights and measures, § 3763; 944.
Of state printer, §§ 3764–3766; 944.
Of state binder, §§ 3767, 3768; 945.
Of judges of supreme court, § 3769; 946.
Of attorney general, § 3770; 946.
Of clerk of supreme court, §§ 3771–3773; 946.
Of judges of district and circuit courts, § 3774; 947.
Of district attorney, §§ 3775, 3776; 947.
Of short-hand reporters, § 3777; 947.
How paid; to be in full, § 3780; 948.
Of clerk of district or circuit court, §§ 3781–3787; 949.
Of sheriff, §§ 3788–3790; 951.

Compensation.—*Continued.*
Of county supervisors, § 3791; 954.
Of county recorder, § 3792; 954.
Of county treasurer, §§ 3793–3795; 954.
Of county auditor, §§ 3797, 3798; 955.
Of coroner, § 3799; 956.
Of notaries public, § 3801; 957.
Of sealer of weights and measures, § 3802; 957.
Of inspector of lumber and shingles, § 3803; 957.
Of justices of the peace, §§ 3804, 3806; 957.
Of constables, §§ 3805–3807; 958.
Of township trustees, § 3808; 959.
Of township clerk, § 3809; 960.
Of township assessor, § 3810; 960.
Of Jurors, §§ 3811, 3812; 960.
Of Appraisers or Commissioners, § 3813; 961.
Of witnesses, §§ 3814–3818; 961.
Of officer for drawing affidavit or certificate, affixing seal, or making out transcript, § 3819; 962.
Of officer or person making arrest, for carriage hire, § 3820; 962.
In estray matters, §§ 3821–3823; 963.
Of commissioners, surveyors, etc., for laying out highways, § 3824; 963.
Of commissioners of insanity, § 3825; 964.
Of trustees of state institutions, members of visiting committees and regents of State University, 17 G. A., ch. 92; 965.
To messenger sent for returns of elections, § 3827; 965.
For solemnizing marriages, § 3828; 965.
Of attorney appointed to defend prisoner, or to appear in prosecution for selling liquors, §§ 3829–3831; 965.
For publication of legal notices, § 3832; 965.
For printing delinquent tax list, § 3833; 966.
Of arbitrators and referees, § 3834; 966.
For taking depositions, § 3835; 966.
For posting up advertisements, § 3838; 966.
Of officers of penitentiary, § 4783; 1152, and 16 G. A., ch. 40, § 3; 1158.
Of governor for performance of duties as to penitentiary, § 4803; 1155.
Of visitor to penitentiary, § 4804; 1155.
Of members of general assembly, Const., Art. 3, § 25; 1227.
Extra, not to be allowed to public officers, Const., Art. 3, § 31; 1229.
Of lieutenant governor, Const., Art. 4, § 15; 1232.
Of judges of supreme and district courts, Const., Art. 5, § 9; 1235.

Compensation for Damages.
By laying railway track through city. § 464; 108.

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Compensation for Damages—*Continued.*
To property condemned by city, §§ 476, 477; 116.
From establishment of highway, § 946; 240.
From location of drain, ditch or water course, § 1209; 325.
To property taken for water power improvements, § 1236; 332.
——— used for works of internal improvement, §§ 1244–1259; 334.
To lands of riparian owners by railway, 15 G. A., ch. 35; 345.
To property taken for public use, how assessed, Const. Art. 1 § 18; 1220.

Competency.
Of jurors, § 227; 51.
Of witness, §§ 3636–3639; 917.

Complaint.
Against master for ill-treatment of apprentice, §§ 2283, 2289; 629
Against apprentice, §§ 2294, 2298; 629.
Of preliminary examination defined, § 4111; 1038.
Before magistrate, warrant upon, § 4185; 1049.

Complete Record.
Book to be kept by clerk, § 197; 44.
As to sale of real estate by administrator, § 2492; 6 2.
When to be kept, § 2866; 767.
Fees for, § 3787; 951.

Compound offenses.
How charged in the indictment, § 4300; 1069.

Compounding felonies.
Punishment for, §§ 3951, 3952; 998.

Compounding offenses.
Punished, § 4316; 1073.

Compromise.
Of debt by executor, § 2382; 644.
Offer of, §§ 2900–2902; 777.

Compromising offenses.
By leave of court, §§ 4708–4711; 1137.

Computation.
Of amount of judgment in case of default, § 2872; 769.

Concealment.
Of cause of action, prevents limitation from running, n. § 2529; 671.

Condemnation of Property.
Of right of way over streets, for railways, § 464; 108.
By City:
Of land for streets, squares, etc., § 470; 114, and § 1270; 342.
——— for water works, § 474; 115.
Method of, §§ 476, 477; 116.
For toll bridges, §§ 1006, 1007; 255.
For mill-dams and races, § 1206; 321.
By Railways:
For what purposes allowed, §§ 1241–1243; 333.

Condemnation of Property.
By Railways.—*Continued.*
Method of, §§ 1244–1253; 334.
For channels and ditches, 18 G. A., ch. 191; 339.
For turnpikes, roads or bridges, § 1269; 342.
By state for public buildings, §§ 1271, 1272; 343.
For street railways over highways, 18 G. A., ch. 32; 343.
For public ways to mines and quarries, 15 G. A., ch. 34; 344.
For school-house sites, §§ 1825–1828; 520.
Exercise of right of, Const., Art. 1, § 18; 1220.

Condition precedent.
Performance of, how pleaded, § 2715; 727.

Condition of Bond.
To be noticed in pleading, § 2728; 729.

Conditional Pardons.
May be granted by governor, n. § 4712; 1138.

Conduct of Jury.
After case is submitted in criminal cause, §§ 4452–4459; 1097.

Confession.
Of matter of defense arising after commencement of action, § 2938; 784.
Not sufficient to warrant conviction, § 4427; 1092.

Confession and Avoidance.
In reply to answer, § 2666, n. § 2635; 717.
Matter by way of, how pleaded, § 2718; 728.

Confession of Judgment.
Cannot be attacked for usury, n. § 2080; 582.
Judgment upon, §§ 2891–2897; 775.
Offer of, §§ 2898, 2899; 776.
In justices' courts, § 3565; 906.

Confinement.
Of insane person not admitted to hospital, § 1403; 391.

Confirmation of Sale.
By judge in vacation, § 2893; 774.

Congressional Districts.
Formation of, Const., Art. 3, §§ 35–37; 1230.
Shall contain only contiguous counties, Const., Art. 3, § 37; 1230.

Connecting Railways.
Terms and rates of, §§ 1293–1296; 355.
Leasing of, § 1300; 356.
Transportation of freight over, 17 G. A., ch. 77, § 10; 367.

Consanguinity.
Degrees of, how computed, § 45, ¶ 24; 11.

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Consent.
Of parent or guardian to agreement of apprenticeship, § 2282; 628.
Conservators of the Peace.
Judges of supreme court and district courts shall be, Const., Art. 5, § 7; 1234.
Consideration.
Imported in contract, § 2113; 592.
Want or failure of, § 2114; 592.
Consolidated Tax.
To be entered on tax list, § 838; 205.
Consul.
Acknowledgments taken before, § 1957; 553.
Conspiracy.
Punished, §§ 4086, 4087; 1030.
Evidence necessary to convict for, § 4425; 1092.
Constable.
Not to act as attorney, § 342; 82.
Not to become purchaser of property sold, § 343; 82.
To execute warrant of coroner, §§ 354, 362; 84.
To be elected, § 389; 89.
Powers and duties of, §§ 398, 399; 91.
Election of, § 590; 158.
Additional, election of, § 592; 158.
How voted for, § 593; 158.
May be designated to attend place of election; duties of, §§ 612, 613; 162.
Bond of, § 678; 172.
Vacancy in office of, how filled, §§ 794, 795; 188.
May serve notice of mechanic's lien, 16 G. A., ch. 100, § 7; 599.
Summary proceedings against, § 2906; 779.
May be garnisheed for money in his hands, § 2976; 795.
Provisions as to sheriff in chapter on attachments applicable to, § 3024; 805.
Provisions as to sheriff in case of executions applicable to, § 3129; 827.
May execute warrant against boat or raft, § 3436; 888.
To summon jurors in justice's court, § 3547; 905.
Execution on judgment in justice's court to issue, § 3570; 907.
May take answers of garnishees, § 3607; 913.
Special, appointment of, § 3630; 916.
Is executive officer of justice's court, § 3632; 916.
Service of subpœnas by §§ 3671, 3677; 929.
To serve subpœna of officer taking deposition, § 3682; 930.
Fees of, § 3805–3807; 958.
———in proceedings as to estrays, § 3822; 963.
Constable—*Continued*,
Bribery of, punished, § 3948; 998.
Person falsely assuming to be, punished, § 3962; 1000.
Stirring up controversies, punished, § 3964; 1001.
As peace officer, § 4109; 1038.
Constitution of U. S.—See p. 1171.
Constitution of Iowa.—See p. 1214.
Amendment of, Const., Art. 10, §§ 1, 2; 1241.
To be supreme law of the state, Const., Art. 12, § 1; 1244.
Effect of adoption of, Const., Art. 12; 1244.
Method of submitting amendments of, 16 G. A., ch. 114; 1247.
Constitutional Convention.
Question of calling, to be submitted to vote, Const., Art. 10, § 3; 1242.
Construction.
Of statutes, rules for, § 45; 8.
Of liquor law; meaning of terms, §§ 1554, 1555; 436.
Of Code, § 2528; 670.
Of language of instructions, n. § 2789; 743.
Of chapter on attachment and garnishment, § 3021; 805.
Of words in indictments, § 4303; 1070.
Construction Companies.
Place of bringing action against, § 2583; 689.
Constructive Notice.
Of instruments, effect of, §§ 1941, 1944; 547.
Contempt.
Punishment for, by general assembly, §§ 14–16; 3.
Juror failing to appear, guilty of, § 230, 51.
Disobedience of court by sheriff deemed, § 338; 82.
Of process of coroner, punishment for, § 356; 84.
Answer to interrogatories attached to pleading compelled by process of, § 2700; 726.
Referee may punish for, § 2820; 751.
Obedience to judgments or order enforced by, § 3026; 806.
Punishment for, of party or witness failing to appear in summary proceedings against debtor, § 3145; 829.
Punishment for, in proceedings to subject property to payment of judgment, § 3151; 830.
Punishment for, upon failure to surrender property in proceedings under execution, § 3153; 830.
Punishment for, in obstructing levy of writ of replevin, §§ 3233, 3243; 855.

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Contempt.—*Continued.*
In refusing to obey order of court in winding up corporation, § 3367; 875.
In disobeying injunction, how punished, §§ 3403–3407; 883.
Attachment for, in habeas corpus proceedings, §§ 3476, 3477, 3489; 893.
DEFINED, PUNISHMENT FOR, §§ 3491–3501; 895.
Failure to obey subpœna or testify, deemed, §§ 3675, 3676; 930.
Disobedience to subpœna in criminal case deemed, § 4566; 1114.

Contested Elections.
Of county officers, proceedings for trial of, §§ 692–717; 174.
Of state officers, §§ 718-729; 178.
Of members of general assembly, §§ 730–736; 179, and Const., Art. 3, § 7; 1225.
Of governor and lieutenant governor, §§ 737–745; 179, and Const., Art. 4, § 5; 1231.

Contingent Funds.
Accounts of, to be kept, § 123; 27.

Continuance.
Effected by adjournment of court, §§ 170–172; 39.
In case of insufficient notice, § 2626; 704.
When portion of defendants are not served, § 2627; 705.
Amendments as ground for, § 2691; 724.
For failure to answer interrogatories attached to pleadings, § 2696; 725.
In equitable actions, when evidence is taken by deposition, n. § 2742; 733.
When to be granted; proceedings to obtain, §§ 2748–2760; 735.
In proceedings before referee, § 2820, 751.
Offer to compromise not ground for, § 2902; 778.
Of summary proceedings against debtor, § 3144; 829.
To perfect transcript on appeal, § 3185; 842.
Granted in supreme court on death of party, § 3211; 848.
Not granted in action against boat or raft, § 3437; 889.
Of actions in justices' courts, §§ 3526–3529; 902.
In actions of forcible entry and detainer, § 3618; 914.
For failure of party subpœnaed to appear, § 3683; 930.
In criminal cases, § 4419; 1089.
Of criminal cases on motion of state on account of new witness, § 4421; 1090.

Contracts.
For unlawful expenditures prohibited, § 127; 27.
For supplies, officer of state institution not to be interested in, 17 G. A., ch. 144; 31.

Contracts.—*Continued.*
For publication of supreme court reports, 18 G. A., ch. 60, §§ 4–8; 36.
Of cities and towns, how made, § 493; 124.
Restricting liability of railway companies, void, § 1307; 357.
Limiting liability of common carriers, void, § 1308; 358.
Of railways with municipal corporations, §§ 1312–1316; 359.
For support of the poor, §§ 1369–1371; 383.
In violation of liquor law, void, § 1550; 434.
Written, homestead made liable by, § 1993; 563.
To be controlled by standards of weights and measures, § 2048; 575.
Payable in property, not usurious, n. § 2079; 580.
If void for usury where made, not valid here, n. § 2080; 582.
Payable in property, §§ 2097–2103; 588.
Surety on, may require creditor to sue, §§ 2108–2110; 591.
Import a consideration, § 2113; 592.
What sufficient, to entitle to mechanic's lien, 16 G. A., ch. 100, § 3; 596.
Common carrier cannot limit liability by, § 2184; 609.
Of marriage, how made, validity of, etc., §§ 2185, 2186; 611.
Of husband or wife, the other not liable on, § 2203; 613.
Liability of married women under, § 2213; 615.
Of minors, disaffirmance of, § 2238; 621.
With minors for personal services, payments under, § 2240; 622.
Successive actions on, § 2524; 669.
Limitation of actions on, § 2529; 671.
Actions for special performance of, when barred, n. § 2529; 671.
To convey, actions to recover money paid on, when barred, n. § 2529; 671.
Money due on, may be item of current account, n. § 2551; 675.
Causes of action on, how revived, § 2539; 677.
For the school fund, action on, not barred by statute of limitation, § 2542; 678.
Joint or several, action upon, § 2550; 681.
To be performed in a particular place, place of bringing action on, § 2581; 688.
Causes of action upon, as counter claims, § 2659; 715.
Pleadings referring to, must state whether in writing, § 2720; 729.
Petition for attachment in claim founded on, § 2953; 788.
Deeds of trust as security for performance of, § 3318; 868.
By owners of boats, action to enforce, § 3432; 838.

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Contracts.—*Continued.*
Place of bringing action on, before justice, § 3513; 899.
When evidence of, must be in writing, § 3663, 3664; 925.
Not evidenced as required by statute, not void, n. § 3663; 925.
For compounding felonies, n. § 3951; 998.
For gaming, void, § 4029; 1015.
For sale of diseased sheep, void, § 4055; 1023.
For use of threshing machine not properly boxed, void, § 4064; 1025.
Made on Sunday, void, n. § 4072; 1027.
Officers of penitentiary not to be interested in, § 4768; 1149.
To furnish supplies for penitentiary, §§ 4773–4775; 1150.
For supplies for penitentiary at Anamosa, 17 G. A., ch. 186; 1159.
Law impairing obligation of, not to be passed. Const., Art. 1, § 21; 1222
In furtherance of lottery scheme, void, n. Const., Art. 3, § 28; 1228.

Contractor.
May have a mechanic's lien, 16 G. A., ch. 100, § 6; 598.
Extra compensation not to be made to, Const., Art. 3, § 31; 1229.

Contribution.
Enforced by stockholder of corporation, § 1085; 274.

Controversies.
Submission of, in action or without action, §§ 3408–3415; 884.
Submission of, to arbitrators, §§ 3416–3431; 885.

Convention.
Joint, of General Assembly, §§ 19–26; 4.
To revise and amend constitution, Const., Art. 10, § 3; 1242.

Conversation.
When part introduced in evidence, the whole admissible, § 3650; 921.

Conversion.
Under rightful possession will not constitute larceny, n. §§ 3902, 3906; 986.
In case of embezzlement, how shown, n. § 3908; 988.

Conveyances of Real Property.
By city, § 470; 114.
Included in plats, § 559; 147.
Deemed warranty that the description is sufficiently accurate to be entered in plat-book, § 570; 151.
By aliens, legalized, § 1909; 540.
Recording of, §§ 1941–1947; 547.
Entry of instrument on transfer books, §§ 1948–1954; 551.
Acknowledgment of instrument, §§ 1955–1965; 552.
Acknowledgments legalized, §§ 1966–1969; 555.

Conveyances of Real Property.—*Continued.*
Forms of instruments, § 1970; 556.
Records transcribed, §§ 1971–1975; 557.
Of homestead, how made, § 1990; 561.
Not affected by change of homestead, § 2000; 565.
Between husband and wife, valid, § 2206; 614.
By executor, approval of, §§ 2389, 2400; 647.
May be pleaded by legal effect or name, § 2723; 729.
By commissioner appointed by court, §§ 2886–2893; 774.
By sheriff when property is not subject to redemption, § 3101; 822.
——— after expiration of period of redemption, §§ 3124–3126; 826.
Unrecorded, notice of, in real action, or action for partition, §§ 3251, 3279; 858.
By referee, in partition proceedings, execution and recording of, §§ 3301, 3302; 866.
Fraudulent, making of, punished, § 4074; 1028.

Convicts.
Limitation of action by, for recovery of property sold for taxes, § 962; 230.
Production of, as witnesses, § 3678; 940.
Liberation of, upon giving note and schedule, § 4611; 1123.
Sentenced to hard labor, credited upon fine and costs, § 4741; 1144.
Sentenced by U. S. courts may be imprisoned in penitentiary, § 4771; 1150.

Conviction.
In county having jurisdiction bars prosecution in another county, § 4164; 1046.
Bars another prosecution for same offense, or for lower degree or offense necessarily included, §§ 4364, 4365; 1081.
May be for lower degree, or for offense necessarily included, §§ 4465, 4466; 1099.
Of lower degree of offense necessarily included, is acquittal of higher offense, n. § 4466; 1099.
Of portion of defendants jointly tried, § 4467; 1100.
Judgment of, § 4496; 1104.
Procured by fraud not to bar second trial, n. Const., Art. 1, § 12; 1219.
Of lower degree of offense, operates as an acquittal of offense for which party is put on trial, n. Const., Art. 1, § 12; 1219.
Of treason, what sufficient evidence for, Const., Art. 1, § 16; 1220.

Conviction of Felony.
What sufficient as ground for divorce, § 2223; 617.
Is ground of challenge to jury, § 2772; 739.

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Conviction of felony.—*Continued.*
Witness may be interrogated as to, § 3648; 921.
Co-parties.
Appeal by, to supreme court, §§ 3174–3176; 839.
Copy.
Of original notice to be delivered when served, § 2693; 697.
Of account or writing, failure to attach to petition, ground of demurrer, § 2618; 710.
Of lost pleading, substitution of, § 2735; 731.
Of motion for continuance, need not be served, § 2756; 738.
Of written instrument to be filed in action before justice, § 3532; 903.
Of record of instrument affecting real property, admissible in evidence, § 3660; 924.
Of patent of land receivable in evidence, 16 G. A., ch. 10; 925.
Of public record to be given by officer on demand, § 3706; 933.
Copies.
Of records for new counties, §§ 1971–1975; 557.
Of deeds, records, etc., fees for, to be taxed as costs, § 2936; 784.
Copyright.
Of supreme court reports, § 158; 34, and 18 G. A., ch. 60, § 28; 35.
Corn.
Weight of per bushel, § 2049; 575.
Corners.
How established by surveyor, § 372; 86.
When lost, survey to re-establish, 15 G. A., ch. 8; 862.
Coroner.
Not to act as attorney, § 342; 82.
Not to become purchaser of property sold by him, § 343; 82.
Powers and duties of, §§ 349–363; 83.
Election of, § 589; 157.
Bond of, § 678; 172.
To hold inquest in case of death in coal mine, 18 G. A., ch. 202, § 2; 443.
To report to clerk of court cases of death, 18 G. A. ch. 151, § 7; 453.
Service of subpœnas by, § 3671; 929.
Compensation of, § 3799; 956.
Bribery of, punished, § 3948; 998.
Person falsely assuming to be, punished, § 3962; 1000.
Stirring up controversies, punished, § 3964; 1001.
May deliver dead body to medical college or physician, § 4018; 1012.
Coroner's Inquest.
Over dead body, §§ 352–368; 84.
Over patient of insane hospital, § 1439; 399.
Coroner's Jury.
How summoned, duties of, §§ 352–360; 84.
Corporations.
Municipal, see CITIES AND TOWNS.
The word "person" may include, § 45, ¶ 13; 10.
Taxation of stock of, § 813; 195.
Engaged in manufacturing, taxation of, 18 G. A., ch. 57; 197.
FOR PECUNIARY PROFIT:
Formation and powers of, §§ 1058–1061; 269.
Notice of formation of, §§ 1062–1068; 270.
Duration of, §§ 1069, 1070; 271.
Fraud, consequences of, §§ 1071–1075; 272.
By laws, indebtedness, transfer of shares, non-user, loaning of funds, §§ 1076–1081; 272.
Liability of private property for corporate debts, §§ 1082–1087; 274.
Single person entitled to advantages of, § 1088; 275.
Want of legal organization cannot be set up, § 1089; 275
Legislative control over, § 1090, 275.
Doing banking business, double liability of stockholders in, 18 G. A., ch. 208; 275.
OTHER THAN FOR PECUNIARY PROFIT:
Organization and powers of, §§ 1091–1094; 276.
Charitable, scientific or religious societies, formation, meetings and powers of, §§ 1095–1102; 277.
Changing name of, 15 G. A., ch. 40; 278.
For making water power improvements, powers of, §§ 1236–1240; 332.
For construction of canals, turnpikes or bridges, may take private property, § 1269; 342.
Liable for wrongful acts of servants producing death, n. § 2526; 670.
Statute of limitations applicable to, § 2538; 677.
Foreign, may sue in corporate name, § 2554; 683.
Place of bringing action against, §§ 2582–2585; 689.
Service of notice upon officer of, by copy not good, n. § 2603; 697.
Service of notice on, how made, §§ 2611–2613; 699.
Foreign, service by publication in actions against, § 2618; 701.
Verification of pleadings by, § 2670; 718.
Capacity or relation of, how pleaded, how denied, §§ 2716, 2717; 728.
Required to give security for costs, § 2927; 781.
Foreign, attachment against, § 2951, 787.

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Corporations.—*Continued.*
Method of attaching interest in, § 2967; 792.
Municipal or political, garnishment of, § 2976; 795.
Municipal, judgment against, how enforced, § 3049; 810.
Stock in, how levied on under execution, § 3060; 811.
Action against, when acting without authority or after forfeiture of powers, §§ 3345-3359; 872.
Dissolution of, by action, trustees appointed, etc., § 3360-3367; 874.
Action on bonds of officers of, §§ 3368, 3369; 875.
Injunction to stop operation of, § 3391; 881.
Embezzlement by agent of, § 3907; 989.
Process upon indictment against, § 4326; 1075.
When indicted need not be arraigned, § 4327; 1075.
To be created only by general laws, Const. Art. 8, § 1; 1237.
Taxation of property of, Const., Art. 8, § 2; 1237.
State not to become stockholder in, nor liable for, Const., Art. 8, § 3; 1237.
Political or municipal, not to become stockholder in banking associations, Const., Art. 8, § 4; 1237.
With banking powers, act to create, to be submitted to the people, Const., Art. 8, § 5; 1237.
General assembly, may amend or repeal all laws for creation of, Const., Art. 8, § 12; 1238.
For banking, see BANKING ASSOCIATIONS and STATE BANK.

Correction.
Of assessments by board of equalization, § 831; 202.
Of error in kind of proceedings, §§ 2514, 2516; 667.

Corroboration.
Necessary to warrant conviction upon testimony of accomplice, or of prosecutrix in case of rape or seduction, §§ 4559, 4560; 1113.

Corruption.
Of jurors, referees, etc., punished, §§ 3946, 3947; 998.

Costs.
Of contested election, § 711; 177.
In proceedings to remove officer, § 755; 181.
Of publication of notice of tax sale, § 874; 215.
Of appeal in proceedings to establish highway, § 963; 244.
In proceedings to appraise damages for taking private property for mill-dams and races, § 1203; 323.
In matter of ascertaining homestead, § 2005; 566.

Costs.—*Continued.*
In action by person claiming easement, § 2035; 573.
Not to be recovered in action on usurious contract, § 2080; 582.
In case of suit brought by surety, § 2110; 591.
Of advertising sale of unclaimed property, § 2179; 607.
In proceedings of guardian for leave to sell property, § 2262; 626.
In matter of referees to set off widow's share, § 2447; 655.
Judgment for, against administrator, § 2477; 660.
In actions against heirs and devisees, § 2485; 661.
Of action for discovery, by whom paid, § 2523; 669.
Judgment for, where counter claim barred by statute is pleaded as a defense, § 2540; 678.
In case of change of place of trial, where suit is brought in the wrong county, § 2589; 690.
Of change of place of trial, by whom paid, § 2596; 694.
Fees for serving original notice taxed as, n. § 2601; 695.
To be paid by defendant making defense after notice of no personal claim, § 2608; 699.
Allowed for misjoinder of action, § 2634; 707.
Of intervention, when to be taxed to intervenor, § 2684; 721.
In case of striking irrelevant or redundant matter from pleading, § 2719; 728.
Of continuance to be paid by party applying therefor, §§ 2748, 2757; 735.
Of new trials, § 2840; 762.
In case of trial as to omitted fact, § 2843; 762.
In case of dismissal of action, § 2848; 764.
In case of offer to confess judgment, §§ 2898, 2899; 776.
In case of offer to compromise, §§ 2900, 2901; 777.
Security for, §§ 2927-2932; 781.
GENERAL PROVISIONS as to §§ 2933-2948; 783.
Taxation of attorney's fees as part of, 18 G. A., ch. 185; 785.
Expenses of keeping attached property, taxed as, § 3013; 804.
Of intervention proceedings in attachment, § 3016; 804.
Of summary proceedings against debtor, taxation and enforcement of, § 3147; 829.
On appeal, liability of co-parties for, § 3176; 839.
On appeal, judgment on bond for, § 3195; 846.
Security for, in supreme court, § 3210; 848.

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Costs.—*Continued.*
In action to quiet title, § 3275; 861.
In partition proceedings, §§ 3283, 3287, 3297; 864.
In action by *quo warranto*, §§ 3350, 3356, 3358; 873.
In mandamus proceedings, § 3379; 878.
Of submission of controversy, §§ 3412, 3415; 884.
In proceedings by arbitration, § 3430; 887.
In justice's court, § 3538, 3545; 904.
Of appeals from justices, §§ 3592, 3593, 3596; 910.
In action of forcible entry and detainer, § 3619; 914.
Of serving subpœna by person not officer, not allowed, § 3671; 929.
Of taking depositions, § 3754; 942.
Fees of reporter taxed as, § 3777; 947.
Jury fees taxed as, § 3812; 960.
Of preliminary examination, taxed to prosecuting witness, when, § 4254; 1060.
Of prosecution, taxed to private prosecutor, § 4292; 1065.
In criminal case transferred to another county, how paid, § 4386; 1084.
Of change of venue of criminal case, how paid, § 4381; 1084.
May be taxed against prosecuting witness in proceedings before justice, § 4691; 1134.

Council, Executive.
See EXECUTIVE COUNCIL.

Council of City.
See CITY COUNCIL.

Council of Incorporated Towns
Election and powers of, §§ 511–516; 129.

Counsel.
May be employed by governor, § 59; 13.
Conduct of trial by, §§ 2779–2783; 741.
Defendant entitled to, upon preliminary examination, § 4227; 1056.
To be allowed defendant when arraigned, § 4332; 1076.
Not to be restricted as to time, § 2783; 742, and § 4423; 1091.
In case of impeachment, § 4548; 1112.
Defendant in criminal prosecution, entitled to, § Const., Art. 1, § 10; 1218.

Counter Affidavits.
On motion for change of venue not allowable in civil cases, n. § 2590; 691.
Not allowable in applications for continuance, n. § 2750; 736.

Counter Claim.
Against assignee of non-negotiable instrument or account, §§ 2086, 2087; 586.
Not lost by failure to interpose as defense, § 2522; 665.
Pleaded as a defense although barred, § 2540; 678.
Action by assignee without prejudice to, § 2546; 680.

Counter Claim—*Continued.*
WHAT CONSTITUTES, how stated, etc., §§ 2659–2664, 715.
May be stricken out of answer and made separate action when new party is necessary, § 2662; 716.
Reply to, § 2665; 717.
Verification of, § 2674; 718.
To be tried, although original action dismissed, § 2846; 764.
Dismissal of, § 2847; 764.
Judgment on, § 2860; 766.
Suit on attachment bond by way of, § 3017; 804.
Not allowed in action to recover personal property, § 3226; 853.
In action for recovery of real property, § 3245; 857
In action for partition, § 3277; 863.
Not allowed in *quo warranto* proceedings, § 3346; 873.
Not allowed in proceedings by mandamus, § 3380; 878.
In actions before a justice, §§ 3531–3542; 903.
Not allowed in trial on appeal from justice, § 3591; 910.
Action of forcible entry and detainer not subject of, § 3622; 915.

Counterfeiting.
Of brand of inspector of lumber punished, § 2073; 579.
Of records, instruments, etc., deemed forgery, §§ 3917–3919; 991.
Of bank notes or public securities, §§ 3920–3924; 992.
Making tools for, punished, §§ 3924–3931; 993.
Of coin, or having same in possession, §§ 3925, 3926; 993.
Of bank notes or instruments in writing, §§ 3927–3930, 3934; 993.
Of coin of foreign country, § 3932; 995.
Of seals, § 3939; 995.
Existence of corporation, how proved in prosecutions for, § 3934; 995.
Of brands or stamps authorized by law, § 3935; 995.
Of mark, stamp or brand of another, § 4079; 1029.

Counts.
Common, abolished, § 2644; 708.
Of petition, § 2646; 708.
Several, statement of same cause of action in, n. § 2646; 708.
Sufficiency of, as against demurrer, n. § 2648; 710.
Of petition, how numbered, § 2705; 726.

County.
To receive copy of supreme court reports, § 159; 35.
Powers and jurisdiction of, §§ 279–280; 61.
Funding indebtedness of, §§ 289, 290; 63.
Levy of tax in, to pay bonds, § 291; 64.

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County.—*Continued.*
Redemption of bonds of, § 292; 65.
Executive council may levy tax to pay bonds of, § 293; 65.
Refunding of bonded indebtedness of, 17 G. A., ch. 58; 65.
To build and keep in repair public bridges within city, § 527; 134.
Not to appropriate money for sectarian schools, § 552; 146.
Not to become interested in banking institution or railway, etc., § 553; 146.
Bonds of, issued to railways, void, §§ 554, 555; 147.
Officers of, not to purchase warrants at discount, § 556; 147.
Canvass of election returns for, §§ 634–648; 165.
Property of, exempt from taxation, § 797; 189.
Responsible to state for state tax, §§ 908, 909, 232.
Concurrent action of, as to highway through two counties, §§ 955, 956; 242.
May recover for support of poor person from relatives, § 1350; 379.
May recover for support of poor person from county of settlement, § 1353; 381.
Liable for expenses of patient in Hospital for the Insane, § 1418; 395.
To levy tax for expense of insane patients, § 1428; 396.
Collection and disbursement of insane tax by, 17 G. A., ch. 183; 397.
Entitled to tuition of three scholars in Agricultural College, § 1619; 469.
Responsible for loss to school fund, § 1860; 527.
Responsible for school fund, §§ 1881–1884; 532.
May bid in property to secure debt; control and disposal of, §§ 1910–1919; 540.
Newly organized or detached, transcript of records for, § 1972; 557.
To be supplied with standards of weights and measures, §§ 2053–2054; 576.
Standards of weights and measures for, custody of, etc., §§ 2057–2058; 577.
Statute of limitations runs against, n. § 2529; 671.
When statute of limitations begins to run upon claim against, n. § 2529; 671.
In which action should be brought, §§ 2576–2578; 687.
To which action shall be sent in case of change of place of trial, §§ 2589, 2590, 2592; 690.
Being party to an action, ground for change of place of trial, § 2590; 691.
Liability of, for fees and expenses in trial of cause transferred by change of venue, §§ 2597, 2598; 694.

County.—*Continued.*
Service of original notice on, § 2610; 699.
Presentation of claim against, before action brought, § 2610; 699.
Intervention by tax-payer in action against, n. § 2683; 720.
Issuance of execution from one into another; transcript and return in such cases, §§ 3027, 3031, 3032; 806.
Public buildings of, exempt from execution, § 3048; 810.
Levy of tax by, to pay judgment, § 3049; 810.
Action on bail bond by, n. § 3370; 876.
May recover costs of prosecution or offenses committed in another county, § 3841; 967.
Jurisdiction of, as to public offenses, §§ 4160, 4164; 1045.
Liable for costs of criminal case transferred to another county on change of venue, § 4381; 1084.
Liable for costs in criminal cases transferred, § 4386; 1084.
Change in boundary lines, how effected, Const., Art. 3, § 30; 1228.
Not to be divided in forming congressional, senatorial, or representative districts. Const., Art. 3, § 37; 1230.
Not to be created of less size than, Const., Art. 11, § 2; 1242.
Limit of indebtedness of, Const., Art. 11, § 3; 1242.

County Agricultural Societies.
Premiums of, appropriations to, etc., §§ 1109–1113; 280.

County Auditor.
Sale or disposition of session laws by, §§ 41–43; 8.
To make abstract of census returns, § 114; 24.
May appoint person to take census, on failure of assessor, § 117; 25.
To apportion number of jurors to election precincts, § 236; 52.
To prepare a list of jurors, § 240; 53.
May administer oaths and take acknowledgments, § 277; 59.
May fix date and give notice of special meeting of board of supervisors, § 301; 69.
May designate paper for publication of notices pertaining to his office, § 306; 74.
Duties of; who eligible as, §§ 320–326; 79.
To report to clerk expense of criminal prosecution, 18 G. A., ch. 22, § 2; 87.
To issue warrant for election in new townships, § 386; 89.
To make duplicate tax lists where there are township collectors, § 402; 91.
To place city tax on tax book of county, § 495; 124.

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County Auditor.—*Continued.*
May require plats to be made and filed, § 568–570; 150.
When to be elected, § 589; 157.
To furnish poll-book for election precincts, § 615; 162.
To send for election returns, § 634; 165.
To give notice of lot to determine tie vote, §§ 643. 644; 167.
To forward abstracts of votes, § 645; 167.
Bond of, § 678; 172.
Bonds of county officers to be filed and recorded in office of, §§ 682, 683; 173.
To keep record of official bonds, § 683; 173.
To be clerk of court for trial of contested elections, § 696; 175.
May issue subpœnas for witnesses in trial of contested elections, § 704; 176.
Shall enter of record order of removal or suspension of officer, §§ 754, 758; 181.
Deputy may be appointed by, §§ 766–768; 183.
To notify township officers of removal of justice from office, § 779; 185.
To notify governor of vacancy in office of senator or representative, § 790; 187.
To notify township clerk of vacancy in office of justice or constable and approve bond of officers appointed to fill the vacancy, §§ 794, 795; 188.
To transmit to auditor of state abstract of property, § 833; 203.
To make change in valuations directed by executive council, § 836; 204.
To make out tax list, §§ 837, 838; 204.
To correct error in assessment or tax book, § 841; 205.
To make out and transmit tax list, §§ 842, 843; 205.
To make certified statement of valuation of property, § 844; 206.
To keep account of taxes, § 869; 212.
To attend tax sale and keep record, § 882; 217.
Penalty for neglect or malfeasance of, as to tax sale, §§ 884, 885; 218.
To give certificate of redemption from tax sale, § 891; 221.
Records of, as evidence as to tax sale, § 905; 231.
To issue license to peddlers, § 907; 231.
To issue license for shows, 16 G. A., ch. 131; 232.
Failing to perform duties, guilty of misdemeanor, § 919; 235.
To appoint commissioner for establishment of highway, § 924; 237.
Duty of, as to establishment of highway, §§ 934–944; 238.
To record and certify plat and field notes, § 949; 241.
To make out and file transcript, on appeal in proceedings to establish highway, § 961; 243.

County Auditor.—*Continued.*
To give notice of re-survey of highway, § 965; 244.
To make out highway plat-book, §§ 967, 968; 245
To keep account of highway tax, 18 G. A., ch. 36; 248.
To certify to adjutant general copy of list of militia, 18 G. A., ch. 74, § 2; 260.
To keep record of proceedings as to drains, ditches and water courses, § 1215; 327.
To transmit copy of order as to length of track of railway in each taxing district, § 1321; 362.
To issue order for expenses of taking insane patient to hospital, § 1410; 383.
May collect expenses of insane patient in hospital, § 1433; 398.
Duty of, as to estrays, § 1468–1470; 403.
Duties of, as to lost vessels, goods, money, etc., taken up or found, §§ 1512–1520; 419.
Duties of, as to granting permission to sell liquors, § 1529; 424.
Apportionment of school tax by, §§ 1781, 1782; 505.
To give certificate of election of superintendent and report interest on school fund, § 1783; 505.
Duties of, as to school funds, see SCHOOL FUND, §§ 1837–1884; 522.
To keep transfer, index and plat books, §§ 1948–1954; 551.
Acknowledgment of instruments by, 17 G. A., ch. 164; 556.
To certify transcript of records, §§ 1971, 1974; 557.
Service of notice on, § 2610; 699.
To hold money recovered for waste or trespass on property sold for taxes, § 3344; 872.
Docket of justice deposited with, § 3626; 915.
To determine succession of justice, § 3628; 916.
Compensation of, § 3797; 955.
Limit of compensation of, § 3798; 956.
To keep account of and report fees, 18 G. A., ch. 184; 956.
To be furnished with office, fuel, stationery, etc., § 3844; 967.

County Board of Equalization.
Board of supervisors to constitute; duties, § 832; 203.

County Bonds.
For funding indebtedness, §§ 289–293; 63.
For refunding bonded indebtedness, 17 G. A., ch. 58; 65.

County Buildings.
To be built, repaired and insured by board of supervisors, § 308, ¶¶ 5, 6; 70.
Vote as to erection of, § 308, ¶ 24; 71.

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County Buildings.—*Continued.*
Exempt from levy under execution, § 3048; 810.

County Canvassers.
To make jury list, § 238; 52.
Board of supervisors to constitute, § 303, ¶ 23; 71.
Duties of, §§ 635–648; 165.
——— at elections of presidential electors, § 662; 169.
——— at special elections for member of general assembly, or of congress, § 792; 188.

County High Schools.
Establishment of, §§ 1697–1699; 486.
Government of, §§ 1700. 1701; 487.
Tax for, §§ 1702, 1703; 487.
Additional bonds of officers, § 1704; 488.
Site, buildings, § 1705; 488.
Instruction, tuition, § 1706–1708; 488.
Rules of, how enforced, § 1709; 489.
Report of board, vacancies, compensation, §§ 1710–1712; 489.

County Officers.
Entitled to copies of session laws, § 40; 7.
To report information or statistics, 18 G. A., ch. 22; 87.
Not to purchase or receive warrants at discount, § 556; 147.
Violating provisions as to appropriation of moneys, guilty of misdemeanor, § 558; 147.
Resignations of; vacancies, how filled, §§ 782, 783; 186.
Failure of, to perform duty, deemed misdemeanor, § 919; 235.
Not to occupy office of practising attorney, § 3844; 967.
To be furnished with stationery, fuel, lights, etc., § 3844; 967.

County Recorder.
May designate paper for publication of notices of his office, § 306; 74.
Eligible to office of county auditor, § 325; 80.
Duties of; who eligible to office of, §§ 335, 336; 81.
Women eligible to office of, 18 G. A., ch. 40; 81.
Shall mark plats when vacated, § 566; 150.
When to be elected, § 589; 157.
Bond of, § 678; 172.
May appoint deputy, §§ 766–768; 183.
Recording of articles of incorporation by, § 1060; 269.
To record and index instruments affecting personal property, §§ 1924–1926; 544.
——— affecting real property, §§ 1943–1947; 549
To record evidence of titles to lands

County Recorder.—*Continued.*
held under grants, 18 G. A., ch. 183; 550.
Not to file deed for record until entered in transfer book, § 1953; 552.
To procure and keep book of original entries, §§ 3703, 3705; 934.
Compensation of, § 3792; 954.
To be furnished with office, fuel, stationery, etc., § 3844; 967.

County Sealers of Weights and Measures.
Appointment and duties; resignation of, §§ 2055–2064; 576.

County Seats.
Terms of probate court in counties having two or more, § 164; 38.
Re-location of, §§ 281–288; 61.
Board of supervisors may order vote for re-location of, § 303, ¶ 15; 71.
Special acts for locating or changing, Const., Art. 3, § 30; 1228.

County Superintendents.
When to be elected, § 589; 157.
Bond of, § 678; 172.
To report list of blind persons, § 1680; 482.
To report list of deaf and dumb persons, § 1689; 483.
President of board of trustees of county high school, § 1701; 487.
Women eligible to office of, 16 G. A., ch. 136; 492.
Cannot hold any other office, § 1765; 501.
Examination of teachers; giving of certificates by, §§ 1766–1768; 501.
To hold normal institutes, § 1769; 502.
Deputy, § 1770; 502.
May revoke certificates, § 1771; 502.
Report of, §§ 1772, 1773; 502.
Duties and compensation, §§ 1774–1776; 503.
May attach one township to another, § 1797; 508.
To appoint appraisers to assess damages for taking property for school-house site, § 1827; 520.
Appeals to, from board of directors, §§ 1829–1834; 521.
Appeals from, to state superintendent, § 1835; 522.
Cannot render judgment for money, § 1836; 522.
To be furnished with office, fuel, stationery, etc., § 3844; 967.

County Surveyor.
Powers and duties of, §§ 369–378; 86.
Duty of, as to re-survey of town plats, 15 G. A., ch. 54; 153.
When to be elected, § 589; 157.
Bond of, § 678; 172.
May appoint deputy, §§ 1766–1768; 183.
Compensation, § 3890; 957.

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County Treasurer.
Oath of, before obtaining credit with state auditor, § 73; 16.
Duty of, as to county bonds, §§ 290–292; 64.
May designate newspaper for publication of notices pertaining to office, § 306; 74.
Not to be auditor, § 326; 80.
DUTIES OF, §§ 327–334; 80.
Eligible to office of county recorder, § 336; 81.
To deliver duplicate tax list to tax collector, § 405; 91.
To receive tax after settlement with township collector, § 408; 93.
To collect and pay over tax levied for expenses of board of health, § 420; 95.
To collect and pay over taxes of cities and towns, §§ 495, 498; 124.
To endorse date of receipt upon warrant, § 557; 147.
When to be elected, § 589; 157.
Bond of, § 678; 172.
May appoint deputy, §§ 766–768; 183.
COLLECTION OF TAXES BY:
To enter delinquent taxes on tax book, § 845; 206.
Tax book to be authority for collection of taxes, § 846; 207.
To notify person paying tax, of sale of property, § 847; 207.
To certify tax due upon property; fee for, § 848; 207.
To assess omitted property, §§ 851, 852; 207.
To collect taxes by distress and sale, §§ 859–864; 209.
TAX SALE AND DEED:
To make sale for tax, § 871; 213.
To give notice of tax sale and collect charges therefor, § 873, 874; 214.
To sell lands for portion of tax due, 16 G. A., ch. 79; 216.
To keep record of tax sale, § 882; 217.
Penalty for neglect or malfeasance in making tax sale, §§ 884, 885; 218.
To make out certificate of purchase at tax sale, § 887; 219.
To give receipt for subsequent tax paid by tax purchaser, § 889; 220.
Execution of tax deed by, § 895; 223.
To sign and acknowledge tax deed, § 897; 225.
Records of, evidence as to tax sales, § 905; 231.
County liable for default of, § 909; 232
Discounting warrants at less amount than due, liable to a fine, § 911; 233.
Liable to fine for loaning public money, § 912; 233.
To make settlement with board of supervisors, §§ 913, 917; 233.
To make monthly statement to auditor of state, and pay funds into treasury, § 914; 234.
To account for funds, § 918; 234.
Failing to perform duty, guilty of misdemeanor, § 919; 235.
To pay over highway tax to township clerk, § 976; 248.
To collect account for clothing furnished pupils in College for the Blind, § 1678; 481.
——— in Institution for the Deaf and Dumb, § 1695; 484.
To pay over school tax, §§ 1784, 1785; 506.
To pay out money on loans from school fund, § 1864; 528.
Shall keep accounts with school fund, §§ 1876, 1878; 531.
Disposition of proceeds of unclaimed property by, § 2182; 609.
Action against, for public moneys, when barred, n. § 2529; 671.
Action of mandamus against, to compel payment of tax collected, n. § 3373; 876.
Compensation of, § 3793; 954.
To give information as to amount of taxes due, §§ 3794, 3795; 955.
To keep and render account of fees, § 3796; 955, and 18 G. A., ch. 184; 956.
To be furnished with office, fuel, stationery, etc., § 3844; 957.

County Warrants.
Record of, to be made in warrant book, § 308; 75.
When depreciated, question of special tax may be submitted to vote, § 309; 75.
Auditor may issue, § 321; 79.
Disbursements upon, by treasurer, § 327; 80.
Interest upon, § 328; 80.
Division of; new warrant for surplus, § 329; 80.
Treasurer to keep record of, as paid, § 330; 81.
How cancelled; returns of, §§ 332, 333; 81.
Officer shall not purchase at discount, § 556; 147.
Treasurer to endorse date and amount upon receipt, § 557; 147.
Receivable for taxes, § 854; 208.

Courses and Distances.
Description of property by, § 2726; 729.

Court, Supreme.
See SUPREME COURT:

Court, Circuit.
See CIRCUIT COURT:

Court, District.
See DISTRICT COURT:

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Court, District or Circuit.
Jurisdiction, terms, etc., of, §§ 161–166; 38.
Adjournment of, for failure or sickness of judge, §§ 167–169; 39.
Effect of adjournment of, §§ 170–172; 39.
Place of holding, §§ 173, 174; 40.
Reading and approval of records, §§ 176–179; 40.
Rules of, how made and published, § 180; 41.
Short-hand reporters in, §§ 181, 182; 42.
Verdicts in, after opening of court in another county, not invalid; judgment in such case, §§ 185, 186; 42.
Proceedings in, to be public, § 189; 43.
Not to be held on Sunday, § 191; 43.
Where to be held, § 192; 43.
Records of, what constitute, §§ 196, 197; 44.
——— may be ordered kept in one set of books, § 202; 45.
Proceedings in, to revoke or suspend license of attorney, §§ 217–223; 50.
May order deposit of money by trustee, §§ 255, 256; 55.
May send boy or girl to reform school, § 1653; 477.
Acknowledgments before, §§ 1955, 1956; 552.
May compel attendance of witnesses to prove acknowledgments, § 1955; 555.
Proceedings of, to determine extent of homestead, §§ 2002–2006; 566.
May appoint assignee of estate of insolvent debtor, § 2128; 595.
May direct as to interest of minor child, § 2215; 616.
Proceedings before, to authorize conveyance for insane husband or wife, §§ 2216–2218; 616.
Remedies in civil cases in, how divided, § 2504; 665.
May direct change in kind of proceedings, § 2518; 668.
May order necessary parties brought in, § 2551; 682.
May dismiss action of minor, or substitute other person as guardian or next friend, § 2565; 685.
May appoint guardian *ad litem* for minor, §§ 2566–2568; 685.
May appoint guardian to bring action for insane person, § 2569; 686.
Change in term of, not to affect notice served, n. § 2599; 694.
Shall certify to fees and expenses incurred in trial of cases transferred by change of venue, § 2598; 694.
May approve notice against unknown defendant, and order publication thereof, §§ 2623, 2624; 703.
What deemed first day of, § 2637; 707.
Powers of, as to amendments, §§ 2686–2691; 721.

Court, District or Circuit.—*Continued.*
May punish by contempt failure to answer interrogatories attached to pleading, § 2709; 726.
May order bad pleading corrected, § 2709; 726.
May impose terms where pleading is corrected on motion, §§ 2706, 2707; 726.
Judgment or determination of, how pleaded, § 2714; 727.
May cause irrelevant or redundant matter to be stricken from pleading, § 2719; 728.
May require more specific statement, § 2730; 730.
What issues to be tried by, § 2742; 733.
May make findings of fact and legal conclusions, § 2743; 734.
May grant separate trial, when, § 2746; 735.
Action of, in matter of continuance, §§ 2748–2758; 736.
Trial of challenges to jurors by, §§ 2766, 2767, 2773, 2774; 739.
Order of procedure by, on trial, § 2779; 741.
Giving and refusal of instructions by, §§ 2784–2789; 742.
May permit jury to view premises, § 2790; 746.
To advise jury upon permitting separation, § 2792; 746.
Always open to receive verdict of jury, § 2798; 747.
To give additional instructions on request of jury, §§ 2800, 2801; 748.
Reference by, §§ 2815–2830; 750.
Must distinguish in finding, between matter in abatement and in bar, § 2851; 764.
May direct judgment upon verdict, §§ 2857–2859; 765.
When acting as jury, how governed, § 2863; 766.
May discharge judgment or vacate assignment thereof, §§ 2867, 2868; 767.
Assessment of damages by, in case of judgment by default, § 2872; 769.
Approval of deed of commissioners by, § 2890; 774.
Appointment and control of receivers by, §§ 2903–2905; 778.
May vacate or modify judgments rendered; proceedings for, §§ 3154–3162; 851.
May direct commencement of proceedings in *quo warranto*, § 3347; 873.
May issue order of mandamus, § 3344; 877.
Contempts of, defined and punished, §§ 3491–3501; 895.
Proceedings in, to change name, §§ 3502–3506; 897.
May establish rules for taking depositions, § 3729; 933.

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Court, District and Circuit.—*Continued.*
Shall decide questions of law, § 4439; 1095.
May direct verdict in criminal case, when, n. § 4440; 1095.

Courts.
Superior, in cities, 16 G. A., ch. 143; 140.
For trial of contested county elections, §§ 695–717; 175.
For trial of contested state elections, §§ 719–729; 178
Of limited jurisdiction, presumptions as to proceedings in, § 3669; 929.
Federal, records of, as evidence, § 3712; 954.

Court House.
County auditor to have control of, § 323; 80.

Court Martial.
Of officers of militia, 18 G. A., ch. 74, §§ 33–35; 266.

Covenants.
Running with the land, mortgagee entitled to, n. § 1938; 546.
——— grantor must take notice of, n. § 1941; 547.
Of warranty in statutory warranty deed, effect of, n. § 1970; 556
Of warranty, mortgagee becoming purchaser at foreclosure sale cannot rely upon, n. § 3319; 868.

Credentials.
Committee on, in general assembly, § 8; 2.

Credibility of Witness.
How affected by religious belief, n. § 3636; 917.
Facts admissible to lessen, § 3637; 918.
Character of, may be proved to affect, § 3649; 921.

Credit.
Meaning of term as to taxation, § 802; 193.
Listing of, for taxation, § 814; 196.
On sale of real property of decedent, § 2395; 646.

Creditor.
May be required by surety to sue, § 2108–2110; 591.
To acknowledge satisfaction of mechanic's lien, 16 G. A., ch. 100, § 15; 603.
Administration granted to, § 2354; 640.
Redemption by, from sale under execution, §§ 3104–3120; 823.

Creditors.
Assignment for benefit of, §§ 2115–2128; 592.
Will prejudicing rights of, how sustained, § 2384; 645.
Having liens, may be parties in partition, § 3251; 864.

Crime.
On river forming boundary, punishment of, n. § 3; 1.
What sufficient evidence of commission of, to justify in slander, n. § 4682; 719.
Assault with intent to commit, punishment for, § 3876; 980.
Person convicted of, not entitled to vote, Const., Art. 2, § 5; 1224.

Crimes and Punishments.
Offenses against the sovereignty of the state, §§ 3845–3847; 969.
Offenses against the lives and persons of individuals, §§ 3848–3879; 970.
Offenses against property, §§ 3880–3901; 981.
Larceny and receiving stolen goods, §§ 3902–3916; 986.
Forgery and counterfeiting, §§ 3917–3935; 991.
Offenses against public justice, §§ 3936–3976; 996.
Malicious mischief and trespass on property, §§ 3977–3992; 1003.
Offenses against the right of suffrage, §§ 3993, 4007; 1007.
Offenses against chastity, morality and decency, §§ 4008–4034; 1009
Offenses against public health, §§ 4035–4042; 1017.
Offenses against public policy, §§ 4043–4064; 1019.
Offenses against public peace, §§ 4065–4072; 1026.
Cheating by false pretenses; gross frauds, and conspiracy, §§ 4073–4088; 1028.
Nuisances and abatement thereof, §§ 4089–4096; 1033.
Libel, §§ 4097–4102; 1036.

Criminal.
Reward may be offered by governor for arrest of, § 58; 13.

Criminal Act.
Degree of proof necessary to recover damages for, n. § 4428; 1092.

Criminal Liability.
Sufficient to excuse witness from testifying, § 3647; 921.

Criminal Prosecutions.
Rights of accused in, Const., Art. 1, § 10; 1218.

Criminal Returns.
Abstract of, by secretary of state, § 63; 14.
To be made by clerk of district court, § 203; 46, and 18 G. A., ch. 22; 87.

Criminal Procedure.
Public offenses defined, §§ 4103–4106; 1037.
What defendants are bailable, § 4107 1037.

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Criminal Procedure.—*Continued.*
Magistrates, peace officers and complaints, §§ 4108–4111; 1037.
Resistance to commission of offense, §§ 4112–4114; 1038.
Security to keep the peace, §§ 4115–4129; 1039.
Vagrants, §§ 4130–4144; 1041.
Resistance to process and suppression of riots, §§ 4145–4154; 1043.
Local jurisdiction of offenses, § 4155–4164; 1044.
Time of commencing criminal actions, §§ 4165–4170; 1046.
Fugitives from justice, §§ 4171–4184; 1047.
Warrant of arrest on preliminary information, §§ 4185–4196; 1049.
Arrest, by whom made, §§ 4197–4225; 1052.
Preliminary examination, §§ 4226–4254; 1056.
Selecting, summoning and empaneling grand jury, §§ 4255–4271; 1060.
Powers and duties of grand jury, §§ 4272–4290; 1063.
Finding and presentment of indictment, §§ 4291–4294; 1066.
Form and requisites of indictment, §§ 4295–4317; 1068.
Process upon indictment, §§ 4318–4326; 1074.
Arraignment of defendant, §§ 4327–4336; 1075.
Setting aside indictment, §§ 4337–4344; 1077.
Pleading by defendant, §§ 4345, 4346; 1079.
Mode of trial, §§ 4347–4351; 1079.
Demurrer, §§ 4352–4358; 1079.
Pleas to the indictment, §§ 4359–4367; 1081.
Change of venue, §§ 4368–4388; 1082
Formation of trial jury, §§ 4389–4397; 1085.
Challenging the jury, §§ 4398–4418; 1086.
Trial of issue of fact, §§ 4419–4451; 1089.
Conduct of jury after cause submitted, §§ 4452–4459; 1097.
Verdict, §§ 4460–4478; 1098.
Bills of exception, §§ 4479–4486; 1101.
New trial, §§ 4487–4490; 1103.
Arrest of judgment, §§ 4491–4494; 1104.
Judgment, §§ 4495–4511; 1104.
Execution, §§ 4512–4519; 1107.
Appeals, §§ 4520–4545; 1108.
Impeachment, §§ 4546–4555; 1112.
Evidence, §§ 4556–4572; 1112.
Bail before indictment, §§ 4573–4581; 1115.
Bail upon indictment, §§ 4582–4586; 1117.
Bail upon appeal, §§ 4587, 4588; 1118.
Deposit of money instead of bail, §§ 4589–4592; 1119.

Criminal Procedure.—*Continued.*
Surrender of defendant by bail, §§ 4593–4595; 1119.
Forfeiture of bail, §§ 4596–4600; 1120.
Recommitment after giving bail, §§ 4601–4605; 1122.
Undertakings of bail, when liens, §§ 4606–4608; 1123.
Judgments for fines, when liens, §§ 4609, 4610; 1123.
Liberation of poor convicts, §§ 4611, 4612; 1123.
Dismissal of actions, §§ 4613–4619; 1124.
Insanity of defendant before or after conviction, §§ 4620–4628; 1125.
Search warrants and proceedings thereon, §§ 4629–4653; 1126.
Disposal of property stolen or embezzled, §§ 4654–4659; 1130.
Proceedings and trials before justices of the peace, §§ 4660–4706; 1130.
Proceedings in police and city courts, §§ 4707; 1137.
Compromising offenses by leave of court, §§ 4708–4711; 1137.
Pardons and remission of fines and forfeitures, §§ 4712–4714; 1138.
Illegitimate children, §§ 4715–4722; 1139.

Croppers.
Leases of, expire when, § 2015; 569.

Crops.
Jury to find value of, in real action, § 3265; 860.
Taking and carrying away of, punished, § 3983; 1005.

Cross-examination.
Of witness by party in default, § 2873; 770.
Of person making affidavit, § 2913; 780, and §§ 3694, 3695; 932.

Cross-interrogatories.
For taking deposition, § 3723; 937.
In proceedings to perpetuate testimony, § 3748; 940.
For depositions on preliminary examination, § 4235; 1056.

Cross-petition.
For divorce, § 2225; 618.
By defendant against co-defendant or other person, § 2663; 716.

Crossing of Railways.
Near Mississippi river, § 1290; 352.

Crossings.
To be constructed by railways, §§ 1262–1268; 341.
Of highways to be constructed by railways, § 1288; 349.
Of railway lines, § 1292; 355.

Cruelty to Animals.
Abandoned animals may be cared for, § 1482; 408.

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Cruelty to Animals —*Continued.*
Impounded or confined animals supplied with food and water, § 1483; 408.
Punishment for, §§ 4031–4034; 1016.
Cumulative Evidence.
Discovery of, not sufficient to entitle to new trial, n. § 2837; 756.
Curative Acts.
Not necessarily unconstitutional, n. Const., Art. 1, § 6; 1215.
Not unconstitutional as being special, n. Const., Art. 3, § 30; 1228.
Curators of State Historical Society.
Report of, 16 G. A., ch. 159, § 1; 28.
Appointment, meetings, duties, etc., of, §§ 1901–1906; 536.
Currants.
Weight of, per bushel, § 2049; 575.
Currency of Banking Associations.
Security of, Const., Art. 8, § 8; 1238.
Current Funds.
Note payable in, not negotiable, n. § 2085; 585.
Current Revenues.
City may retain and apply to current expenses n. Const., Art. 11, § 3; 1242.
Curtesy.
Estate of, abolished, § 2440; 653.
Custodian of Will.
Duty of; penalty for failure to produce, §§ 2338, 2339; 637.
Custody.
Of insane person, §§ 1415, 1416; 394.
Of children, to whom awarded in proceedings for divorce, § 2229; 619.
Of children, parents entitled to, § 2241; 623.
Of lunatic, drunkard or spendthrift, priority of claim for, § 2279; 628.
Of adopted child, 2311; 632.
Damages.
FOR TAKING OF PRIVATE PROPERTY FOR PUBLIC USE:
For establishment of highway, claim for, when to be filed, § 934; 238.
——— appraisement of, §§ 940–945; 240.
For mill-dams and races, §§ 1190–1195; 321.
For drains, ditches and water-courses, § 1209; 325.
For damage of marsh land, § 1222; 329.
For works of internal improvement, §§ 1244–1259; 334.
For construction of telegraph lines, §§ 1325, 1326; 374.
How assessed, Const., Art. 1, § 18; 1220.
To stock from failure to fence railway, recovery for, § 1289; 350.
For injuries to employes, liability of railways for, § 1307; 357.
Damages.—*Continued.*
By domestic animals, liability for, §§ 1448, 1449; 402.
For which stock is distrained, assessment of, §§ 1454, 1455; 404.
From illegal sale of liquors, liability for, §§ 1556, 1557; 437.
For giving false certificate of acknowledgment, § 1964; 555.
For non-acceptance or non-payment of bills of exchange, § 2096; 588.
Against warehouseman or wharfinger, § 2176; 607.
Against common carrier for injury to baggage, § 2183; 609.
Recoverable by apprentice against master, 2293; 629.
For injuries producing death, how disposed of, § 2526; 670.
For seduction, who may bring action for, §§ 2555, 2556; 683.
For injury to person, character, or property, mitigating circumstances, how pleaded, § 2682; 719.
Allegation of amount of, deemed controverted, § 2712, 726.
Malice to affect, must be averred, § 2727; 729.
New trial not to be granted on account of smallness of, § 2839; 762.
Not to be distinguished from debt in case of recovery, § 2862; 766.
How assessed in case of judgment by default, § 2872; 769.
What may be recovered on attachment bond, § 2961; 790.
To property sold under execution, may be recovered by purchaser, § 3127; 827.
May be allowed upon affirmance of judgment in proceedings to vacate in court where rendered, § 3162; 835.
Awarded in case of appeal taken for delay, § 3196; 846.
Exemplary, in action to recover real property, § 3263; 859.
May be recovered in action for nuisance, § 3331; 871.
Treble, against tenant or guardian committing waste, § 3332; 871.
———against wilful trespasser, § 3335; 871.
Dams.
Taking of private property for, §§ 1188–1206; 321.
To be provided with fish-ways, 17 G. A., ch. 188; 18 G. A., ch. 123; 411.
Malicious injury to, punished, § 3978; 1003.
Dead Bodies.
Digging up, or exposing, punished, § 4017; 1011.
Delivery of, for medical study, §§ 4018–4020; 1012.

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Deaf and Dumb.
See INSTITUTION FOR DEAF AND DUMB, §§ 1685–1696; 482.
Death.
Of tenant for life, or *cestui qui vie*, effect of, upon rent, § 2011; 568.
Of sealer of weights and measures, § 2062; 577.
Of defendant abates proceedings for divorce, n. § 2229; 619.
Terminates disability of minority, n. § 2237; 621.
Causes of action do not abate by, § 2525; 669.
Damages to estate by, how disposed of, § 2526; 670.
Ends disability of non-residence, n. § 2533; 676.
Of person entitled to cause of action, effect of, upon limitation of action, § 2536; 677.
Of child, who may sue for damages for, § 2556; 683.
Of plaintiff or defendant in execution, effect of, §§ 3130–3133; 827.
Of party, ground for vacating judgment, § 3154; 831.
Of party, not to abate proceedings on appeal, § 3211; 848.
Sentence of, how executed, 17 G. A., ch. 165; 972.
Deaths.
Report and registry of, 18 G. A., ch. 151, §§ 3–8; 452.
Debt.
Evidences of, circulating as money, not barred by statute of limitations, § 2538; 677.
Recovery in action for, § 2862; 766.
Imprisonment for, prohibited, Const., Art. 1, § 19; 1222.
Debts.
To be deducted from credits in listing for taxation, § 814; 196.
Of railway corporations, §§ 1283–1287; 348.
Liability of homestead for, §§ 1992, 1993; 562.
Of insolvent debtor, not due, payment of, § 2126; 594.
Of husband or wife, the other not liable for, § 2212; 615.
Due estate, or owing by it, collection or payment of, § 2385; 645.
Of decedent, should be paid out of personal estate, n. § 2386; 645.
Of decedent, order of payment of, by administrator, § 2420; 650.
Barred by statute, not extinguished, n. § 2529; 671.
Not due, attachment for, §§ 2956–2958; 789.
How attached, § 2967; 792.
Of state, see STATE INDEBTEDNESS.
Debtor.
Insolvent, Examination of before court, § 2124; 594.
Of deceased person, not released by being made executor, n. § 2370; 642.
Summary proceedings against, §§ 3135–3149; 828.
Decedent.
See ESTATES OF DECEDENTS.
Cause of action in favor of, when barred, § 2536; 677.
Decision.
Of court upon trial of issue of fact, to be part of record, § 2743; 734.
Of supreme court to be certified to court below, § 3206; 847.
Decisions.
Of superintendent of public instruction, publication of, §§ 1577, 1581; 459.
Declaration of Independence.
See p. 1167.
Decrees.
Interest on money due on, § 2078; 530.
Deed.
Meaning of term, § 45, ¶ 20; 10.
Of real estate, sold upon execution to be made by sheriff in office, § 348; 83.
Of property sold for taxes, see TAX DEED, §§ 894–898; 222.
Recording of, §§ 1941–1947; 547.
Fraudulent, not validated by recording, n. § 1941; 547.
Entry of, in transfer, index and plat book, § 1951; 552.
Acknowledgment of, §§ 1955–1965; 552.
Form of, § 1970; 556.
Execution of, on behalf of insane husband or wife, §§ 2218, 2219; 616.
Of guardian of minor, to be approved by the court, § 2263; 626.
Record of, in case of sale of real property by administrator or guardian, § 2492, 662.
Of commissioner appointed to convey property, §§ 2887–2891; 774.
———, recording of, § 2892; 774.
FOR PROPERTY SOLD UNDER EXECUTION:
Execution of, where redemption not allowed, § 3101; 822.
Execution and recording of, after expiration of period of redemption, §§ 3124–3126; 826.
Unrecorded, notice of, in real action, or partition, §§ 3251, 3279; 858.
Of referees, in partition proceedings, §§ 3301, 3302; 866.
Deeds of Trust.
Action on, by equitable proceedings, § 2501; 666.
Execution and foreclosure of, §§ 3518, 3519; 863.

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Defacing Walls of Public Buildings.
Punishment for, § 3986; 1005.
Default.
Failure to amend or plead over after demurrer sustained, deemed, § 2654; 713.
Judgment upon, in action on account, 16 G. A., ch. 36; 727.
Waives trial by jury, § 2814; 750.
Entry of; setting aside; judgment upon, §§ 2869–2875; 767.
Upon service by publication, security required; new trial granted, §§ 2876–2881; 770.
Appeal from judgment upon, not allowed until after motion to set aside, n. § 3168; 836.
Judgment upon, before justice, § 3540–3544; 904.
New pleadings in circuit court, upon appeal from judgment upon, in justice's court, § 3596; 911.
Defect of Parties.
Ground of demurrer, § 2648; 710.
Defendant.
Who made, in action against executor for specific performance, § 2488; 662.
Who is, § 2505; 665.
May have error in kind of proceeding corrected, §§ 2515, 2516; 667.
Time of non-residence of, not included in period of limitation, § 2533; 676.
Who may be made; joinder of, §§ 2547, 2548, 2551; 681.
Unknown, action against, how brought, § 2557; 684.
Minor or insane, defense by guardian for, §§ 2566, 2570; 685.
May have guardian of insane person joined as plaintiff, § 2571; 686.
In action to recover personal property may have other person claiming the property substituted as defendant, § 2572; 686.
Notice to, of commencement of action, § 2599; 694.
When held to appear after service, § 2602; 696.
Defending without reason, liable for costs, § 2608; 699.
Method of service upon, when a minor, or insane, or in penitentiary, §§ 2614–2617; 700.
Service upon, by publication, § 2618; 701.
Unknown, service of notice upon, §§ 2622–2625; 703.
Appearance of, § 2626; 704.
Not served, procedure in action against, § 2627; 705.
May have cause of action improperly joined, stricken out, § 2632; 707.
When first pleading by, to be filed, § 2635; 707.
Defendant.—*Continued.*
Pleadings by, § 2645; 708.
May demur when, § 2648; 710.
May demur and answer as to different parts of same petition, § 2651; 713.
May file cross-petition against co-defendant or other person, § 2665; 716.
May demur to reply, § 2668; 717.
May have actions consolidated, § 2734; 731.
Continuance of action as to one of several, § 2760; 738.
May have judgment or other relief on counter claim, § 2860; 766.
Served by publication only, may have new trial, § 2877; 770.
When served by publication only, personal judgment not to be rendered against, § 2881; 771.
Offer to confess judgment by, § 2898; 776.
Offer to compromise by, §§ 2900–2902; 777.
Apportionment of costs to, § 2934; 783.
In attachment, may be examined as to property, § 2968; 793.
Stay of execution by, § 3061; 813.
In possession of real property, to be notified of sale, § 3087; 879.
May have property sold according to plan, § 3088; 820.
Redemption by, of property sold under execution, §§ 3102, 3112, 3117, 3123; 822.
Who deemed, in case of execution, § 3128; 827.
Effect of death of, upon execution, § 3133; 827.
In replevin suit, compelled to discover property, § 3233; 855.
May give bond for delivery of property, in replevin, § 3235; 855.
In criminal proceedings, competent witness, § 3636; 917.
Called to testify for co-defendant, may be impeached, n. § 3649; 921.
In criminal actions, name of, corrected, § 4299; 1069.
Presence of, necessary upon trial for felony, § 4351; 1079.
——— at rendition of verdict, § 4461; 1098.
——— at judgment on conviction, § 4497; 1105.
May be witness for himself or co-defendant in criminal prosecution, n. § 4556; 1112.
On trial under indictment, may be convicted of misdemeanor, n. Const., Art. 1, § 11; 1218.
After acquittal, not to be again tried, Const., Art. 1, § 12; 1219.
Defense.
Of want of organization, not to be set up by or against corporation, § 1089; 275.

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Defense.—*Continued.*
To action on life insurance policies, 16 G. A., ch. 55; 309.
Of usury, who may interpose, n. § 2080: 582.
Counter claim may be pleaded as, although barred, § 2540; 678.
Action by assignee, without prejudice to, § 2546; 680.
For prisoner in the penitentiary, how made, § 2559; 684.
By minor, how made, § 2566; 685.
In action against insane person, by whom made, § 2570; 686.
How stated, requisites of, § 2657; 715.
To cross-petition, § 2663; 716.
What pleadable to counter claim, requisites of, § 2667; 717.
Sham or irrelevant, stricken out on motion, § 2707; 726.
Inconsistent, may be stated in same answer or reply, § 2710; 726.
In confession and avoidance, how pleaded, § 2718; 728.
Arising subsequent to commencement of action, how stated, § 2733; 731.

Degrees of Consanguinity and Affinity.
How computed, § 45, ¶ 24; 11.

Degrees of Murder.
Defined; punishment of, how ascertained, §§ 3849–3851; 970.

Degrees of Offenses.
Conviction of lower degree, in case of doubt, § 4429; 1099.
Verdict in lower degree, § 4465; 1099.

Delay.
Damages for taking appeal for, § 3196; 846.

Deliberation of Jury.
In criminal cases, § 4442; 1095.

Delivery.
When necessary in sale or mortgage of personal property, n. § 1923; 542.

Delivery Bond.
In attachment, §§ 2994–2998; 800.
In replevin, § 3235; 855.

Demand.
Of taxes not necessary, § 857; 209.
Not necessary to hold guarantor, n. § 2090; 587.
Paper due on, not entitled to grace, 16 G. A., ch. 81; 587.
On negotiable notes or bills, § 2093; 587.
Notice of, how given, § 2095; 588.
Of performance of contract payable in property, § 2097; 588.
When necessary in action of replevin, n. § 3225; 852.

Demands.
Against estates of decedents, may be presented before due, § 2413; 649.

Demands.—*Continued.*
——— order of payment, § 2420; 650.
——— not due, payment of by executor, § 2425; 651.

Demurrer.
Want of consideration not ground of, n. § 2013; 592.
When to be filed, §§ 2635, 2636; 707.
But one allowable; effect of; when to be submitted; not to be withdrawn, §§ 2639–2642; 708.
Waives error in ruling upon a motion, n. § 2639; 708.
Time for filing, to amendment to petition, § 2647; 710.
Causes of, Requisites, §§ 2648–2664; 710.
Admits facts well pleaded, n. § 2648; 710.
General, abolished, n. § 2649; 712.
May be filed to portion of causes of action, § 2651; 713.
What deemed joinder in, § 2652; 713.
Upon being overruled, party may answer, or reply, § 2653; 713.
Effect of failure to amend or plead over after decision upon, § 2654; 713.
Error in ruling on, waived by pleading over or amending, n. § 2654; 713.
To answer, § 2664; 716.
To reply, § 2668; 717.
Need not be verified, § 2669; 717.
May be amended, n. § 2689; 721.
Will not lie for insufficient ground in petition for attachment, n. § 3018; 805.
Appeal from decision on, § 3164; 835.
Defective petition for mandamus attacked by, n. § 3373; 876.
May be filed to defendant's answer, in habeas corpus, § 3481; 893.
Ruling of justice upon, how reviewed, n. § 3597; 911.

Demurrer to Indictment.
How put in, § 4346; 1079.
How tried, § 4347; 1079.
Joinder in, not necessary, § 4348; 1079.
Grounds of; form and trial of, §§ 4352–4368; 1079.
Judgment upon, not bar to second prosecution, § 4366; 1082.

Denial.
In case of claims against estate of decedent, § 2410; 649.
Concerning time, sum, quantity, or place, § 2701; 726.
What evidence may be introduced under, § 2704; 726.
Of signature of written instrument under oath, § 2730; 730.
Of execution does not put in issue genuineness of signature, n. § 2730; 730.

Departments.
Of state government, Const., Art. 3, § 1; 1224.

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Deposit.
Of money by order of court, §§ 255, 256; 55.
By life insurance companies to cover valuation of policies, § 1169; 305.
Of property in case of interpleader in action to recover personal property, § 2572; 686.
Of money instead of bail, §§ 4589–4592; 1119.

Deposits.
Penalty for receiving by insolvent banks, 18 G. A., ch. 153; 458.

Deposit Notes.
In mutual insurance companies, § 1138; 288.

Depositions.
Commissioners in other states empowered to take; effect of, §§ 267, 271; 58.
May be taken in cases of contested elections, §§ 703, 723, 733; 176
In actions for divorce, § 2222; 617.
Answers to interrogatories attached to pleading read as, § 2693; 724.
May be used on trial of issues of fact, § 2741; 732.
Testimony taken by, in equitable actions, § 2742; 733.
Not to be taken by jury upon retiring, 2797; 747.
When taken in case of service by publication without appearance, may be used on subsequent re-trial, n. § 2877; 770.
Appeal from ruling on motion to suppress, not allowed, n. § 3164; 835.
Not deemed part of record; how sent up on appeal, § 3184; 841.
In justice's court, objections to, n. § 3590; 910.
Taken conditionally, admissible in action against executor or guardian, § 3640; 919.
Taken for one court may be used in another, § 3640; 929.
Of prisoners, how taken, §§ 3678, 3679; 930.
Person authorized to take may subpœna witnesses, §§ 3680–3682; 930.
Taken to be used as affidavits, §§ 3692–3694; 931.
When and how taken, §§ 3721–3743; 936.
Taken by one party may be introduced by the other, n. § 3721; 936.
In justice's court, §§ 3727, 3744; 937.
Reduced to writing by attorney of party without consent, suppressed, n. § 3735; 938.
For perpetuating testimony, §§ 3745–3750; 940.
Notice of filing; exceptions to; motion to suppress, § 3751; 941.
Trial of exceptions to, error in, how waived, §§ 3752, 3753; 942.

Depositions.—*Continued.*
Costs of, how paid, § 3754; 942.
Fees for taking, § 3835; 966.
On preliminary examinations, §§ 4234–4236; 1056.
In trial of criminal cases, § 4571; 1114.
Not admissible against defendant in criminal prosecution, n. Const., Art. I, § 10; 1218.

Depository.
Establishment of, by treasurer of state, 17 G. A., ch. 57; 18.

Depot Grounds.
Rate of speed of trains at, § 1289; 350.
Liability of company for stock killed at, n. § 1289; 350.

Deputy City Marshal.
In cities of second class, § 532; 135.
In cities of first class, § 536; 137.

Deputy Clerk of District Court.
Is deputy clerk of circuit court, § 195; 44.
May not act as justice, or attorney, § 204; 46.
May administer oaths, and take acknowledgments § 277; 59.
Acknowledgments before, n. § 1955; 552.
Acknowledgments by, legalized, 17 G. A., ch. 164; 556.
May be employed when; compensation of, § 3784; 950.

Deputy County Auditor.
May administer oaths and take acknowledgments, § 277; 59.
Acknowledgments by, legalized, 17 G. A., ch. 164; 556.
May be employed when; compensation of, § 3793; 956.

Deputy County Treasurer.
Appointed to collect taxes, § 859; 209.
May be employed when; compensation of, § 3793; 954.

Deputy Inspector.
Of lumber and shingles, §§ 2069–2072; 578.

Deputy Sheriff.
May administer oaths, § 277; 59.
Powers, duties, etc., of, §§ 337–344; 82.
Not to act as attorney, § 342; 82.
Not to be purchaser at sale, § 343; 82.

Deputy Warden of the Penitentiary.
Appointment, qualification and duties of, § 4754; 1147.
Compensation of, § 4783; 1152.
Shall act as warden, 4792; 1153.

Deputy State Treasurer.
May be indicted for embezzlement, n. § 3908; 988.

Deputies.
What officers entitled to, powers of, oath, compensation, §§ 766–771; 183.

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Deputies of State Officers.
Salaries of, §§ 3756–3760; 943.

Descent.
Aliens may acquire property by, §§ 1903, 1909; 539.
Of homestead, § 2008; 567.
Of property of intestate, §§ 2453–2459; 657.
Cast, gives color of title. n. § 2529; 671.
Of property, rights of aliens as to, Const., Art. 1, § 22; 1223.

Description.
Of homestead, how given and recorded, § 1999; 565.

Desertion.
Cause for divorce, § 2223; 617.
Of family, by husband or wife, the other may prosecute and defend actions, § 2564; 684.

Des Moines River Lands.
Occupying claimants upon, § 1987; 560.

Destruction.
Of lumber, fences, produce, etc., by burning, etc., punished, § 3886; 982.

Devise.
To charitable or religious corporation, how far valid, § 1101; 278.
By aliens, valid, § 1908; 539.
Of homestead, § 2010; 568.
By or to married women, valid, § 2202; 613.
Includes bequest, § 2336; 637.
Gives color of title to real property, n. § 2529; 671.

Devisee.
Construed to embrace legatee, § 2336; 637.
Dying before testator, heirs of, to take, § 2337; 637.
In the absence of executor, to take charge of real estate, §§ 2402–2404; 647.
Judgment against, for costs, proportionally, § 2485; 661.
May be defendant in action against executor for specific performance, § 2488; 662.

Diligence.
What sufficient to entitle to continuance, n. §§ 2749, 2750; 736.
In discovering new evidence, what sufficient, n. § 2837; 756.

Diminution.
In transcript, how supplied, § 3185; 842.
Of sentence of convict in penitentiary for good behavior, 18 G. A., ch. 154; 1156.

Dining and Sleeping Cars.
Taxation of, 17 G. A. ch. 114; 362.

Directors of Corporations.
Liability of, for unauthorized action, § 3359; 874.

Directors of District Townships.
Division of assets and liabilities by, § 1715; 490.
Election of, §§ 1718–1720; 491.
Women eligible as, 16 G. A. ch. 136; 492.
See BOARD OF DIRECTORS.

Directors of Independent Districts.
Election of, § 1805; 511.
See BOARD OF DIRECTORS.

Directors of Insurance Companies.
Election and duties of, §§ 1126–1129; 284.
Liability of, § 1150; 294.

Disability.
Of minority terminates by death, n. § 2237; 621.
Of non-residence ends with death, n. 2533; 676.

Disaffirmance.
Of contracts by minors, §§ 2238, 2239; 621.

Disagreement.
As to homestead, how settled, §§ 2002–2006; 566.

Disbarment.
Of attorney for deceit, § 212; 48.

Discharge.
Of patient from hospital for the insane, §§ 1408, 1409; 393.
Of surety, by failure of creditor to sue, § 2109; 591.
Of apprentice, § 2297; 630.
Of administrator, § 2476; 660.
Of attached property on bond, §§ 2994, 2996; 800.
Of attachment on motion; appeal from, §§ 3018, 3020; 805.
Of boat or raft, in action against, § 3438; 889.
Of plaintiff in *habeas corpus*, § 3484; 894.
Of convicts from penitentiary, §§ 4777–4779; 1151.

Discharge of Defendant.
Upon defective indictment, § 4450; 1096.
Upon verdict of acquittal, § 4473; 1100.
After reversal of judgment on appeal, § 4540; 1111.
Upon acquittal, before justice, § 4690; 1134.

Discharge of Jury.
When business of term does not require their attendance, § 233; 52.
After retiring for deliberation, §§ 2791, 2793, 2794; 746.
In trials before justices, § 3549; 905.
In criminal cases, before cause is submitted, §§ 4443–4451; 1096.
——— after cause is submitted, § 4456; 1097.
In trials upon information before justices, § 4686; 1134.

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Discharge of Judgment.
Upon motion, §§ 2867, 2868; 767.

Discipline.
Of militia, 18 G. A., ch. 74, § 18; 263.
Of prisons, §§ 4723–4743; 1141.

Disclaimer.
By defendant in action to quiet title, § 3275; 861.

Discontinuance.
Of city or town, § 447–453; 165.
Failure to file petition by date fixed in notice, deemed, § 2000; 696.

Discount.
Of note, does not constitute usury, n. § 2079; 580.

Discovery.
Of assets of estate of decedent, § 2379; 644.
Action for, when brought, § 2533; 669.
Enforced in proceedings to subject property to payment of judgment, § 3151; 830.
Of property in action of replevin, how enforced, § 3233; 855.

Diseased Animals.
May be killed, § 1484; 408; and § 4057; 1024.
Knowingly bringing within the state, punished, §§ 4055, 4056; 1023.

Dismissal of Action.
New suit brought prevents bar of statute of limitations, § 2537; 677.
When allowed, §§ 2844–2848; 763.
For failure to give bond for costs, §§ 2928, 2930; 782.
Costs in case of, § 2939; 784.
For want of jurisdiction, costs how taxed, § 2941; 784.
In replevin, effect of, n. § 3239; 856.
Before justice for want of appearance, § 3558; 904.
In criminal prosecutions, for failure of grand jury to indict, §§ 4289, 4290; 1065.
In criminal cases, §§ 4613–4619; 1124.
In criminal cases, after trial commenced, operates as acquittal, n. Const., Art. 1, § 12; 1219.

Dismissal of Appeal.
For failure to file transcript or assign errors, §§ 3181–3183; 840.
Upon motion, §§ 3212, 3213; 848.
From judgment of justice, n. § 3587; 909.

Disobedience to Injunction.
How punished, §§ 3403–3407; 883.

Disqualification of Officer.
For conviction of bribery, § 3941; 997.
For dueling, Const., Art. 1, § 5; 1215.

Dissent.
Of judge of supreme court, to be recorded, § 144; 33.

Dissolution.
OF CORPORATION:
How effected, § 1066; 271.
Appointment of trustees, etc., §§ 3360–3367; 874.
OF LIMITED PARTNERSHIP.
What deemed, § 2158; 605.
How effected, § 2170; 606.
Of apprenticeship, § 2300; 630.
OF INJUNCTIONS:
Upon motion, §§ 3393, 3399–3401; 881.
Upon answer, § 3400; 883.

Distrained Animals.
Doing damage, § 1448; 402.
Release of, on bond, § 1486; 409.
Improperly at large, §§ 1452, 1456; 404.

Distress.
Right of, superseded by landlord's lien, n. § 2017; 569.

Distress and Sale.
By township collector, § 405; 92.
By county treasurer, §§ 857–864; 209.

Distributee.
Unassigned share of, goes to personal representative, n. § 2436; 652.

Distribution.
Of laws, § 39; 7.
Of public documents, 16 G. A., ch. 159, § 3; 28.
Of property of intestate, §§ 2436–2452; 652.

Distributive Share in Estate.
Setting off, to husband or wife is disposal of homestead, § 2008; 567.
Right to, vests when, § 2436; 652.

District Attorney.
Duties of, §§ 205–207; 46.
When to be elected, §§ 584, 585; 157.
Bond of, § 678; 172.
May be directed by judge to file petition for removal of officer, § 757; 182.
Resignation of, shall be made to governor, § 782; 186.
May have warrant issued for arrest of insane prisoner restored to reason, § 1413; 394.
Shall bring suit on bond given to obtain permit to sell liquors, § 1532; 425.
To appear and prosecute in trials for violation of liquor law, § 1551; 436.
To bid in real property for county, § 1911; 540.
May demand payment or security for indebtedness due the state, § 3005; 802.
Attachment issued by, for indebtedness due the state, § 3006; 802.
May commence proceedings in *quo warranto*, § 3347; 873.
May bring proceedings by mandamus, § 3377; 878.
Shall be informed of proceedings in *habeas corpus*, § 3459; 891.

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District Attorney.—*Continued.*
Compensation of, § 3775; 947.
What witnesses to be examined by, in criminal cases, § 4156; 1045.
May attend before grand jury, §§ 4281, 4282; 1064.
May bring action on forfeited bail bond, §§ 4598, 4599; 1121.
Dismissal of prosecutions by, §§ 4617, 4618; 1125.
May prosecute proceedings against putative father of illegitimate child, § 4719; 1140.
To be an inspector of jails, § 4729, 1142.
Election and term of, Const., Art. 5, § 13; 1235.

District Court.
Jurisdiction of, § 161; 38.
Shall have jurisdiction of proceedings to remove officers, § 747; 181.
Jurisdiction of, as to probate matters, n. § 2312; 634.
Transfer of probate matters to, § 2317; 635.
Proceedings in, to set aside will, n. § 2353; 640.
Jurisdiction of, as to claims against estates, n. § 2408; 648.
May grant writ of certiorari, § 3217; 850.
Proceedings in, upon security to keep the peace, §§ 4124–4129; 1040.
Proceedings in, against vagrants, §§ 4139–4141; 1042.
Local jurisdiction of, in criminal matters, § 4156; 1045.
Appeals to, from judgments of justices in criminal actions, § 4697; 1135.
Trial of appeals from justices in criminal cases, §§ 4702–4706; 1136.
Complaint in, against father of illegitimate child, §§ 4715–4722; 1139.
Shall decide questions of law, § 4439; 1095.
May direct acquittal, n. § 4440; 1095.
Judicial power vested in, Const., Art. 5, § 1; 1233
Election and term of judge of, Const., Art. 5, §§ 5, 11; 1234.
Jurisdiction of, Const., Art. 5, § 6; 1234.
Judges of, to be conservators of the peace, Const., Art. 5, § 7; 1234.
Changes in districts, or number of judges of, Const., Art. 5, § 10; 1235.
See, generally, COURT, DISTRICT OR CIRCUIT.

District Court of the United States.
Lien and satisfaction of judgments in, n. § 2882; 772; and 17 G. A., ch. 129; 773.

District Judge.
SEE JUDGE OF DISTRICT COURT.

District Townships.
School districts organized under name of, § 1716; 490.
Meetings of, 1717; 490.

District Township.—*Continued.*
Powers of, in case of destruction of buildings by fire, § 1717½; 491.
Election of directors in, §§ 1718–1720; 491.
Powers of directors, §§ 1721–1738; 492.
May be divided into sub-districts, § 1725; 493.
Lying in two counties may vote specific sums as taxes, 15 G. A., ch. 67; 505.
Meetings, organization and adjournment of, § 1789; 507.
Establishment of sub-districts and change of boundaries, § 1796; 508.
Portion of, may be attached to adjoining township, how restored, §§ 1797, 1798; 508.
Independent districts may be formed into, §§ 1815–1820; 515.
May issue bonds to fund judgments, 18 G. A., ch. 51; 518.
May fund bonded indebtedness, 18 G. A., ch. 132; 518.
May condemn propert for school house site, §§ 1825–1828; 520.
Public property of, exempt from execution, § 3048; 810.

Districts.
Senatorial and representative, formation of, Const., Art. 3, §§ 35, 36; 1230.
Congressional, senatorial and representative, to contain only entire, contiguous counties, Const., Art. 3, § 37; 1230.
See, SCHOOL DISTRICTS.

Districts, Judicial.
How constituted and changed, Const., Art. 5, § 10; 1235.

Disturbance.
Of school, assembly, or religious worship, punished, § 4023; 1013.
Inciting of, punished, § 4069; 1027.

Ditches.
Location and construction of, by board of supervisors, §§ 1207–1214; 324.
Repair of, § 1226; 330.
Damages for obstruction of, § 1227; 330.
Obstruction of, punished, § 3991; 1006.

Dividends.
Not to be made by corporations other than for pecuniary profit, § 1093; 276.
Of insurance companies, when allowable, § 1136; 287.
To creditors of estates of insolvent debtors, § 2122; 594.
Among creditors of estates of decedents, § 2427; 651.

Division Fences.
See FENCES. §§ 1489–1508; 414.

Division Hedges.
Provisions as to, 16 G. A., ch. 106; 418.

Divisions.
Of answer, or reply, how numbered, § 2705: 726.

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Divorce.
Jurisdiction of actions for, § 2220; 617.
Proceedings in actions for, §§ 2221–2225; 617.
Causes for, § 2223; 617.
Orders as to alimony and custody of children, §§ 2226–2229; 618.
Rights forfeited by, § 2230; 620.
Annulling illegal marriages, §§ 2231–2236; 620.
Action for, to be prosecuted by equitable proceedings, § 2511; 666.
Right to jury trial does not exist in actions for, n. § 2511; 666.
Service by publication in action for, § 2618; 701.
What shall be the trial term in action for, § 2745; 735.
Judgment by consent cannot be entered in, § 2861; 766.
Re-trial of action for, upon application of party served by publication only, not allowable, n. § 2877; 770.
Decree in, may be set aside for fraud, n. § 3154; 831.
Shall not be granted by general assembly, Const., Art. 3, § 27; 1228.

Docket.
Of judge, not part of records of court, n. § 196; 44.
Transfer of action to proper, 2514; 667.
Entry on, to contain statement of garnishments, § 2992; 800.
Of supreme court entry and arrangement of causes upon, § 3203; 847.
Of Justice of the Peace:
How to be kept, § 3515; 900.
Entry of pleadings upon, § 3530; 902.
To be deposited with successor, § 3625; 915.
To be furnished by board of supervisors, § 3635; 916.

Documents, Public.
To be sent to public libraries, § 131; 28.
Printing and distribution of, 16 G. A., ch. 159, § 3; 28.
To be sent to congressional library, and to other governments, 16 G. A., ch. 159, § 10; 30.

Dogs.
Power of city to regulate the running at large, etc. of, § 459; 107.
Taxation of, by cities and towns, § 499; 126.
Worrying animals, or attacking persons, may be killed, § 1485; 408.
Punishment for entering enclosures with, § 3900; 985.

Domestic and other Animals.
Cities and towns may regulate or restrain the running at large of, § 459; 107.
City council may levy tax upon, § 499; 126.
Restraining from running at large; § 1446; 401.
Male animals may be taken up, § 1447; 401.
Damages from, when running at large, §§ 1448, 1449; 402.
Submission of question as to restraining stock, §§ 1450, 1451; 403.
Damages from, where stock is prohibited from running at large, § 1452; 404.
Relieving from distraint, 18 G. A., ch. 188, § 2; 404.
Owner of, meaning of term, § 1453; 404.
Taking up of estrays, §§ 1464–1478; 405.
Marks and brands, §§ 1479–1481; 408.
Cruelty to, prevented, §§ 1482, 1483; 408.
Diseased animals killed, § 1484; 408; and § 4057; 1024.
Dogs may be killed for worrying, etc., § 1485; 408.
Release of distrained animals, § 1486; 409.
Bounty on scalps, §§ 1487, 1488; 409.
Maliciously injuring punished, § 3977; 1003.

Doubt of Guilt.
See Reasonable Doubt, §§ 4428, 4429; 1092.

Dower.
Not subject to payment of debts of estate, n. § 2357; 645.
Claim for, must be set up in proceedings for leave to sell real estate, n. § 2359; 645.
In property of deceased husband, § 2440; 653.
Interest in several tracts may be assigned in a body, n. § 2440; 653.
While inchoate, may be enlarged or abridged, n. § 2440; 653.
May be protected from fraudulent alienation by husband, n. § 2440; 653.
How set off, §§ 2441–2451; 655.
Should be set off in specific portions of real property, n. § 2448; 656.
Not to be affected by will, § 2452; 656.
Action for, when barred, n. § 2529; 671.
Action for recovery of, n. § 3246; 857.

Drafts.
Entitled to grace, 16 G. A., ch. 81; 587.

Drainage.
Of lots by city, § 480; 118.
Of swamp or marsh lands, §§ 1217–1227; 328.
Of coal lands, 1228; 330.
Of lead mines, §§ 1229–1235; 330.

Drains, Ditches and Water-courses.
Location and construction of, §§ 1207–1216; 324.

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Drains, Ditches and Water-courses.—*Continued.*
Drains through two or more counties, 17 G. A., ch. 121; 18 G. A., ch. 85; 327.
Drawback.
May be allowed by railways on business from other lines, §§ 1298, 1299; 356.
Drawing of Jurors.
To supply deficiency in panel, § 232; 52.
To form panel of trial and grand jurors, §§ 240, 241; 53.
Of trial jury in civil cases, § 2761; 738.
Of grand jury, § 4255; 1060.
Of trial jury in criminal causes, §§ 4389, 4397; 1085.
Dried Peaches and Apples.
Weight of, per bushel, § 2049; 575.
Drills.
Of militia, 18 G. A., ch. 74, §§ 20–22; 264.
Driving off Stock.
Punished, § 3896; 984.
Drugs.
Adulterated, sale of, punished, 18 G. A., ch. 75, § 7; 450.
Adulteration of, punished, § 4037; 1017.
Poisonous, to be labeled and record of sale kept, 18 G. A., ch. 75, § 9; 450; and § 4038; 1017.
Drunkards.
Guardianship of, §§ 2272–2279; 627.
Habitual, deemed vagrants, § 4130; 1041.
Drunkenness.
Habitual, cause for divorce, § 2223; 617.
Due Bills.
Assignment of, § 2084; 585.
Due Process of Law.
Person not to be deprived of rights without, Const., Art. 1, § 9; 1216.
Duel.
Jurisdiction of the offense of fighting, § 4158; 1045.
Dueling.
Punished, §§ 3852–3855; 974.
Person engaged in, disqualified from holding office, Const., Art. 1, § 5; 1215.
Duplicity in Indictment.
Effect of, § 4000; 1069.
Duration.
Of corporations, §§ 1069, 1070; 271.
Duties assigned to two or more officers jointly.
Paper and stationery to be procured for printer, offices, committees, etc., §§ 121, 122, 15 G. A., ch. 1; 26.
Account of contingent fund to be kept and rendered, §§ 123, 124; 27.
Oaths of regents, trustees, etc., §§ 126, 128; 27.
Duties assigned to two or more officers jointly.—*Continued*
Officers prohibited from contracting beyond appropriations, § 127; 27.
Public documents to be distributed to public libraries, § 131; 28.
Public books and accounts to be open to inspection, § 132; 28.
Reports of public officers and institutions, 16 G. A., ch. 159; 28.
Officers of state institutions not to contract beyond appropriations nor divert funds, 17 G. A., ch. 67; 30.
——— not to be interested in contracts, 17 G. A., ch. 144; 31.
Dwelling.
Burning of, punished, §§ 3880–3883; 981.
Dying Declarations.
Not rendered incompetent by lack of religious belief, n. § 3636; 917.
Admission of, in evidence, not unconstitutional, n. Const., Art. 1, § 10; 1218.
Earnings of Minor.
Liability for, and recovery of, n. § 2240; 622.
Easements.
Of railway companies, forfeiture of by non-user, §§ 1260, 1261; 340.
In real estate, §§ 2031–2036; 572.
Non-user does not bar right to, n. § 2529; 671.
Education.
Of children, liability of husband or wife for, § 2214; 615.
Of minor, sale of property for, § 2257; 624.
Of apprentice, by master, § 2306; 631.
Election.
Of state printer, § 94; 22.
Of state binder, § 106; 23.
For re-location of county seat, §§ 285–288; 62.
Of members of board of supervisors, §§ 294, 295; 68.
For erection of county buildings, § 303, ¶ 24; 71.
Of assessor, in townships containing cities, and in cities, § 390; 89.
Of township collector, § 411; 93.
For organization of city or town, § 422; 97.
Of officers, on organization of city or town, § 425; 98.
For annexation of territory to city or town, §§ 427, 429; 98.
For annexation of territory by city or town, § 430; 99.
For annexation of one city or town to another, § 432; 100.
For extension of city limits, 16 G. A., ch. 47; 101.
For abandonment of special charter, §§ 435–438; 102.

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Election —*Continued.*
Of officers in city abandoning special charter, § 433; 103.
For discontinuance of city or town, §§ 447–450; 105.
Of officers of cities and towns, § 501–503; 126.
Of members of council in cities, § 521; 131.
OF STATE, COUNTY, DISTRICT AND TOWNSHIP OFFICERS.
Governor, lieutenant-governor, and superintendent of public instruction, § 580; 157.
Secretary, auditor and treasurer of state, register of state land office, and attorney-general, § 581; 157.
Judges of supreme court, § 582; 157.
Clerk and reporter of supreme court, § 583; 157.
District judge and district attorney, §§ 584, 585; 157.
Circuit judge, § 586; 157.
Members of house of representatives, § 587; 157.
Senators in general assembly, § 588; 157.
Clerk of courts, county recorder, auditor and treasurer, sheriff, coroner, county superintendent, and surveyor, § 589; 157.
Justices of the peace and constables, § 590; 158.
Township trustees, 17 G. A., ch. 12, 158.
Township clerk, assessor and highway supervisor, 18 G. A., ch. 161; 158.
Additional justices and constables, § 592; 158.
OF PRESIDENTIAL ELECTORS, §§ 659–669; 160.
Of officers to fill vacancies, §§ 789, 790; 187.
Of officers, trustees, etc., of corporations not for pecuniary profit, §§ 1097–1099; 277.
For restraining stock from running at large, § 1450; 403.
Of directors of district townships, §§ 1718–1720; 491.
Of directors in independent districts, §§ 1802, 1803; 510.
Of governor and lieutenant-governor, Const., Art. 4, §§ 2, 3; 1231.
Of attorney-general, Const., Art. 5, § 12; 1235.
Of district attorney, Const., Art 5, § 13; 1235.
Of judges of supreme and district courts, Const., Art. 5, § 11; 1235.

Elections.
By joint convention of the general assembly, §§ 19–26; 4.
Place of, to be designated by township trustees, § 391; 90.

Elections.—*Continued.*
In cities and towns, §§ 501–503; 126.
General, when held, § 573; 156.
Special, § 574; 156.
Vacancies to be filled at, § 575; 156.
Proclamation and notice of, §§ 577–579; 156.
Registration of voters at, §§ 594–602; 159.
METHOD OF CONDUCTING:
Precincts established, §§ 603–605; 160.
Judges and clerks of; failure to attend; oaths, §§ 606–610; 161.
Opening and closing polls; § 611; 161.
Preserving order, §§ 612, 613; 162.
Ballot-boxes, poll-books, ballots, §§ 614–617; 162.
Register, unregistered voters, challenges, list of voters, §§ 618–621; 162.
Ballots for highway supervisor and township assessor, 17 G. A., ch. 71; 163.
CANVASS OF VOTES:
By judges of election, §§ 622–633; 163.
By board of supervisors, §§ 634–648; 165.
By board of state canvassers, §§ 649–678; 168.
CONTESTING, §§ 692–745; 174.
Special, to fill vacancies, §§ 789, 791–793; 187.
Sale of liquors on day of, prohibited, 17 G. A., ch. 119, § 2; 439.
Selling or giving liquors to voters at, prohibited, 18 G. A., ch. 82; 441.
In district townships, or sub-districts, § 1709; 507.
In independent school districts; precincts, etc., § 1808; 18 G. A., ch. 8, 511.
Depositions cannot be required to be taken on day of, § 3722; 936.
Compensation of messenger sent for returns, § 3827; 965.
Misconduct of officers at, punished, §§ 4003–4007; 1008.
Who entitled to vote at, Const., Art. 2, § 1; 1223.
Electors privileged from arrest and military duty on day of, Const., Art. 2, §§ 2, 3; 1224.
To be by ballot, Const., Art. 2, § 6; 1224.
Houses of general assembly judges of, as to their own members, Const., Art. 3, § 7; 1225.
To fill vacancies in general assembly, Const., Art. 3, § 12; 1226.
By general assembly, to be *viva voce*, Const., Art. 3, § 38; 1230.
Submission of amendments to Constitution at, 16 G. A., ch. 114, § 2, 1247.

Electors.
Bribery of, § 3093; 1007.

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Electors.—*Continued.*
Illegal voting by, §§ 3994–3997; 1007.
Illegally influencing to, or preventing from voting, §§ 3998–4000; 1008.
Who entitled to be, Const., Art. 2, § 1; 1223.
Privileged from arrest and exempt from military duty on election day, Const., Art. 2, §§ 2, 3; 1224.
Persons in U. S. military or naval service not entitled to be, Const., Art. 2, § 4; 1224.
Idiots, insane persons, and persons convicted of infamous crimes, not entitled to privilege of, Const., Art. 2, § 5; 1224.

Electors for President and Vice-president.
Election of, §§ 659–669; 169.

Eligibility.
Of representatives and senators in general assembly, Const., Art. 3, §§ 4, 5; 1225.
Senator or representative not eligible to civil office, Const., Art. 3, § 21; 1227.
Person holding office or having public money not eligible as member of general assembly, Const., Art. 3, §§ 22, 23; 1227.
To office of governor or lieutenant-governor, Const., Art. 4, § 6; 1231.

Emancipation.
Of minor, n. § 2240; 622.

Embankments.
Of mill owners, protection of, §§ 1204, 1205; 323.

Embassador.
Acknowledgments taken before, § 1957; 553.

Embezzlement.
Of state property by officer or soldier of militia, 18 G. A., ch. 74, § 26; 265.
By public officer, § 3908; 988.
By officer, clerk, agent, etc., § 3909; 989.
By common carrier, § 3910; 989.
Requirements of indictment for, § 4317, 1073.
Disposition of property taken by, §§ 4648, 4653–4659; 1129.

Eminent Domain.
See TAKING OF PRIVATE PROPERTY.

Employes of Railway Companies.
Liability of company for injuries to, § 1307; 357.

Enacting Clause.
Form of, Const., Art. 3, § 1; 1224.

Encumbrance Book.
To be kept by clerk of court, § 197; 45.
Entrance in, of order as to property of absconding parent, husband, or wife, § 1345; 378.

Encumbrance Book—*Continued.*
Recording notices of actions affecting real property in, § 2629; 706.
Entry of levy of attachment in, § 3022; 806.

Encumbrances.
Upon homestead, how executed, § 1990; 561.
Priority of mechanic's liens over, 16 G. A., ch. 100, § 9; 600.
Upon lands of decedent, payment of, by administrator, § 2423; 651.
Proceedings as to, in partition, §§ 3284–3289; 864.

Encumbrancers.
Protected against mechanic's liens, 16 G. A., ch. 100, § 6; 598.

Endorsee.
Action of, against guarantor, § 2091; 587.

Endorsement.
Of notes and bills, §§ 2082–2084; 584.
Of non-negotiable instrument equivalent to new note, n. § 2084; 585.
In blank, constitutes guaranty, when, § 2089; 586.
In full, by one not a party, makes him endorser, n. § 2089; 586.
On written instrument, signature to, deemed genuine, unless denied under oath, § 2730; 730.
Upon executions, § 3038; 808.
Of renewal of execution by justice, § 3573; 907.

Endorser of Notes and Bills.
Action against, § 2093; 585.
Notice to, of demand, what sufficient, § 2093; 587.
How notified of demand, § 2095; 588.

Engineer of City.
In cities of first class, 16 G. A., ch. 33; 136.

Enlistments.
In militia, 18 G. A., ch. 74, § 10; 261.

Enticing away.
Female child for purposes of prostitution, § 3865; 977.
Child under twelve years of age, § 3866; 977.
Female to house of ill-fame, § 4016; 1011.
Child, or female child for purposes of prostitution, jurisdiction of offense of, § 4162; 1045.
Female, limitation of prosecution for, 4165; 1046.

Entry.
Of judgment by clerk, § 2864; 766.
Of judgment by confession, § 2897; 776.
Of government lands, resulting trust in, n. § 5664; 926.

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Entry Book.
For conveyances of real property, § 1943; 549.
Entry and Detention of Real Property.
Action for, §§ 3611–3624; 913.
Entries.
IN RECORDS OF COURT.
Reading and approval of, § 176; 40.
May be altered, when, § 179; 41.
Deemed part of record, § 3184; 841.
In entry book of conveyances, §§ 1944, 1945; 549.
On docket of justice, § 3515; 900.
By deceased person, when admissible in evidence, § 3657; 923.
Against interest, receivable in evidence, § 3657; 923.
Original, copies of as evidence, §§ 3702, 3705; 933.
False, by public officer, punishment for, § 3968; 1001.
Enumeration.
Of orphans, §§ 1633–1637; 471.
Of rights, not to affect rights retained by people, Const., Art. 1, § 25; 1223.
Of inhabitants, when to be made, Const., Art. 3, § 33; 1230.
Equality before the Law.
Guaranteed by constitution, n. Const., Art. 1, § 1; 1214.
Equalization.
Of assessments, § 829–836; 201.
Equitable Actions.
Method of trial in, § 2742; 733.
Trial term for, § 2745, n. § 2742; 735.
Method of securing trial *de novo* in, § 2742; 733.
See ACTIONS.
Equitable Defenses.
How pleaded and tried, n. § 2655; 713.
Equitable Interest in Real Property.
Lien of judgment upon, n. § 2882; 772,
Equitable Issues.
In actions at law, how tried, n. § 2517; 667.
Equitable Proceedings.
Issues of fact in, how tried, n. § 2740; 732.
Not cognizable before justices, § 3508; 898; and Const., Art. 11, § 1; 1242.
Equitable Relief.
In case of failure to file claim against estate, n. § 2421; 650.
May be granted in action to quiet title, n. § 3274; 861.
Equity.
Jurisdiction of, cannot be abolished by the legislature, n. § 2507; 666.
Error in bringing suit in, not ground of demurrer, n. § 2514; 667.
Equity—*Continued.*
Judgment by default in actions in, § 2874; 770.
Proceedings in, to subject property to satisfaction of judgment, §§ 3150–3153; 830.
Jurisdiction of, to grant new trials in law actions, n. §§ 3155, 3157; 832.
Right of trial by jury does not exist in cases in, n. Const., Art. 1, § 9; 1216.
Jurisdiction of supreme court in, Const., Art. 5, § 4; 1233.
Jurisdiction of district court in, Const., Art. 5 § 6; 1234.
Jurisdiction of justices does not extend to proceedings in, § 3508; 898; and Const., Art. 11, § 1; 1242.
Erasure.
Amendments in pleadings not to be made by, § 2692; 724.
Error.
AS TO KIND OF PROCEEDINGS.
Effect of, how corrected, §§ 2514–2516; 667.
How waived, § 2519; 668.
Not affecting substantial rights to be disregarded, § 2690; 724.
Clerical, amendment of application for continuance on account of, § 2753; 738.
In refusing or granting continuance, may be reviewed, § 2755; 738.
WITHOUT PREJUDICE.
In giving instructions, n. § 2789; 743.
Not to be regarded in supreme court, § 2836; 756.
Effect of, in criminal cases, n. § 4538; 1110.
Not presented to court below is not ground for appeal, § 3168; 836.
Writs of, from justices, §§ 3597–3604; 911.
In ruling upon exceptions to depositions, waived, § 3753; 942.
Errors, Assignment of.
Dismissal of appeal for failure to file, § 3183; 841.
Form of, § 3207; 848.
Not necessary in criminal cases, § 4535, n. § 4538; 1110.
Escape of Prisoner.
Jailor or officer permitting, punished, §§ 3953–3955; 999.
From penitentiary or jail, person aiding, punished, §§ 3956, 3957; 999.
From custody of officer, person aiding, punished, § 3958; 999.
From county jail, punishment for, § 3959; 1000.
From penitentiary, reward for re-arrest, § 4776; 1151.
Escheat.
Provisions as to, §§ 2460–2464; 658.

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Escrow.
How pleaded, § 2718; 728.

Establishment of Highways.
Jurisdiction of; petition; bond, §§ 920–923; 236.
Appointment and duties of commissioner, §§ 924–935; 237.
Notice; action of auditor, §§ 936–939; 238.
Damages claimed; appraisement §§ 940–945; 240.
Action by board of supervisors, §§ 946–958; 240.
Appeals, §§ 959–963; 242.
Re-survey, and platting, §§ 964–968; 244.

Estate, Particular or Superior.
Commencement of, how pleaded, § 2724; 729.

Estates of Deceased Patentees.
Title in, to inure to heirs, 17 G. A., ch. 33; 658.

Estates of Decedents.
JURISDICTION, in relation to, §§ 2312–2321; 634.
WILLS:
Who may make; how executed, §§ 2322–2331; 635.
Executors may be appointed, §§ 2332, 2333; 636.
Posthumous child, share of, §§ 2334, 2335; 637.
Devisee defined; heirs of, to take, §§ 2336, 2337; 637.
Custody and probate of, §§ 2338–2344; 637.
Executors, who may be; vacancy in; qualification of trustees, §§ 2345–2350; 638.
Foreign, effect of probate in another state, §§ 2351, 2352; 639.
Probate conclusive, § 2353; 640.
ADMINISTRATION:
To whom granted, §§ 2354 2356; 640.
Special administrators, powers and duties of, §§ 2357–2361; 641.
Bond of administrator, oath, letters, notice, §§ 2361–2366; 641.
Within what time granted, § 2367; 641.
To foreign executors, §§ 2368, 2369; 642.
SETTLEMENT OF THE ESTATE:
Inventory and appraisement, §§ 2370–2378; 642.
Allowance to widow and children, §§ 2371, 2375, 2377; 643.
Life insurance money, § 2372; 643.
Discovery of assets, §§ 2379–2381; 644.
Compounding with debtors, § 2382; 644.
Interest in mortgage deemed personal assets; satisfaction of, § 2383; 645.
Will sustained by giving security to creditors, § 2384; 645.

Estates of Decedents.
SETTLEMENT OF THE ESTATE.—*Continued.*
Debts collected and claims paid, § 2385; 645.
SALE OF PROPERTY:
Personalty, § 2386; 645.
Realty, proceedings for, §§ 2387–2400; 645.
Bond to prevent sale, §§ 2396–2398; 646.
Limitation of actions to recover property sold, § 2401; 647.
POSSESSION OF REAL PROPERTY:
By executor, for heirs or devisees, §§ 2402–2404; 647.
Taxes to be paid for minor heirs, § 2405; 648.
Executor exempted from giving bond, § 2406; 648.
Business of decedent may be carried on, §§ 2406, 2407; 648.
CLAIMS AGAINST ESTATE.
Presentation and allowance of; proceedings, §§ 2408–2415; 648.
References in matter of accounts of executors, § 2412; 649.
Suits against decedent, § 2416; 649.
Executors interested, not to act, § 2417; 649.
Order of payment, §§ 2418–2428; 650.
Limitation of claims, § 2421; 650.
Payment of legacies, §§ 2429–2434; 652.
Judgment on bond of executor, for failure to make payment, § 2435; 652.
DESCENT AND DISTIBUTION OF PROPERTY.
Personalty, §§ 2436–2439; 652.
Share of husband or wife, amount of, how set off, §§ 2440–2451; 653.
——— not affected by will, § 2452; 656.
Rules of descent, §§ 2453–2458; 657.
Property given by way of advancement, § 2459; 658.
Title of deceased patentee inures to heir or devisee, 17 G. A., ch. 33; 658.
Escheats, §§ 2460–2464; 658.
Inheritance by and from illegitimate children, §§ 2465–2468; 659.
ACCOUNTING AND MISCELLANEOUS PROVISIONS.
Accounts and discharge of executor, §§ 2469–2476; 660.
Execution against executor, § 2477, 660.
Receipts by one executor, § 2478; 661.
Service of notice upon executor, §§ 2479–2481; 661.
Penalty for failure to account, § 2482; 661.
Executor of executor has no authority, § 2483; 661.
Intermeddlers, liability of, § 2484; 661.

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Estates of Decedents.
MISCELLANEOUS PROVISIONS.—*Cont'd*
Costs in action against heirs and devisees, §§ 2485, 2486; 661
Specific performance enforced, §§ 2487, 2488; 661.
Judgment against several executors, § 2489; 662.
Records of clerk, §§ 2490–2493; 662.
List of heirs to be furnished § 2491; 662.
Compensation of executors, §§ 2494, 2495; 662.
Removal of executers, §§ 2496–2503; 663.
Damages for injuries producing death, belong to, § 2526; 670.
Limitation of actions upon claims accruing to, n. § 2529; 671.

Estates of Drunkards, Spendthrifts and Idiots.
Settlement of, when insolvent, § 2278; 628.

Estates of Insane Patients.
Liability of, for charges of support, § 1433; 398.

Estates of Insolvents.
See ASSIGNMENTS FOR BENEFIT OF CREDITORS, §§ 2115–2128; 592.

Estates of Minors.
Jurisdiction as to guardianship of, § 2312; 634.

Estray Book.
Entry in, by justice, of strays, § 1467; 406.
Entry in, by auditor, of the taking up of rafts, logs, or lumber, § 1509; 418.
Entry in, by auditor, of vessels taken up, § 1512; 419.
Entry in, by justice and auditor, of money, notes, etc., found, § 1514; 420.
Entry in, by auditor, as to loss or destruction of property found or taken up, § 1520; 422.
Entry in, by justice, of unclaimed property, § 2178; 607.

Estray Vessels, Rafts, or Lumber.
See LOST GOODS, §§ 1509–1522; 418.

Estrays.
Taking up, advertisement and care of, §§ 1456–1478; 405.
Fees in proceedings relating to, §§ 3821–3823; 963.

Eviction for Waste.
Judgment of, § 3333; 871.

Evidence.
Copy of field-notes and plat of surveyor as, § 374; 87.
Certificate of port warden as, § 528; 134.
Tax deed as, § 897; 225.
Records of tax sale as, § 905; 231.
Possession of liquors presumptive, of illegal intent, § 1542; 428.

Evidence —*Continued.*
What presumptive, of use of building for illegal keeping or sale of liquors, § 1543; 429.
Of land grant titles to be placed on record, 18 G. A., ch. 186; 550.
As to walls in common must be written, § 2030; 572.
As to adverse possession of easement, § 2031; 572.
Of service of notice upon person claiming easement, § 2034; 573.
Receipts of warehousemen or wharfingers receivable as, § 2171; 606.
Of marriage, register deemed, § 2197; 612.
What sufficient in action for divorce, § 2222; 617.
Of regularity of sales of property of minors, § 2264; 626.
Will when probated, receivable as, § 2342; 638.
Conveyance of executor as, § 2400; 647.
Instruments receivable in, without being set out in pleading, n. § 2648; 710.
Amount of, not affected by verification of pleading, § 2679; 719.
Of mitigating circumstances in action for injuries to person, property, or character, § 2682; 719.
What may be introduced under denial, § 2704; 726.
What sufficient to authorize judgment upon default in actions on account, 16 G. A., ch. 36; 727.
Oral, issues of fact triable by, § 2741; 732.
What to go to supreme court, §§ 2741, 2742; 732.
How taken and certified on appeal in equitable actions, § 2742; 733.
Motion for continuance on account of absence of, § 2759; 736.
Affidavit for continuance used as, § 2751; 737.
Upon trial of challenge to jury, §§ 2767, 2773; 739.
Order of introduction of, n. § 2779; 741.
Cannot be excluded from jury by instructions, n. § 2789; 743.
What necessary to appear of record to enable supreme court to pass upon instructions, n. § 2789; 743.
Introduction of, after testimony is closed, n. § 2799; 747.
Method of certifying by referee, n. § 2821; 751.
Effect of general objection to, n. § 2832; 754.
Newly discovered; when ground for new trial, § 2837; 756.
Admission or rejection of, in trials to the court, n. § 2863; 766.
Answer of garnishee as, § 2987; 793.
Sheriff's deed receivable as, § 3126; 826.

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Evidence.—*Continued.*
Of title, not admissible unless referred to in abstract, §§ 3251, 3279; 858.
Of proceedings in foreclosure of chattel mortgage, how preserved, §§ 3314, 3315; 867.
In *habeas corpus* proceedings, § 3482; 894.
In proceedings for contempt, § 3497; 896.
GENERAL PRINCIPLES:
Who competent as witnesses; defendant may testify on his own behalf, § 3636; 917.
Religious opinions not to render witness incompetent, Const., Art. 1, § 4; 1215.
Facts shown to lessen credibility, § 3637; 918.
Interest shall not exclude witness, § 3638; 918.
As to personal transactions where one party is deceased, §§ 3639, 3640; 918.
Husband or wife as witness against the other, § 3641; 919.
Privileged communications, §§ 3642–3644; 920.
Judge competent witness, § 3645; 920.
Civil or criminal liability as excuse for refusing to answer, §§ 3646, 3647; 921.
Previous conviction, § 3648; 921.
Moral character as affecting credibility, § 3649, 921.
Part of act, conversation or writing, § 3650; 921.
Written portion of instrument controls printed, § 3651; 922.
Terms of agreement taken as understood, § 3652; 922.
Historical works; books of science or art, § 3653; 922.
Subscribing witness, § 3654; 922.
Proof of handwriting, § 3655; 922.
——— by experts, unsatisfactory, n. § 3655; 922.
Proof of private writing by acknowledgment, § 3656; 923.
Entries and writings of a person deceased, § 3657; 923.
BOOKS OF ACCOUNT, § 3658; 923.
INSTRUMENTS AFFECTING REAL PROPERTY, § 3659; 924.
United States and state patents, 16 G. A., ch. 10; 925.
STATUTE OF FRAUDS:
Evidence of certain contracts must be in writing, §§ 3663–3665; 925.
Contract may be enforced unless denied, § 3666; 928.
Opposite party as witness to prove contract, § 3667; 928.
Protest of notary public as proof of dishonor and notice, § 3668; 928.
Presumption as to regularity of proceedings, § 3669; 929.

Evidence.—*Continued.*
Records, papers, or depositions filed in district or circuit court, used in the other, § 3670; 929.
TESTIMONY, HOW PROCURED:
Subpœnas for witnesses, §§ 3671, 3672; 929.
Subpœnas to bring books and papers, § 3672; 929.
How far witnesses may be compelled to attend, § 3673; 929.
Fees in advance, § 3674; 929.
Failing to obey subpœna, §§ 3675, 3676; 930.
Service of subpœna on witness attempting to conceal himself, § 3677; 930.
Of prisoner, §§ 3678, 3679; 930.
Subpœnas by person authorized to take depositions to be used in other states, how issued and served, §§ 3680–3682; 930.
Upon failure of party subpœned, to appear as witness, opposite party may have continuance or pleading taken as true, §§ 3683, 3684; 930.
Production of books and papers by order, §§ 3685–3688; 931.
AFFIDAVITS:
How procured, §§ 3689–3695; 931.
Presumption of genuineness of signature of officer to, § 3696; 932.
To prove and perpetuate publication or posting of notice, etc., §§ 3697–3700; 932.
Field-notes or plats, § 3701; 933.
Certified copies of records, entries or papers, § 3702, 3706; 933.
Book of original entries, §§ 3703–3705; 933.
Copies of maps, etc., from surveyor-general's office, § 3707; 933.
Certificate as to search for paper, § 3708; 933.
Duplicate receipt or certificate of receiver of land office, § 3709; 933.
Certificate of entry, § 3710; 934.
Signature of officer presumed genuine, § 3696; 932; and § 3711; 934.
JUDICIAL RECORDS, how proved, §§ 3712–3715; 934.
EXECUTIVE AND LEGISLATIVE RECORDS:
Acts of executive, and proceedings of legislature, §§ 3716, 3717; 935.
Statutes, § 3718; 935.
Written law; unwritten law, § 3719; 935.
Ordinances or proceedings of municipal corporation, § 3720; 936.
DEPOSITIONS:
Upon notice or commission, §§ 3721–3729; 936.
Service of notice for, §§ 3730–3733; 938.
Manner of taking, §§ 3734–3744; 938.
For perpetuating testimony, §§ 3745–3750; 940.

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Evidence.
DEPOSITIONS —*Continued.*
Notice of filing; exceptions; motions to suppress, § 3751; 941.
Exceptions, when to be decided, § 3752; 942.
Errors in rulings upon objections must be excepted to, § 3753; 942.
Costs, how paid and taxed, § 3754; 942.
Notes of short-hand reporter receivable as, § 3777; 947.
IN CRIMINAL CASES:
What sufficient to warrant conviction for treason, § 3847; 969, and Const., Art. 1, § 16; 1220.
Of existence of corporation in prosecution for forgery or counterfeiting, § 3934; 995.
Rules of, in civil cases, applicable, § 4426; 1092, and § 4556; 1112.
What necessary, to conviction for conspiracy, § 4425; 1092.
Confession alone not sufficient to warrant conviction, § 4427; 1092.
In case of prosecution of railway for obstructing highway, § 4557; 1113.
In case of rape, § 4558; 1113.
Testimony of accomplice not sufficient to convict, § 4559; 1113.
What sufficient in prosecution for rape or seduction, § 4560; 1113.
Subpœnas, how issued and served, §§ 4561–4570; 1114.
Depositions and perpetuating testimony, §§ 4571, 4572; 1114.

Evidences of Debt.
Circulating as money not barred by statute of limitations, § 2538; 677.

Examination.
Of insurance company by auditor, as to capital, investments, etc., § 1131; 285.
——— as to business, condition, etc., § 1149; 293.
——— expenses of, § 1156; 296.
Of life insurance companies, by auditor, § 1172; 306.
Of person suspected to have property of estate, § 2379–2381; 644.
Of administrator as to accounts, § 2470; 660.
Of witnesses, to be by one counsel only, § 2779; 741.
Of defendant in attachment, as to property, § 2968; 793.
Of garnishee, §§ 2980, 2982, n. § 2979; 796.
Of debtor, before judge or referee, § 3137, 3138; 828.
Of defendant in habeas corpus, § 3472; 893.

Exchange.
On foreign bills not usury, n. § 2079; 580.

Exclusive Privileges.
Not to be granted by general assembly, Const., Art. 8, § 12; 1238.

Exhibits.
To depositions, § 3736; 939.

Exceptions.
To interrogatories attached to pleading, § 2695; 725.
To general law, how pleaded, § 2711; 726.
To giving or refusal of instructions, §§ 2787, 2789; 742.
To instructions, what sufficient, n. § 2789; 743.
To additional instructions given at request of jury, § 2801; 748.
To report of referee, § 2821; 751.
Taken before referee, § 2823; 752.
HOW AND WHEN TAKEN, form of, etc., §§ 2831–2836; 753.
Bill of, to be signed by judge or bystanders, § 2835; 755.
Not regarded unless ruling is material and prejudicial, § 2836; 756.
To depositions, §§ 3751–3753; 941.
IN CRIMINAL CASES, §§ 4479–4486; 1101.

Execution of Instruments.
Of tax deed, notice of; form, etc., §§ 894–896; 222.
How acknowledged, §§ 1955–1965; 552.
Acknowledgments legalized, §§ 1966–1968; 555.
Of conveyances on behalf of insane husband or wife, §§ 2218, 2219; 616.
Of will, probate conclusive as to, § 2353; 640.
Effect of denial of; proof under, n. § 2730; 730.
Testimony of subscribing witnesses not conclusive as to, § 3654; 922.

Execution of the Laws.
Governor to take care of, Const., Art. 4, § 9; 1231.

Executions.
Upon judgment of court of contested elections, §§ 712, 727; 177.
Against corporations, how levied, §§ 1082–1084; 274.
Against occupying claimants, §§ 1976, 1986; 558.
Against homestead:
Sale under, § 1992; 562.
Officer having, to make plat, § 1998; 565.
Against executors, on judgment for costs, § 2477; 660.
——— when more than one, § 2489; 662.
Interpleader by officer holding property under, in replevin suit, § 2573; 686.
Special, must be asked for, § 2852; 746.
Upon judgment by agreement, § 2861; 764.
Upon judgments which have ceased to be liens, n. § 2882; 772.
Upon judgments by confession, § 2897; 776.

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Executions.—*Continued.*
Notice of, not required, n. § 3025; 806.
Cannot issue upon transcript of judgment from another county, n. § 3031; 807.
GENERAL PROVISIONS:
Form of, how and when to issue, how executed, §§ 3025–3038; 806.
Sale after expiration of, valid, n. § 3037; 808.
Against principal and surety, §§ 3039–3042; 808.
Levy of, §§ 3043–3050; 809.
Garnishment under, §§ 3051, 3052; 811.
Against partnership property, §§ 3053, 3054; 811.
Indemnifying bond, §§ 3055-3060; 812.
Stay of, §§ 3061–3071; 813.
Exemptions, §§ 3072–3078; 815.
Sale under, §§ 3079–3090; 817.
Money, notes, etc., levied on under, may be appropriated without sale, § 3091; 820.
Against real property of decedent, §§ 3092–3096; 821.
Mutual, may be set off, § 3097; 821.
Redemption from sale under, §§ 3098, 3099, 3101–3123; 821.
Appraisement of personal property, § 3100; 821.
Stay of, waives right of redemption, § 3102; 822.
Deed upon sale under, §§ 3124–3126; 826.
Meaning of terms, provisions applicable in justices' courts, §§ 3128, 3129; 827.
In case of death of plaintiff or defendant, §§ 3130–3134; 827.
PROCEEDINGS AUXILIARY TO, §§ 3135–3149; 828.
Equitable proceedings to subject property to, §§ 3150–3153; 830.
Countermanded, on filing of appeal bond, §§ 3191–3193; 844.
From supreme court, issuance and return of, § 3215; 849.
Recovery of property erroneously seized under, n. § 3225; 852.
On judgment in replevin, §§ 3240, 3241; 856.
In action to recover real property, §§ 3265, 3266; 860.
On judgment in foreclosure, §§ 3321, 3322; 868.
Purchaser under, may recover for waste or trespass, §§ 3339, 3341; 872.
On judgment against boat or raft, §§ 3438–3441; 889.
IN JUSTICES' COURTS:
Recalled after setting aside default § 3546; 905.
Setting off of, §§ 3561, 3562; 906.
Cannot issue after transcript is taken to circuit court, § 3568; 907.

Executions.
IN JUSTICES' COURTS—*Continued.*
Issuance, form, date, when returnable, §§ 3569–3571; 907.
Renewal of, §§ 3572–3574; 907.
Suspended by appeal, § 3582; 909.
May be issued upon judgment of predecessor, § 3627; 915.
May be issued by successor, § 3634; 916.
OF JUDGMENT IN CRIMINAL CASES:
Of sentence of death, time and method of, 17 G. A., ch. 165; 972.
By commitment, §§ 4512–4517; 1107.
For a fine, § 4518; 1108.
For abatement or removal of a nuisance, etc., § 4519; 1108.
After affirmance by supreme court, §§ 4541–4545; 1111.
Upon judgment for fine may be stayed, § 4610; 1123.
Of judgments upon information in justices' courts, § 4693; 1135.

Executive Council.
Who compose, § 111; 24.
Duties of, as to census, §§ 112–118; 24.
Journal of acts of, § 119; 25.
To have custody of state property, and furnish fuel, lights, stationery, etc., for state offices, § 120; 25.
To award contracts for stationery, § 121; 26.
To furnish attorney-general with office, § 153; 34.
To award contracts for publication of supreme court reports, 18 G. A., ch. 60; 35.
May levy tax to pay county bonds, § 293; 65.
May make additional levy to pay funding bonds, 17 G. A., ch. 58, § 5; 67.
To constitute state board of canvassers, § 651; 168.
To constitute state board of equalization, § 834; 204.
To assess and tax railway property, §§ 1317–1323; 360.
To classify railways, 15 G. A., ch. 68; 363.
To approve bond of treasurer of Reform School, § 1647; 476.
——— of treasurer of College for the Blind, § 1673; 481.
May authorize sale of school land below minimum price, § 1849; 525.
Duties of, as to property bid in for the state, §§ 1913–1916; 540.

Executive Department.
Of state government, Const., Art. 4; 1231.

Executive Officers.
To give information to governor, Const., Art. 4, § 8; 1231.
Election, terms and duties of, Const., Art. 4, § 22; 1233.

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Executor.
Term includes administrator, § 45, ¶ 21; 10.
To list property of estate, § 803; 193.
Of tenant for life, may recover portion of rent accrued, § 2011; 568.
Of deceased surety may require principal to sue, § 2111; 592.
Jurisdiction for appointment of, § 2312; 634.
Clerk may appoint in vacation, § 2315; 634.
Appointed to carry out will, §§ 2332, 2333; 636.
To be furnished with the will, § 2344; 638.
Who may be; refusal to act; vacancy; substitution, § 2345–2349; 638.
Resignation of, n. § 2347; 638.
Foreign, may be authorized to sell real property, § 2352; 639.
Special, appointment and powers of, §§ 2357–2361; 641.
Bond and oath of, §§ 2362–2364; 641.
Letters to, § 2365; 641.
Notice by, of appointment, § 2366; 641.
Foreign, may be appointed for this state, § 2368; 642.
Shall file inventory, § 2370; 642.
Not released from his own debt to the estate, n. § 2370; 642.
May compound with debtor, § 2382; 644.
Shall enter satisfaction of mortgage, § 2383; 645.
May be authorized to sell personal property, § 2386; 645.
Application by, for leave to sell real property; notice, § 2388, 2389; 645.
Sale of real property by; conveyance; approval, §§ 2390–2400; 646.
May take possession of and manage real property in case of absence or minority of heir or devisee, §§ 2402–2405; 647.
May be exempted from giving bond, § 2406; 648.
May be authorized to prosecute the business of the decedent, §§ 2406, 2407; 648.
Allowance of claims by, §§ 2408–2414; 648.
References in matter of accounts of, § 2412; 649.
May be substituted as defendant in actions against decedent, § 2416; 649.
Not to serve when interested; temporary executor appointed, § 2417; 649.
Order of payment of claims by, §§ 2418–2428; 650.
Payment of specific legacies by, §§ 2429–2434; 651.
Summary proceedings against, upon bond, § 2435; 652.
Payment of distributive shares by, §§ 2437–2439; 653.

Executor.—*Continued.*
Accounting and discharge of, §§ 2469–2476; 660.
Judgment against, for costs, § 2477; 660.
Receipts of money by, § 2478; 661.
Orders upon, how served, §§ 2479–2481; 661.
Penalty for failure to account, § 2482; 661.
Cannot act where decedent was merely executor or trustee, § 2483; 661.
Liability of person acting as, without authority, § 2484; 661.
Specific performance enforced against, §§ 2487, 2488; 661.
Considered as one person; judgment and execution against, § 2489; 662.
May be required to furnish list of heirs, § 2491; 662.
Compensation of, §§ 2494, 2495; 662.
Removal of, §§ 2496–2500; 663.
Shall deliver over property; commitment of, for failure, §§ 2501, 2502; 663.
Authority of, ceases upon revocation of letters, § 2503; 663.
May sue in his own name, § 2544; 679.
Not required to verify pleadings, § 2675; 718.
Capacity of, how pleaded or denied, §§ 2716, 2717; 728.
May be garnished, § 2976; 795.
May bring action to quiet title, n. § 3273; 861.
May bring action of forcible entry and detainer, n. § 3613; 914.
Competency of witnesses in action against, § 3639; 918.
Promise of, to be individually liable, must be in writing, § 3664; 926.

Exemplary Damages.
May be recovered for causing intoxication, § 1557; 437.
In action on attachment bond, § 2961; 790.

Exemption from Jury Service.
Who entitled to, § 228; 51.
Members of militia entitled to, 18 G. A., ch. 74, § 19; 264.
Firemen entitled to, § 1560; 441.
Not cause of challenge, § 2777; 740, and § 4406; 1088.

Exemption from Military Duty.
Who entitled to, 18 G. A., ch. 74, § 1; 260; and Const., Art. 6, §§ 1, 2; 1235.
Firemen entitled to, § 1560; 441.

Exemption from Taxation.
What property entitled to, §§ 797–800; 189.

Exemption from Execution Sale.
Of homestead, §§ 1988, 2008; 560.
Of mechanic's lien, 16 G. A., ch. 100, § 13; 602.
Of property set apart to wife, § 2371; 643

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Exemption from Execution Sale — *Continued.*
Of damages recovered for injury producing death, § 2526; 670.
Of public property, § 3048; 810.
To head of a family; may embrace what, § 3072; 815.
Waiver of, n. § 3072; 815.
Family does not include strangers or boarders, § 3073; 817.
Earnings of debtor and his family, § 3074; 817.
To unmarried persons and non-residents, § 3075; 817.
To debtor who has started to leave the state, § 3076; 817.
Not allowed against executor for purchase money, § 3077; 817.
To family of absconding debtor, § 3078; 817.
Of money judgment in replevin for property entitled to exemption, § 3244; 857.

Expenditure.
Illegal, contract for, by public officer, punished, § 3976; 1003.

Expenses.
Of governor, in executing laws, how paid, § 60; 13.
Of supreme court, auditing of, § 138; 32.
Of militia, allowance for, 18 G. A., ch. 74, §§ 40, 41; 267.
Of treatment of patient in Hospital for the Insane, §§ 1417–1421; 395.
Of family, etc., husband or wife liable for, § 2214; 615.
Of executors of decedents, allowance of, § 2495; 663.
From injury or death of child, who may sue for, § 2556; 683.
Of special term of court for trial of cause transferred by change of venue, § 2598; 694.
Of keeping convicts, how paid, § 4735; 1143.

Experts.
Testimony of, as to medical science and standard authorities, n. § 3653; 922.
——— as to handwriting, § 3655; 922.
——— unsatisfactory in character, n. § 3655; 922.
Additional compensation of, as witnesses, § 3814; 961.

Expiration of Charter.
Of corporation, § 1080; 273.

Exposing Child.
Punishment for, § 3870; 978.

Ex-post-facto Laws.
Shall not be passed, Const , Art. 1, § 21; 1222.

Express Companies.
Taxation of, § 811; 195.
Sale of unclaimed property by, § 2177–2180; 607.

Express Companies.—*Continued.*
Place of bringing action against, § 2582; 689.

Expulsion of Members.
By general assembly, how effected, Const., Art. 3, § 9; 1226.

Extension of City Limits.
By city council, 18 G. A., ch. 56; 99.
By vote of corporation, 16 G. A., ch. 47; 101.
Constitutionality of, n. Const., Art. 1, § 18; 1220.

Extension of Time.
Constitutes new loan, within the usury law, n. § 2079; 580.

Extent of Homestead.
Limitation as to, §§ 1995–1997; 564.
How questioned, §§ 2002–2006; 566.

Extortion.
Threats for purpose of, punished, § 3871; 979.
By receiving illegal fees, punished, § 3950; 998.

Extra Session of General Assembly.
Compensation of members at, § 12; 2; and Const., Art. 3, § 25; 1227.
Laws passed at, when to take effect, Const., Art 3, § 26; 1227.
May be called by governor, Const., Art. 4, § 11; 1231.

Facts.
Finding of, see FINDING OF FACTS.

Fairs of Agricultural Societies.
Regulations as to gambling, horse-racing, and sale of liquors at; permits, §§ 1114–1116; 281.

False Pretenses.
Cheating by, punished, § 4073; 1028.

False Personation.
Obtaining money by, punished, § 3906; 988.

False Representations.
Action for, founded on contract, n. § 2955; 789.

False Statements.
By insurance companies, prohibited, 17 G. A., chap. 111; 298.
To obtain liquors, penalty for, § 1559; 439.
In certificate of limited partnership, § 2154; 604.

False Weights and Measures.
Use of, punished, § 4076; 1029.

Falsely Assuming to be an Officer.
Punishment for, §§ 3962, 3963; 1000.

Family.
Homestead of, exempt, § 1988; 560.
Sale of property for maintenance of, upon abandonment by husband or wife, § 2207; 614.

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Family.—*Continued.*
Liability of husband or wife for expenses of, § 2214; 615.
Service of notice by leaving copy with member of, § 2603; 697.
Property exempt to head of, § 3072; 815.
Who is head of, as to exemptions, n. § 3072; 815.

Fast Driving.
City has power to prevent and punish, § 456; 106.
Over bridge, penalty for, § 1002; 254.
Punishment for, § 4071; 1027.

Father.
May be compelled to support poor person, § 1330; 377.
Of illegitimate child, question as to who is, may be determined in proceeding to compel support, § 1332; 377.
Is entitled to control of minor, n. § 2240; 622.
Has no authority to sell real estate of minor, n. § 2257; 624.
Intemperate or vicious, guardianship of children of, § 2301; 630.
Of illegitimate children, inheritance by and from, §§ 2466, 2468; 659.
May bring action for injury or death of child, § 2556; 683.
Original notice to be served on, in action against minor, § 2614; 700.

Federal Courts.
Lien and satisfaction of judgments in, 17 G. A., ch. 129; 773.
Proceedings by mandamus in, n. § 3373; 876.
Jurisdiction of, over maritime torts, n. § 3432; 888.

Fees.
Allowed commissioners in other states, § 270; 58.
To be paid by insurance companies, § 1153; 295.
To be paid by life insurance companies, § 1183; 309.
For copies of records, etc., taxed as costs, § 2936; 784.
Of officers, etc., taxation of, as costs, § 2942; 784.
Of garnishees, § 2983; 797.
——— effect of failure to tender, n. § 2983; 797.
Of witness, to be tendered in advance, §§ 3674, 3676; 929.
Of district attorney, taxed against defendant, § 3776; 947.
Of fence-viewers, how paid, § 3808; 959.
Of witnesses for defense in criminal cases, how paid, § 3818; 962.
See, also, COMPENSATION.

Fees of Officers.
To be paid when services are rendered, § 3857; 966.
Contract in relation to, void, n. § 3840; 967.

Fees of Officers.—*Continued.*
Payable in advance, § 3842; 967.
Payable by state or county, to be paid when account rendered, § 3843; 967.
Extorting or receiving illegal, punished, § 3950; 998.
Failure to pay over, false entries as to, appropriation of, punished, §§ 3970–3972; 1001.
Of officers to be reported to supervisors, § 3973; 1002.
See, also, COMPENSATION.

Fee-bill.
To have force of execution, § 3842; 967.

Fee-book.
To be kept by clerk of court, § 197; 44.

Fee-simple Deed.
Form for, § 1970; 556.

Feeble-minded Children.
Asylum for, 16 G. A., ch. 152; 473.

Felony.
Conviction of, cause for divorce, § 2223; 617.
Witness may be asked as to previous conviction of, § 3648; 921.
Assault with intent to commit, punished, § 3876; 980.
Compounding of, punished, §§ 3951, 3952; 998.
Defined, §§ 4103, 4104; 1037.
Presence of defendant necessary on arraignment for, § 4328; 1075.
Defendant must be present on trial for, § 4351; 1079.
Bail upon indictment before conviction, in case of, § 4584; 1117
Prosecution for, not barred by dismissal of previous action, § 4619; 1125.
Only triable upon indictment, Const., Art. 1, § 11; 1218.

Female.
Time of majority of, § 2237; 621.
Unmarried, may sue for her own seduction, § 2555; 683.
Rape upon, seducing, etc., punished, §§ 3861–3868; 975.
Enticing to house of ill fame, punished, § 4016; 1011.

Fence Viewers.
Township trustees deemed, § 393; 90.
To decide controversy as to fences, §§ 1490–1503; 414.
Compensation of, § 3808; 959.

Fences.
To be constructed by railway companies, § 1289; 350.
Partition, when defective; liability for, § 1449; 402.
——— duty to maintain, how enforced, §§ 1489–1506; 414.
What legal, § 1507; 417.
Where stock is restrained from running at large, § 1508; 417.
Division hedges, 16 G. A., ch. 106; 418.

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Fences.—*Continued.*
Maliciously breaking down or injuring, punished, § 3981; 1004.
Ferries.
License for, from board of supervisors, § 303, ¶ 8; 70.
City council may license, § 529; 135.
Franchises of, how taxed, § 801; 192.
License for; rates, §§ 1011–1018; 255.
Ferries and Toll-bridges.
Joint provisions as to, §§ 1019–1030; 257.
Fictions.
In pleading, abolished, § 2644; 708.
Field-notes.
Of county surveyor, recording, etc., of, § 370; 86.
Of highway, to be recorded, § 949; 241.
——— proceedings for re-survey when lost, §§ 964–966; 244.
Receivable as evidence, § 3701; 933.
Fees for copy of, § 3800; 957.
Fighting.
Constituting affray, punishment for, § 4065; 1026.
Figures.
Taken as part of the language, § 45, ¶ 22; 10.
Filing of Pleading.
Time for, § 2635–2643; 707.
Entry of, on appearance docket, § 2643; 708.
Finder of Lost Goods.
Duties of, §§ 1509–1522; 418.
Finding and Appropriating.
By person knowing the owner, punishment for, § 3907; 988.
Finding and Presentment of Indictment.
Concurrence of twelve grand-jurors necessary; endorsement by foreman, § 4291; 1066.
Name of private prosecutor to be endorsed, to whom costs may be taxed, § 4292; 1066.
Names of witnesses to be endorsed and minutes of evidence returned, § 4293; 1066.
Minutes may be used before another grand jury, 18 G. A., ch. 130, § 5; 1067.
Presentation and filing, § 4294; 1067.
Finding of Facts.
By court, when to be made, effect of, § 2743; 734.
By jury, §§ 2807–2809; 749.
By referee, §§ 2821, 2822; 751.
As to matters in abatement, § 2851; 764.
Not necessary to secure review on appeal, § 3170; 837.
Judgment in supreme court upon, n. § 3194; 845.
Fines.
For contempt of general assembly, §§ 14, 15; 3.
For violation of city ordinances, §§ 482–486; 120.
For absence or misconduct of members of Iowa National Guards, 18 G. A., ch. 74, § 31; 265.
Collected from school officers; disposition of, § 1786; 506.
For using incorrect weights and measures, § 2064; 578.
Against weigh-master of public scales, § 2068; 578.
For fraud of partner in general partnership, § 2165; 605.
Action for recovery of, where to be brought, § 2579; 687.
To enforce mandates of supreme court, § 3200; 847.
Disposition of; action for, §§ 3370–3372; 876.
For eluding writ of habeas corpus, § 3467; 892.
For contempt, § 3493; 896.
Failure to pay over; false entries as to; appropriation of; punishment, §§ 3970–3972; 1001.
Collected, to be reported to supervisors, § 3973; 1002.
Judgments for, made liens, § 4609; 1123.
Stay of execution upon judgment for, § 4610; 1123.
Excessive, shall not be imposed, Const., Art. 1, § 17; 1220.
Remission of, by governor, Const., Art. 4, § 16; 1232.
See, also, PENALTY.
Fire.
City may make regulations against, § 457; 106.
Destruction of property, to stop, 15 G. A., ch. 36; 145.
Caused by operation of railway, liability for damages from, 1289; 350.
Giving false alarm of, punished, § 1566; 442.
Stealing during progress of, punished, § 3905; 988.
Fire-arms.
Discharge of, near stock, punished, § 3900; 985.
Fire Companies.
City council may establish and organize § 525; 133.
Members of, exempt from military duty, poll tax, and jury service, §§ 1560–1563; 441.
Destruction or removal of apparatus of, punished, §§ 1564, 1565; 442.
Fire Engines and Apparatus.
Destruction or removal of, punished, §§ 1564, 1565; 442.
Malicious injury to, punished, § 3978; 1005.

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Fire Insurance Companies.
See, INSURANCE COMPANIES.
Fire Limits.
May be established by city, § 457; 106.
Firemen.
Exempt from military duty, poll tax, and jury service, §§ 1560–1563; 441.
Firm Name.
Of limited partnership, § 2159; 605.
Fiscal Term.
Of state, when to end, 16 G. A., ch. 159, § 2; 28.
Fish.
Belonging to owners of premises, penalty and damages for catching, 16 G. A., ch. 70. § 4; 409.
Catching certain fish at certain times unlawful; penalty, 16 G. A., ch. 70, §§ 6, 7; 410.
Obstructing free passage of, punished, 17 G. A., ch. 80, §§ 5, 6; 411.
Appointment and duties of fish commissioner, 17 G. A., ch. 80, §§ 1–4; 410.
——— assistant fish commissioner, 18 G. A., ch. 156; 411.
Construction of fish-ways, 17 G. A., ch. 188; 18 G. A., ch. 123; 411.
Catching of, upon premises of another, except with hook and line, punished, § 4054; 1023.
Obstructing passage of, or catching with net, punished, 15 G. A., ch. 50; 1023.
Fish Commissioner.
Report of, 16 G. A., ch. 159, § 1; 28.
Appointment, duty, salary of, 17 G. A., ch. 80; 410.
Fish-ways.
Construction of, 17 G. A., ch. 188; 18 G. A., ch. 123; 411.
Fixtures.
Chattel mortgage upon, n. § 1923; 542.
Mechanic's lien for, 16 G. A., ch. 100, § 3; 596.
Flax Seed.
Weight of, per bushel, § 2049; 575.
Food and Lodging.
For juries, § 2802; 748.
Foot.
Length and subdivision of, § 2039; 574.
Foot-way.
Right of, not acquired by adverse use, § 2033; 573.
Forcible Entry and Detainer.
Action of, §§ 3611–3624; 913.
Appeal or writ of error in, suspends execution, § 3623½; 915.
Foreclosure.
OF MORTGAGE:
To be by equitable proceedings, § 2509; 666.
Parties to proceeding for, n. § 2547; 681.
Foreclosure.
OF MORTGAGE.—*Continued.*
Place of bringing action for, § 2578; 687.
Service by publication in action for § 2618; 701.
Action for, is notice to the world, n. § 2628; 705.
Trial term in actions for, § 2745; n. § 2742; 735.
Reference in actions for, n. § 2816; 751.
Redemption from sales under, n. § 3102; 822.
Upon personal property, §§ 3307–3318; 867.
Upon real property, §§ 3319–3330; 868.
OF DEEDS OF TRUST, § 3318, 3319; 868.
OF TITLE BOND, §§ 3329, 3330; 870.
OF VENDOR'S LIEN, §§ 3329, 3330; 870.
Foreign Administrator.
Cannot sue without taking out letters, n. § 2368; 642.
Foreign Insurance Companies.
Requirements of, § 1144; 291.
Foreign Language.
Instrument in, how set out in pleading, n. § 2648; 710.
Foreign Railway Corporations.
Powers granted to, 18 G. A., ch. 128; 353.
Foreigners.
Property rights of, §§ 1908, 1909; 539; and Const., Art. 1. § 22; 1223.
Foreman of Grand Jury.
Appointment and oath of, §§ 4267, 4268; 1062.
Has power to administer oaths, § 4274; 1063.
To endorse indictment and present to court, §§ 4291, 4294; 1066.
Foreman of Jury.
To be chosen, and sign verdict, § 2803; 748.
Foreman of Newspaper.
May make proof of publication of notice, § 2620; 702.
Forfeiture.
Of tax voted in aid of railways. 16 G. A., ch. 123, § 7; 372; and 18 G. A., ch. 192; 373.
In case of usury, § 2080; 582.
Action for recovery of, where brought, § 2579; 687.
For waste, judgment of, § 3333; 871.
Of office, action in case of, § 3345; 872.
Of rights of corporation or letters patent, action to enforce, § 3345; 872.
Disposition of; actions for, §§ 3370–3372; 876.
For refusal to deliver copy of process, § 3468; 892.
For failure to obey writ of habeas corpus, §§ 3476, 3489; 893.

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Forfeiture.—*Continued.*
Of bail or deposit money, §§ 4596–4600; 1120.
Remission of, by governor, Const., Art. 4, § 16; 1232.
Forgery.
Counterfeiting brand of inspector of lumber, deemed, § 2073; 579.
Defined; punishment for, §§ 3917–3935; 991.
Indictment for, what sufficient, § 4313; 1073.
Form.
For tax deed, § 896; 224.
For deed or mortgage, § 1970; 556.
Of pleading, to be corrected on motion, § 2706; 726.
Of executions, §§ 3033–3036; 807.
Forms of Actions and Pleadings.
Abolished, § 2644; 708.
Former Conviction or Acquittal.
In one county having jurisdiction, bars prosecution in another, § 4164; 1046.
Plea of, how entered, §§ 4359, 4360; 1081.
Bars second prosecution, when, §§ 4364, 4365; 1081.
Order of trial upon plea of, § 4422; 1091.
Fourth of July.
Regarded as holiday as to negotiable paper, § 2094; 587.
Depositions cannot be required to be taken upon, § 3722; 936.
Franchises.
Of toll-bridge, how procured, etc., §§ 1003–1010; 254.
For ferry, how obtained, conditions, §§ 1011–1018; 255.
For ferry and toll-bridge, sale of, §§ 1027, 1028; 257.
Of corporations, forfeited for fraud, § 1074; 272.
——— forfeited for non-user, § 1079; 273.
How levied on and sold, § 1086; 274.
Person unlawfully holding, action against, § 3345; 872.
Fraud.
Of officer at tax sale, n. § 885; 218.
——— will defeat tax deed, § 897; 225.
In management of corporation, consequences of, §§ 1071–1075; 272.
Of partner in limited partnership, liability for; punishment, § 2165; 605.
In obtaining divorce, ground for setting aside decree, n. § 2229; 619.
Limitation of actions on ground of, § 2529; 671.
When action on ground of accrues, § 2530; 674.
Must be specially pleaded as a defense, n. § 2718; 728.
Answer of debtor in summary proceeding not to be used in prosecution for, § 3138; 828.
Fraud.—*Continued.*
Ground for vacating judgment, § 3154; 831.
Gross fraud or cheat, punished, § 4081; 1030.
Upon hotel keepers, punished, 18 G. A., ch. 76; 1033.
Imprisonment for debt, not allowed except in case of, Const, Art. 1, § 19; 1222.
Fraudulent Conversion.
Requisites of indictment for, § 4317; 1073.
Fraudulent Conveyance.
Making of, punished, § 4074; 1028.
Freedom of Speech.
In general assembly, § 11; 2.
Guaranteed, Const., Art. 1, § 7; 1216.
Frivolous Answer.
What held to be, n. § 2655; 713.
Fruit.
Destroying and stealing of, punished, §§ 3897, 3898; 984.
Fugitive from Justice.
Agents to apprehend; expenses; compensation, §§ 4171–4173; 1047.
Requisition and warrant for, §§ 4174, 4175; 1047.
Proceeding before magistrate, §§ 4176–4182; 1048.
Expenses of agent, how paid, §§ 4183, 4184; 1049.
Funds.
Of insurance companies, how invested, § 1130; 285.
Of life insurance companies, how invested, §§ 1179–1181; 308.
Of State University, how invested, § 1599; 463.
In court, how attached, § 2977; 796.
Funding of Indebtedness.
By counties, §§ 289, 290; 63.
By counties, cities and towns, 17 G. A., ch. 58; 65.
By cities and towns, 16 G. A., ch. 157; 126.
By school districts or district townships, 18 G. A., ch's 51, 132; 518.
Funeral Expenses.
Executors to pay, § 2418; 650.
Gallon.
Standard, § 2044; 574.
Gambling.
Not permitted at fairs of agricultural societies, § 1114; 281.
Keeping house for purpose of, or engaging in, punished, §§ 4026–4028; 1014.
Contracts in furtherance of, void, § 4029; 1015.
Gambling House.
Deemed nuisance, § 4091; 1034.

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Game.
Protection of, 17 G. A., ch. 156; 1020.
Garden.
Trespassing upon, punished, § 3984; 1005.
Garnishee.
Pleading controverting answer of, need not be verified, § 2675; 718.
Notice to, §§ 2975, 2979, 2981; 794.
Proceedings revived by or against heirs or representatives of, § 2978; 796.
Questions propounded to, §§ 2980, 2932; 796.
Fees and mileage of, § 2983; 797.
Failure of, to appear, § 2984, 2985; 797.
May deliver to sheriff money or property due defendant, § 2986; 797
Issue joined upon answer of, § 2987; 798.
Judgment against, § 2988–2992; 798.
Appeal in proceedings against, § 2993; 800.
Distance within which may be summoned, n. § 3673; 929.
Garnishment.
Of mortgagee of personal property, n. § 1927; 544.
Priority of mechanic's lien over, 16 G. A., ch. 100, § 9; 600.
Pleading controverting answer, need not be verified, § 2675; 718.
As mode of attachment, § 2967; 792.
Attachment by, creates no lien, n. § 2967; 792.
How effected: notice to prinicipal defendant before judgment against garnishee, § 2975; 794.
Sheriff, constable, or judgment debtor, may be garnished, § 2976; 795.
Mode of proceedings, judgment, appeal, §§ 2979–2993; 796.
Under execution, §§ 3051, 3052; 811.
In proceedings before a justice, §§ 3607–3608; 913.
See, in general, ATTACHMENT AND GARNISHMENT.
General Assembly.
General provisions as to, §§ 5–27; 2.
Election of state printer by, § 94; 22.
Election of state binder by, § 106; 23.
Election of members of, §§ 587, 588; 157.
Certificates of election of members of, §§ 642, 648; 167.
Abstract and canvass of votes for, §§ 646, 647; 167.
Oath of members of, § 672; 171.
Contesting election of members of, §§ 730–736; 179.
Selection of committee by, to try contested election of governor, §§ 741, 742; 180.
Resignation of members of, to whom made, § 782; 186.
Special election to fill vacancies in, §§ 789, 790; 187.
General Assembly.—*Continued.*
Election of trustees of Hospitals for the Insane by; members of, not eligible as, § 1383; 385.
Election of board of regents of University by, § 1588; 461.
Members of, not eligible to office of regent of University, § 1603; 464.
Election of board of trustees of State Agricultural College by; members not eligible, § 1605; 465.
Election of trustees of Soldiers' Orphans' Home by; members of, not eligible, §§ 1623, 1625; 470.
Election of trustees of Asylum for Feeble-minded Children by, 16 G. A., ch. 152; 473.
Election of trustees of State Reform School by; members of, not eligible, § 1644; 476.
Election of trustees for College for the Blind by, members of, not eligible, §§ 1664, 1665; 480.
Election of trustees of Institution for the Deaf and Dumb by, 17 G. A., ch. 136; 484.
Election of trustees of State Normal School by, 16 G. A., ch. 129, § 2; 485.
Member of, not required to appear in civil action during session, § 2626; 704
May direct proceedings in *quo warranto*, § 3847; 873.
Bribery of members of, punished, §§ 3939–3941; 996.
Impeachment by, §§ 4546–4555; 1112.
Not to make laws respecting religion, Const., Art. 1, § 3; 1215.
Not to grant special privileges or immunities, Const., Art. 1, § 6; 1215.
May authorize trial by jury of less number than twelve, Const., Art. 1, § 9; 1216.
Legislative authority of state vested in, Const., Art. 3, § 1; 1224.
Sessions of, Const., Art. 3, § 2; 1225.
Election and eligibility of representatives and senators in, Const., Art. 3, §§ 3–6; 1225.
Classification and eligibility of senators in, Const., Art 3, §§ 5, 6; 1225.
Each house to choose officers, and judge of qualifications of members; contested elections in, Const., Art. 3, § 7; 1225.
Quorum; attendance of members compelled, Const., Art. 3, § 8; 1225.
Adjournment of houses of; journal; proceedings; punishment or expulsion of members; general powers, Const., Art. 3, § 9; 1226.
Members of, privileged from arrest, Const., Art. 3, § 11; 1226.
Vacancy in either house, how filled, Const., Art. 3, § 12; 1226.
Doors to be open, Const., Art. 3, § 13; 1226.

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General Assembly.—*Continued.*
Neither house to adjourn without consent of the other, Const., Art. 3, § 14; 1226.
Methods of passing bills by, Const., Art. 3, §§ 15–17; 1226.
Impeachment proceedings in, Const., Art. 3, §§ 19, 20; 1227.
Member of, not eligible to office created or increased in emoluments during his term. Const., Art. 3, § 21; 1227.
Persons holding office not eligible as members of, Const., Art. 3, § 2?; 1227.
Compensation of members of, Const., Art. 3, § 25; 1227.
Acts of, when to take effect, Const., Art. 3, § 26; 1227.
Not to grant divorce, Const., Art. 3, § 27; 1228;
Not to pass local or special laws, Const., Art 3, § 30; 1228.
Oath of members of, Const., Art. 3, § 32; 1230.
To cause census to be taken, Const., Art. 3, § 33; 1230.
Apportionment: maximum number of members of, Const., Art 3, §§ 34, 35; 1230.
Elections by, to be *viva voce*, Const., Art. 3, § 38; 1230.
Election of governor and lieutenant-governor by, Const., Art. 4, § 4; 1231
To determine contested elections of governor and lieutenant-governor, Const., Art. 4, § 5; 12 1.
Extra sessions of, Const., Art. 4, § 11; 1231.
Adjournment of, by governor in case of disagreement, Const., Art. 4, § 13; 1232.
Pardon or commutation of sentence of persons convicted of treason by, Const., Art. 4, § 16; 12 2.
Reorganization of judicial district and change of number of judges by, Const., Art. 5, § 10; 1235.
To provide general system of practice, Const., Art 5, § 14; 1235.
To provide general laws for organization of corporations, Const., Art. 8, § 1; 1237.
Not to grant exclusive privileges, Const., Art. 8, § 12; 1238.
May make or repeal laws for creation of corporations, Const., Art. 8, § 12; 1238.
Control and management of school and university funds and lands by, Const., Art. 9, ch. 2, §§ 1–5; 1240.
Proposal of, and action upon amendments to constitution, Const., Art. 10, § 1; 1241.
Location of public lands by, Const., Art. 11, § 7; 1244.
To pass laws to carry constitution into effect, Const., Art. 12, § 1; 1241.
See, also, LEGISLATURE.

General Denial.
Does not put in issue existence of corporation, n. § 2716; 728.

General Election.
When held, § 573, 156.
Provisions as to, see ELECTIONS, §§ 603–621; 160.
Depositions not to be taken upon day of, § 3722; 936.

General Issue.
Does not exist under our system of pleading, § 2644; 708; and n. § 2655; 713.

Genuineness of Signature.
Of officer taking acknowledgment, how shown, §§ 1956, 1957; 552.
Of written instrument, denial of, under oath, § 2730; 730.

Geological Survey.
Specimens of, to belong to University, § 1598; 463.

German.
Teaching of, in common schools, § 1763; 501.

Glanders.
Animal having, to be killed, § 1484; 408; and § 4057; 1024.
—— punishment for bringing into state, § 4056; 1024.

Goats.
To be restrained from running at large, § 1446; 401.

Gold.
Contract for loan of, at higher rate than market value, usurious, n. § 2079; 580.

Goods.
Possession of, when recently stolen, evidence of larceny, n. § 3902; 986.
Receiving of, when stolen, punished, §§ 3911–3914; 990.
Removal of, from custody of officer, punished, §§ 3915, 3916; 991.

Goods and Chattels.
Kinds or species of, to be alleged in action for injuries to, § 2725; 729.

Good Character.
Reasonable doubt of guilt may be raised by proof of, n. § 4428; 1092.
See, also, CHARACTER.

Good Time of Prisoners.
Classification of, 18 G. A., ch. 154; 1156.

Gooseberries.
Weight of, per bushel, § 2049; 575.

Government.
Instituted for protection, security and benefit of people, Const., Art. 1, § 2; 1215

Government of Iowa.
Powers of, how divided, Const., Art. 3, § 1; 1224.

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Government Survey.
Record of, transcribed, § 1971; 557.
Governor.
May convene general assembly elsewhere than at seat of government, when, § 5; 2.
Canvassing the vote for, by joint convention, § 26; 5.
Approval and return of bills by, §§ 28–30; 5.
OFFICE, DUTIES, ETC., OF, § 55–69; 13.
Patents to lands to be signed by, § 87; 19.
May release lands to U. S., or quit-claim to proper person, §§ 91, 92; 20.
Office of, to be furnished with fuel, furniture, stationery, etc., §§ 120. 122; 25.
Shall cause inspection to be made of books, etc., of state treasurer, § 132; 28.
Shall cause public documents to be printed, 16 G. A., ch. 159, § 3; 28.
May appoint or revoke commission of notary public, § 258; 56.
May appoint commissioners in other states, § 267; 58.
May administer oaths, § 277; 59.
To publish statement of change of class of cities, § 509; 128.
To issue proclamation in general election, §§ 577, 579; 156.
When to be elected, § 580; 157.
To cause state officers elect to be notified, § 659; 169.
To issue certificate of election to presidential electors, § 665; 170.
To notify person elected to fill vacancy in office of presidential elector, § 667; 170.
Oath of office of, § 671; 170.
Bonds of state officers to be approved by, § 680; 173.
When to qualify, § 685; 173.
Method of contesting election of, §§ 737–745; 179.
May appoint commission to examine books of state officers, and suspend officer guilty of defalcation, §§ 759–763; 182.
May require giving of new bonds, § 772; 184.
Resignation of, to whom made, § 782; 186.
May call special election to fill vacancy in office of member in congress or general assembly, § 789; 187.
May call out militia, 18 G. A., ch. 74, §§ 3, 4; 260.
As commander in-chief of militia, powers, 18 G. A., ch. 74, §§ 43. 45; 267.
May cause property to be condemned for buildings or improvements of state institutions, §§ 1271, 1272; 343.
To appoint fish commissioner, 17 G. A., ch. 80, § 1; 420.
Governor.—*Continued.*
To appoint assistant fish commissioner, 18 G. A., ch. 136; 411.
——— state mine inspector, 18 G. A., ch. 202, § 1; 443.
——— commissioners of pharmacy, 18 G. A., ch. 75, § 3; 449.
——— members of state board of health, 18 G. A., ch. 151, § 1; 451.
To be president of board of regents of University, § 1587; 461.
To fill vacancies in trustees of Reform School, § 1644; 476.
——— in trustees of College for the Blind, § 1684; 482.
To appoint state librarian, § 1890; 535.
To appoint curators of State Historical Society, § 1901; 536.
To appoint superintendent of weights and measures, § 2052; 576.
May direct commencement of proceedings in *quo warranto*, 3347; 873.
Salary of, § 3755; 943.
Warrant of, for execution of sentence of death, 17 G. A., ch. 165; 972.
May call out military force to enable sheriff to execute process, § 4148; 1044.
May issue requisition for fugitive from justice, §§ 4171, 4175; 1047.
May remit fines and forfeitures, and grant pardons, §§ 4712–4714; 1138.
Duties of, in connection with penitentiary; compensation for, §§ 4799–4804; 1154.
Approval or veto of bills by, Const., Art. 3, § 16; 1226.
To issue writ of election to fill vacancy in general assembly, Const., Art. 3, § 12; 1226.
Liable to impeachment, Const., Art. 3, § 20; 1227.
General powers, duties, etc., of, Const., Art. 4; 1231.
Shall be commander-in-chief of militia, Const., Art. 4, § 7; 1231.
Shall include proposition to amend constitution in proclamation of election, 16 G. A., ch. 114, § 3; 1247.
Grace.
On notes and bills, §§ 2092–2094, and 16 G. A. ch. 81; 587.
Grade of Streets.
Compensation to property owners for damages from change of, § 460; 112
Graded Schools.
Establishment of, § 1726; 494.
Graduates.
Of law department of university, admitted to practice, § 209; 47.
Grand Jurors.
Number of, § 231; 52.
Not to be questioned for action, § 4286; 1025.

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Grand Jury.
May be summoned at special term, § 166; 39.
To appear at second term without summons, § 243; 54.
Action of, not to be questioned on *habeas corpus*, § 3483; 894.
Failure to testify before, punishable as contempt, § 3492; 895.
Selecting, summoning and empannelling; calling and filling panel, §§ 4255–4257; 1060.
Challenges to, § 4258–4266; 1061.
Foreman of, § 4267; 1062.
Oath of; charge of court to; discharge of, §§ 4268–4271; 1063.
Powers and duties of, in finding indictment, §§ 4272–4290; 1063.
Disclosure of proceedings or testimony by, §§ 4284, 4285; 1064.
Re-submission of case to, 18 G. A., ch 130; 1067.
What offenses triable upon indictment by, Const., Art. 1, § 11; 1218
Number of, left to legislative regulation, n. Const., Art. 1, § 11; 1218.

Grandchildren.
Liability of, for support of grandparents, § 1331; 377.
Inheritance by, § 2454; 657.

Grandparents.
Liability of, for support of grandchildren, § 1331; 377.

Granges of Patrons of Husbandry.
Associations for the incorporation of § 1091; 276.

Grant of Agricultural Lands.
Reserving rent, not valid for longer period than twenty years, Const., Art. 1, § 24; 1223.

Grants and Commissions of the State
Sealed and signed, Const., Art. 4, § 21; 1233.

Grapes.
Weight of, per bushel, § 2049; 575.

Grass Seed.
Weight of, per bushel, § 2049; 575.

Great Bodily Injury.
Assault with intent to commit, punished, § 3875; 980.

Gross Fraud.
Punishment for, § §4081; 1030.

Grounds of Demurrer.
What are; how specified, § 2649; 712.

Guarantee.
What constitutes, § 2089; 586.

Guarantor.
Notice necessary to charge, § 2090; 587.
Action against, § 2091; 587.

Guaranty.
Instrument of, is assignable, n. § 2084; 585.

Guardian.
To list property of ward, § 813; 193.
To control interest of ward as to establishment of highways, § 951; 241.
To settle damages for taking property for works of internal improvement, § 1246; 336.
To be appointed for soldiers' orphans, § 1640; 472.
Provisions as to suit by surety not applicable to, § 2111; 592.
May bring or defend action for ward, § 2565–2571; 685.
Service of original notice on, §§ 2614, 2615; 700.
Requisites of answer by, § 2656; 715.
Not required to verify pleadings, § 2675; 718.
OF MINORS:
May act in relation to walls in common, § 2030; 572.
May be "owner" under mechanic's lien law, 16 G. A., ch. 100, § 10; 602.
May consent to marriage of ward, § 2191; 611.
Recovery by, for services of ward, § 2240; 622.
Appointment, powers, duties, compensation, §§ 2242–2256; 623.
Sale of property by, §§ 2257–2265; 624.
Of insane husband or wife, proceedings for conveyance by, § 2217; 616.
Power of, ceases on death of ward, n. § 2245; 623.
Foreign, appointment, bond, powers, etc., of, §§ 2266–2271; 626.
Of drunkards, spendthrifts and lunatics, appointment, powers, etc., of, §§ 2272–2279; 627.
To be notified of proceedings against an apprentice, § 2294; 629.
May be appointed for children of intemperate or vicious parents, § 2301; 630.
May be appointed by clerk in vacation, § 2315; 634.
Complete record of sale of real estate by, to be kept, § 2492; 662.
May sue in his own name, § 2544; 679.
Capacity of, how pleaded, §§ 2716, 2717; 728.
Liabilit of, for waste, § 3332; 871.
Of lunatic, competency of witnesses in actions against, § 3639; 918.

Guardian Ad Litem.
Appointment of, §§ 2566–2568; 685.

Guardianship.
Of minors, §§ 2241–2271; 623.
Of drunkards, spendthrifts and lunatics, §§ 2272–2279; 627.

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Guardianship—*Continued.*
Of children by Home for the Friendless, 17 G. A., ch. 176, § 5; 633.
Jurisdiction as to, § 2312; 634.
Guards.
Of penitentiary, appointment, qualification, term of office, §§ 4755, 4756; 1148.
Guide Boards.
To be erected by supervisors, § 994; 252.
Guilty and not Guilty.
Pleas of, §§ 4359–4362; 1081.
Gun Powder.
City may regulate transportation and keeping of, § 456; 106.
Regulation of manufacture of, § 4090; 1034.
Habeas Corpus.
District attorney to appear in proceedings for, § 205; 46.
Persons confined as insane entitled to writ of, § 1444; 401.
Appeal from order or judgment in, § 3164; 835.
Right to office not to be determined in, n. § 3345; 872.
Petition and allowance of writ, §§ 3449–3459; 870.
Service of writ, §§ 3460–3468; 892.
Precept, §§ 3469–3472; 892.
Appearance, attachment, pleadings, §§ 3473–3482; 893.
What may be tried, §§ 3482, 3483; 894.
Discharge, commitment, bail, §§ 3484–3486; 894.
Restraint of defendant during trial; waiver of presence, §§ 3487, 3488; 894.
Disobedience to order of discharge punished, § 3489; 894.
Papers to be filed in clerk's office, § 3490; 894.
Writ not to be suspended or refused, Const., Art. 1, § 13; 1220.
Hail Insurance Companies.
Mutual, provisions as to, § 1144; 291.
Half Bushel.
Standard, § 2046; 575.
Handwriting.
Evidence as to, § 3655; 922.
Hanging.
Method of executing sentence of death by, 17 G. A., ch. 165; 972.
Harbor Master.
Election or appointment of, § 528; 134.
Hard Labor.
Confinement of vagrants at, 16 G. A., ch. 69; 1043.
Imprisonment at, §§ 4736–4743; 1143.
Head of Family.
Who is, in contemplation of law, n. § 2202; 613.
Head of Family.—*Continued.*
Property of, exempt from execution, § 3072; 815.
Who is, as to exemptions, n. 3072; 815.
See, also, FAMILY.
Health.
Offenses against, see PUBLIC HEALTH.
See, also, BOARD OF HEALTH.
Hedges.
On line of highway, § 999; 253.
Division, 16 G. A. ch. 106; 418.
Maliciously cutting down or injuring, punished, § 3981; 1004.
Heirs.
Listing of property belonging to, for taxation, § 805; 194.
Not protected by recording laws, but purchasers from, are, n. § 1941; 547.
Take homestead of ancestor free from debts, n. § 2008; 567.
Rights of, in property upon failure to take out administration, n. § 2467; 641.
Executor to take charge of real property of, §§ 2402–2404; 647.
Minor, tax on real property of, to be paid by administrator, § 2405; 648.
Rules of descent as to, § 2453–2459; 657.
Of deceased child, inheritance by, § 2454; 657.
Effect of advancement to, § 2459; 658.
Of deceased patentee, title to vest in, 17 G. A., ch. 33; 658.
Action against, for proportionate amounts, §§ 2485, 2486; 661.
Specific performance may be enforced against, § 2487; 661.
May be defendants in action against executor for specific performance, § 2488; 662.
List of, to be furnished by executor, § 2491; 662.
Of deceased plaintiff, revivor of judgment in favor of, §§ 3130–3134; 827.
Recovery by, for injury to inheritance, § 3338; 872.
Hemp Seed.
Weight of, per bushel, § 2049; 575.
Herders.
Lien of, for charges, 18 G. A., ch. 25; 609.
Hereditaments.
Incorporeal, how described in petition for injury to, § 2726; 729.
High Schools.
See COUNTY HIGH SCHOOLS, §§ 1697–1712; 486.
Highway Crossings.
To be maintained by railways, §§ 1262–1264; 341, and § 1288; 349.
Liability of railways for stock killed at, n. § 1289; 350.

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Highways.
Include bridges, § 45, ¶ 5; 9.
Through two or more counties, appointment of commissioners to lay out, § 303, ¶ 13; 70.
Power of supervisors to lay out, alter or discontinue, § 303, ¶¶ 16, 17; 71.
Use of bridge fund for improvement of, 18 G. A., ch. 88; 73.
Voting special tax to aid in construction of, § 309; 75.
In cities:
Improvement of, at the expense of adjacent property, § 466; 111.
Labor upon, § 487; 121.
Leading to city, appropriation for, § 488; 121.
Property occupied for, not taxable to owner of adjacent property, § 809; 194.
Jurisdiction over, § 920; 236.
Width of, § 921; 236.
PROCEEDINGS TO ESTABLISH; petition and bond, § 922, 923; 236.
Appointment and duty of commissioner, §§ 924-935; 237.
Notice; action of auditor, §§ 936-939; 238.
Damages claimed, § 940-945; 240.
Final action, §§ 946-948; 240.
Opening of, §§ 949, 950; 241.
Rights of minors and lunatics, how protected, § 951; 241.
Streets of cities and towns deemed a part of, §§ 952, 953; 242.
Across lands of state institutions, § 954; 242.
In two or more counties, §§ 955, 956; 242.
By consent, §§ 957, 958; 242.
Appeals, §§ 959-963; 242.
Lost field-notes, re-survey, §§ 964-966; 244.
Plat book of, §§ 967, 968; 245.
WORKING OF:
Highway tax, §§ 969-971; 246.
Duties of township clerk, §§ 972-976; 247.
Qualification and duties of supervisor, §§ 977-998; 248.
Firemen exempt from, § 1560; 441.
Planting hedges upon line of, § 999; 253.
Persons meeting on to turn to right, § 1000; 254.
Crossing of, by railways, §§ 1262-1267; 341.
——— company to make cattle guards and crossings, and erect signs, § 1288; 349.
Right of way for street railways over, 18 G. A., ch. 32; 343.
Telegraphs may be erected upon, §§ 1324, 1325; 374.
Use of, following dedication presumed adverse, n. § 2031; 572.

Highways.—*Continued.*
What constitutes adverse possession of, against public or owner, n. § 2599; 671.
Between two counties, action for offense committed on; where brought, § 2579; 687.
Proceedings to establish reviewed on certiorari, n. § 3216; 849.
Private action for obstruction of, n. § 3331; 871.
Damage for taking timber for repair of, § 3336; 871.
Fees of persons laying out or changing, § 3824; 963.
Obstructing or injuring, punished, § 3979; 1003.
Breaking up, obstructing or injuring, punished, § 3992½; 1007.
Racing, or fast driving upon, punished, § 4071; 1027.
Obstruction of, deemed nuisance, § 4089; 1033.
Obstruction of, to be inquired into by grand jury, § 4278; 1064.
Evidence of obstruction by railway company, § 4557; 1113.
Local or special laws relating to, not allowed, Const., Art. 3, § 30; 1228.

Highway Districts.
Trustees to divide township into, § 969; 246.

Highway Supervisors.
Term of office of, when to commence, § 576; 156.
Election of, 18 G. A., ch. 161; 158.
Method of voting for, 17 G. A., ch. 71; 163.
To work streets in unincorporated towns, § 952; 242.
Qualification, powers and duties of, §§ 977-998; 248.
Mandamus against to compel removal of obstruction, n. § 3373; 876.
Resistance to, in removing obstructions is not resistance to process, n. § 3960; 1000.
Allowing Canada thistles to mature on highway, punished, § 4032; 1025.

Highway Tax.
Payable in certificate of labor performed, § 854; 208.
Township trustee to levy, § 969; 246.
Notice of, § 980; 249.
How expended, §§ 981, 982; 249.

Hog.
Is domestic animal, n. § 3977; 1003.

Hogshead.
Measure of contents of, § 2045; 575.

Holidays.
What constitute, as to paper falling due on, § 2094; 587.
Appearance to civil actions not required upon, § 2626; 704.

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Homes for the Friendless.
Powers of, as to children, 17 G. A., ch. 176; 632.
Homestead.
Liability of, for taxes, § 876; 215; and 1991; 562.
Exempt from judicial sale, § 1988; 560.
Widow or widower entitled to, § 1989; 561.
Conveyance or encumbrance of, § 1990; 561.
Liability of, to mechanics' liens, § 1991; 562.
Liable for prior debts, § 1992; 562.
May be made liable by written contract, § 1993; 563.
Must embrace the house; extent of, §§ 1994–1997; 564.
Selection; platting; change of, §§ 1998–2001; 565.
Proceedings to settle controversies as to liability or extent of, §§ 2002–2006; 566.
Disposition of, upon death of owner, §§ 2007–2010; 567.
Husband or wife cannot remove the other or the children from, § 2215; 616.
Judgment for alimony cannot be enforced against, n. § 2229; 619.
May not be disposed of by will, § 2322; 635.
Not liable for expenses of last sickness, n. § 2418; 650.
May be set off as part of distributive share of widow, § 2441; 655.
May be procured by widow out of proceeds of real property of husband, § 2451; 656.
Lien of judgment does not attach to, n. § 2882; 772.
Hops.
Standard size of boxes for, § 2051; 576.
Transportation or cultivation of diseased roots, punished, §§ 4060, 4061; 1024.
Horse-racing.
Punished, § 4071; 1027.
Horses having Disease.
Bringing of, within State, or permitting to run at large, punished, §4056; 1024
Found at large may be killed, § 1484; 408; and § 4077; 1024.
Horticultural Societies.
Duration and dissolution of, §1070; 271.
See STATE HORTICULTURAL SOCIETY, § 1117–1121; 281.
Hospital for the Insane.
Location and government of, §§ 1383–1394; 385.
Admission to, §§ 1398–1401; 389.
Expenses of treatment in, § 1417–1421; 395.
Discrimination in receipt of patients in, § 1422; 395.
Hospital for the Insane.—*Continued.*
Escape of patients from, § 1423; 396.
Discharge of patients from, §§ 1424–1426; 396.
Compensation for keeping patients in, § 1427; 396.
Amounts due from counties to be certified; tax to pay; actions for, § 1428, 17 G. A., ch. 183; 396.
Expenses and fees of superintendent as witness, § 1429; 397.
Superintendent to affix seal, § 1430; 398.
Blanks, regulations, §§ 1431, 1432; 398.
Idiots not to be admitted to, § 1434; 398.
Visiting committee:
See VISITING COMMITTEE.
Letters to and from patients, §§ 1436–1438; 399.
Inquest upon body of inmate, § 1439; 399.
Commission to inquire as to illegal confinement in, §§ 1442, 1443; 400.
Inmates entitled to habeas corpus, § 1444; 401.
Neglect of duty as to insane, deemed misdemeanor, § 1445; 401.
Service of notice upon person confined in, §§ 2615, 2616; 700.
Commitment of insane prisoners to, §§ 4624–4628; 1126.
Hotel Keepers.
Liability of, for money and valuables, 18 G. A., ch. 181, § 1; 610.
Lien of, for charges, 18 G. A., ch. 181, § 2; 610.
Frauds upon, punished, 18 G. A., ch. 76; 1033.
House of Correction.
May be established by city council, § 539; 138.
House of Refuge.
May be established by city council, § 539; 138.
Board of directors may apprentice inmates of, §§ 540, 541; 139.
House of Representatives of General Assembly.
Organization of, §§ 6–10; 2.
Election of members of, § 587; 157.
Finding of impeachment by, §§ 4546, 4547; 1112.
Members of, to be chosen, Const., Art. 3, § 3; 1225.
To have power of impeachment, Const., Art. 3, § 19; 1227.
Limitation of number and apportionment of members of, Const., Art. 3, § 35; 1230.
See, also, GENERAL ASSEMBLY.
Houses of Ill Fame.
Keeping of, punished, § 4013; 1011.
Lease of building used for, void, § 4014; 1011.

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Houses of Ill Fame.—*Continued.*
Leasing of building for purpose of, punished, § 4015; 1011.
Enticing virtuous female to, punished, § 4016; 1011.
Deemed nuisance, § 4091; 1034.
Keepers of, deemed vagrants, § 4130; 1041.

Householder.
Who is, under appraisement law, n. § 3100; 821.

Hundred Weight.
Weight of, § 2043; 574.

Hungarian Grass Seed.
Weight of, per bushel, § 2049; 575.

Husband.
Responsible for marriage return, § 2199; 612.
Is, as matter of law, head of family, n. § 2102; 613.
Not liable for injuries committed by wife, § 2205; 613.
Not entitled to personal property of deceased wife exempt from execution, n. § 2371; 643.
Share of, in real property of deceased wife, § 2440; 653
Not to be joined in action by or against wife, § 2562; 684.
May prosecute or defend action for wife, §§ 2563, 2564; 684.

Husband and Wife.
Conveyances and covenants by, §§ 1936, 1937; 546.
Must join in conveyance of homestead, § 1990; 561.
Separate property - rights of, §§ 2202–2215; 613.
Liability of, for family expenses, § 2214; 615.
Rights of, upon division of property by partition, § 3303; 866.
Not competent witnesses in actions by or against executor, § 3639; 918.
Competency of, as witnesses for or against each other, § 3641; 919.
Not to be examined as to privileged communications between them, § 3642; 920.

Husband or Wife.
Survivor to occupy homestead, §§ 2007, 2008; 567.
Cannot be removed from homestead by the other without consent, § 2215; 616.
Proceedings by, for conveyance of property upon the insanity of either, § 2216–2219; 616.
Proceedings by, for divorce, § 2220–2230; 617.
Share of survivor in property of the other when deceased, § 2440; 653.
Setting off distributive share of, §§ 2441–2451; 655.
Share of, not affected by will, § 2452; 656.

Husband or Wife.—*Continued.*
Rules of inheritance by, §§ 2454, 2458; 657.
Must commence prosecution for adultery, § 4008; 1009.

Idiocy.
Cause for annulling marriage, § 2231; 620.
Not grounds for divorce, n. § 2231; 620.

Idiot.
Meaning of term; not to be admitted to hospital for the insane, § 1434; 398.
Guardianship of, § 2272–2279; 627.
Not entitled to vote, Const., Art. 2, § 5; 1224.

Illegal Voting.
See Offenses Against Suffrage, §§ 3993–4007; 1007.

Illegitimate Children.
Question as to who is father of, may be determined in proceedings to compel support, § 1332; 377.
Become legitimate by marriage of parents, § 200; 612.
Of husband, as affecting right to divorce, § 2224; 618.
Of void marriage, § 2234; 621.
Inheritance by and from, §§ 2465–2468; 659.
Proceedings against putative father of, §§ 4715–4722; 1139.

Ill Fame, House of.
Keeping of, punished, § 4013; 1011.
Lease of building used for, void, § 4014; 1011.
Leasing building for purpose of, punished, § 4015; 1011.
Enticing virtuous female to, punished, § 4016; 1011.
Deemed nuisance, § 4091; 1034.
Keepers of, deemed vagrants, § 4130; 1041.

Illuminating Oils.
Regulation of sale of, 17 G. A., ch. 172; 447.
Mixing naphtha with, punished, § 3901; 985.

Impeachment.
How found and tried, §§ 4546–4555; 1112.
Subpœnas in case of, § 4570; 1114.
Who liable to; judgment, Const., Art. 3, §§ 19, 20; 1227.

Impeachment of Witness.
By proof of moral character, § 3649; 921.
In criminal cases, n. § 4556; 1112.

Importer.
Of foreign liquors may sell in original packages, § 1524; 423.

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Impotency.
Cause for annulling marriage, § 2231; 620.
Children of marriage annulled on account of, illegitimate, § 2234; 621.
Not ground for divorce, n. § 2231; 620.
Imprisonment.
By general assembly for contempt, §§ 15, 16; 4.
Of partner in general partnership for fraud, § 2165; 695.
For non-compliance with orders of court as to property of estate, §§ 2380, 2381; 644.
To enforce mandates of supreme court, § 3200; 847.
As punishment for eluding service of writ of habeas corpus, § 3467; 892.
For contempt in habeas corpus proceeding, § 3476; 893,
In proceedings for contempt, § 3494; 896.
Unlawful, punishment for, § 3869; 978.
Different terms of, how served, n. §4508; 1106.
Until fine paid, extent of, § 4509; 1106.
In pursuance of judgment, §§ 4512–4517; 1107.
Time of, during appeal, to be taken account of in sentence, § 4545; 1111.
At hard labor, §§ 4736–4743; 1143.
For debt, not allowed, Const., Art. 1, § 19; 1222.
Improvements.
By occupying claimants:
Compensation for, §§ 1976–1987; 558.
Removal of, § 1987; 560.
Internal, mechanic's lien upon, 16 G. A., ch. 10[illegible], §§ 3, 5; 596.
Made by grantee, widow cannot claim dower in, n. § 2440; 653.
May be set off against damages in action to recover real property, § 3262; 859.
Inaugural Address of Governor.
Printing and distribution of, 16 G. A., ch. 159; 28.
Incest.
Defined and punished, § 4030; 1015.
Incorporated Towns.
Provisions applicable to, §§ 511–516; 129.
See, also, CITIES AND INCORPORATED TOWNS.
Incorporation of Cities and Towns.
Proceedings for, §§ 421–425; 97.
Special acts for, prohibited, Const., Art. 3, § 30; 1228.
Incumbent.
Who deemed, in contested election, § 693; 175.
To nominate a judge of the court for contesting election, § 700; 176.
Judgment against, for costs, § 711; 177.
Incumbrance Book.
To be kept by clerk of court, § 197; 45.
Recording notices of actions affecting real property in, § 2629; 706.
Entry of levy of attachment in, § 3022; 806.
Incumbrances.
Upon homestead, how executed, § 1990; 561.
Priority of mechanics' liens over, 16 G. A., ch. 100, § 9; 600.
Upon lands of decedent, payment of, by administrator, § 2428; 651.
Proceedings as to, in partition, §§ 3284–3289; 864.
Incumbrancers.
Protected against mechanics' liens, 16 G. A., ch. 100, § 6; 598.
Indebtedness.
Of corporations, limititation of, to be fixed by articles, § 1061; 270.
——— statement of to be kept posted, § 1077; 273.
Continuously accruing, constitutes current account, n. § 2531; 675.
Due the state, attachment for, § 3005–3009; 802.
Of political and municipal corporations, limit of, Const., Art. 11, § 3; 1242.
Of state, see STATE INDEBTEDNESS.
Indemnifying Bond.
Officer levying execution may require, when, § 3055; 812.
How given, § 3056; 812.
Officer may refuse to levy upon, or hold property unless given, § 3057; 812.
Action upon, the only remedy, § 3058; 812.
Provisions as to, applicable to justices' courts, § 3960; 813.
Indenture of Apprenticeship.
Execution of, §§ 2281, 2284, 2285; 628.
Independent Districts.
To be deemed school districts, § 1713; 489.
Corporate name of, § 1716; 490.
Board of district township not to have jurisdiction over, § 1792; 507.
Miscellaneous provisions applicable to, in common with district townships, §§ 1761–1764; 501; and §§ 1786–1799; 506.
Formation of, §§ 1800–1802; 509.
Organization, §§ 1803–1806; 510.
School house tax in, § 1807; 511.
Annual meetings of, § 1808; 511.
Elections in, 18 G. A., ch. 8; 512.
——— time of opening and closing polls at, § 1789; 507.
Boundaries of, may be changed, or district abandoned, § 1809; 513.
May be organized as district township, § 1810; 513.

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Independent Districts.—*Continued.*
Uniting of, in two counties, §§ 1811, 1812; 513.
Statements of receipts and expenditures published, § 1813; 514.
Formation of, into district townships, §§ 1815–1820; 515.
Subdivision of, 17 G. A., ch. 133; 516.
May issue bonds, § 1821–1823; 517.
Funding of bonded indebtedness of, 18 G. A., ch. 132; 518.
May condemn property for school-house sites, §§ 1825–1828; 520.
Action against, for debts of district township, n. § 2550; 681.
Board of directors:
General powers and duties, §§ 1728–1734; 494.
May dismiss or suspend pupils, § 1735; 495.
Election of, 1802; 510.
Levy of school tax by, § 1804; 510.
Shall publish accounts, § 1813; 514.

Index.
To printed acts of general assembly, preparation of, § 35; 6.
Of liens to be kept by clerk of court, § 197; 44.
To records of real estate, § 1943; 549.
Book to be kept by auditor, §§ 1948, 1951; 551.
To homestead book, § 1999; 565.

Indians.
Sale of intoxicating liquors to, punished, § 4044; 1019.

Indictment.
For illegal sale of liquors, may allege different violations, § 1540; 427.
For using building for keeping and sale of liquors, n. § 1543; 429.
Under liquor law, requisites of, § 1549; 433.
Of partners of limited partnerships for fraud, § 2165; 605.
For offenses punishable as contempt, § 3500; 897.
What sufficient:
In case of murder, n. §§ 3848, 3849; 970.
In case of seduction, n. § 3867; 977.
In case of threats to extort, n. § 3871; 979.
In case of an assault with intent to commit an offense, n. § 3872; 979.
In case of assault and battery, n. § 3878; 980.
In case of burning barn, n. § 3884; 981.
In case of breaking and entering, n. § 3891; 983.
In case of selling or concealing mortgaged property, n. § 3895; 984.
In case of larceny of money or notes, n. § 3902; 986.
In case of perjury, n. § 3936; 996.
In case of keeping gambling houses, n. § 4026; 1014.

Indictment.—*Continued.*
In case of false pretenses, n. § 4073; 1028.
In case of conspiracy, n. § 4087; 1031.
When deemed found, § 4170; 1047.
Upon what evidence found, §§ 4273, 4283; 1063.
Finding and presentment of, §§ 4291–4294; 1066.
Proceedings when held insufficient, 18 G. A., ch. 130; 1067.
Form and requisites of, § 4295–4317; 1068.
Process upon, § 4318–4326; 1074.
May be pleaded to, in answer to arraignment, § 4336; 1076.
Setting aside of, §§ 4337–4344; 1077.
Mode of trial on, §§ 4347–4351; 1079.
Demurrer to, grounds of, form and trial of, §§ 4352–4358; 1079.
Pleas to, §§ 4359–4367; 1081.
Trial of issue of fact in, see trial of issue of fact on indictment, §§ 4419–4451; 1089.
Joint or separate, convictions or acquittals under, § 4437; 1094.
Bail on, how given, §§ 4582–4586; 1117.
What offenses triable upon, Const., Art. 1, § 11; 1218.
Legislature may prescribe form and elements of, n. Const., Art. 1, § 11; 1218.
To be in name of state, Const., Art. 5, § 8; 1234.

Individual.
May act as corporation, § 1088; 275.

Indorsee.
Action of, against grantor, § 2091; 587.

Indorsement.
Of notes and bills, effect of, §§ 2082–2084; 584.
Of non-negotiable instrument, equivalent to new note, n. § 2084; 585.
In full by one not a party to instrument makes him indorser, n. § 2089; 586.
In blank constitutes guaranty, when, § 2089; 586.
On written instrument, signature to, deemed genuine unless denied under oath. § 2730; 730.
Upon executions, § 3038; 808.
Of renewal of execution by justice, § 3573; 907.

Indorser.
Of notes and bills:
Action against, § 2083; 585.
Notice of demand, § 2093; 587.
How notified, § 2095; 588.

Industrial Expositions in Schools.
May be held, 15 G. A., ch. 64; 519.

Infant.
In womb, not a human being, n. § 3849; 970.
See MINOR.

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Infirmary.
City council may establish, § 538; 138.

Information.
Answers to interrogatories may be upon; how specified and verified, §§ 2697, 2698; 725.
To be given at request of jury by court, §§ 2800, 2801; 748.

Informations.
For violation of city ordinances, trial in, to be by jury, 18 G. A., ch. 77; 121.
For search warrant for liquors, § 1544; 430.
Under liquor law, may allege any number of violations, § 1540; 427.
——— requisites of, § 1549; 433.
For violation of two mile limit liquor act, 17 G. A., ch. 119, § 7; 440.
Before justices of the peace in criminal cases, §§ 4661–4665; 1131.
What offenses triable upon, Const., Art. 1, § 11; 1218.
See PRELIMINARY INFORMATIONS.

Inhabitants of County.
Prejudice of, ground for change of place of trial, §§ 2590, 2592; 693.

Inheritance.
Right of adopted child as to, § 2310; 631.
Rules of, §§ 2453–2459; 657.
By children of the half blood, n., § 2457; 657.
By and from illegitimate children, §§ 2465–2468; 659.
Recovery for injury to, by waste or trespass, § 3337; 871.

Injunction.
In matter of re-location of county seat, n. § 287; 62.
Against life insurance company, § 1172; 306.
Staying commencement of action stops running of statute of limitations, § 2541; 678.
Temporary, granted in vacation, not to terminate at next term, n. § 2924; 781.
To stay execution in favor of heirs or personal representatives, § 3134; 827.
In proceedings to vacate or modify judgment, § 3161; 834.
Appeal from order allowing or refusing, §§ 3164–3166; 835
To contest foreclosure of chattel mortgage, § 3317; 867.
Against continuance of nuisance, § 3331; 871.
May be granted in proceedings for mandamus, § 3380; 878.
GRANTING OF, §§ 3386–3398; 879.
Temporary, §§ 3387–3389; 880.
VACATION OF, §§ 3399–3402; 882.
VIOLATION OF, §§ 3403–3407; 883.

Injuries.
To employes, liability of railways for, § 1307; 357.
Committed by married women, recovery of damages for § 2205; 613.
To wife, right of action for, n. § 2211; 614.
To person or reputation, limitation of action for, § 2529; 671.
To property, limitation of action for, § 2529; 671.
To child, who may sue for, § 2556; 683.
To real property, place of bringing action for, §§ 2576, 2577; 687
To person or character, pleadings in action for, need not be verified, § 2675; 718.
To person, character, or property, mitigating circumstances to be set up in answer to petition for, § 2682; 719.
To goods or chattels, what alleged in action for, § 2725; 729.
To real property or incorporeal hereditaments, requisites of petition in action for, § 2726; 729.
To property, recovery for, by purchaser at execution sale, § 3127; 827.
To fruit or ornamental trees, punished, § 3899; 985.
To property by riot, § 4070; 1027.

Innkeepers.
See HOTEL KEEPERS.

Inquest.
By coroner, §§ 352–368; 84.
In case of mysterious death of patient in hospital for the insane, § 1439; 399.
In case of death in coal mine, 18 G. A., ch. 202, § 2; 443.
Coroner's fee for, § 3799; 956.

Inquisition.
Return of, by coroner's jury, § 359; 85.

Insane Persons.
Term includes what, § 45, ¶ 6; 9; and § 1434; 398.
Limitation of action by, for recovery of property sold for taxes, § 902; 230.
Rights of, as to establishment, etc., of highways, § 951; 241.
Guardian of, may settle as to damages for taking right of way for railway, § 1246; 356.
Care of, see CARE OF INSANE, §§ 1383–1445; 385.
Prisoners may be confined in hospital, §§ 1412–1414; 394.
Cruel treatment of, punished, § 1415; 394.
Not to be restrained except as provided by law, § 1416; 395.
Estates of, liable for their support, § 1433, 398.
Meaning of term, § 1434; 398.
Guardianship of, §§ 2272–2279; 627.

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Insane Persons.—*Continued.*
Statute of limitations extended in favor of, § 2535; 676.
Actions by or against, how brought or defended, §§ 2569–2571; 686.
Service of original notice upon, § 2615; 700.
Answer to be filed by guardian for, § 2656; 715.
Vacating judgment against, for erroneous proceedings, §§ 3154–3157; 831.
Competency of witnesses in action against guardian of, § 3639; 918.
Not entitled to vote at election, Const., Art. 2, § 5; 1224.
Hospital for, see HOSPITAL FOR THE INSANE, §§ 1383–1394; 385.
See, also, INSANITY, *infra*.

Insane Tax.
Levy and collection of, § 1428, 17 G. A., ch. 183; 396.

Insanity.
Commissioners of, see COMMISSIONERS OF INSANITY, §§ 1395–1411; 388.
Of husband or wife, proceedings for conveyance of property in case of, §§ 2216, 2219; 616.
Not ground for divorce, n. § 2223; 617.
Cause for annulling marriage, § 2231; 620.
Appointment of guardian deemed determination of, n. § 2272; 627.
Fees, etc., in proceedings of commissioners of, § 3825; 964.
Of persons sentenced to death, inquisition as to, 17 G. A., ch. 165, § 7; 972.
What sufficient evidence of, to acquit, n. 4428; 1092.
Verdict of acquittal on account of, § 4472; 1100.
May be shown as cause against judgment, §§ 4504, 4505; 1106.
Of defendant, proceedings to determine before trial or after conviction, §§ 4620–4624; 1125.
Of defendant in criminal actions, proceedings in case of, §§ 4626–4628; 1126.

Insolvent Debtor.
Assignment of property by, §§ 2115–2128; 592.

Insolvency.
Of limited partnership, §§ 2166–2169; 605.

Inspection.
Of accounts of officers, § 132; 28.
Of written instruments, party entitled to, § 2730; 730.
Of original paper in supreme court on appeal, how secured, § 3269; 848.
OF IOWA NATIONAL GUARDS:
18 G A., ch. 74, § 25; 265.
OF COAL MINES:
Appointment, duties, &c., of mine inspector, 18 G. A., ch. 202, § 1–6; 443.

Inspection.
OF COAL MINES—*Continued.*
Regulation of mines, 18 G. A., ch. 202, §§ 7–13; 444.
Actions and penalties, 18 G. A., ch. 202, §§ 14, 15; 445.
Charges against inspector, removal of, 18 G. A., ch. 202, § 16; 446.
Rights and protection of miners, 18 G. A., ch. 202, §§ 17, 18; 446.
Provisions of act not to apply, when, 18 G. A., ch. 202, § 19; 447.
OF COAL OIL, 17 G. A., ch. 172; 447.
OF LUMBER AND SHINGLES, §§ 2069–2074; 578.

Inspector of Lumber and Shingles.
Appointment, qualification, duties, §§ 2069–2072; 578.
Fees of, § 3803; 957.

Inspector of Mines.
Appointment, duties, salary, etc., 18 G. A., ch. 202, §§ 1–6; 443.

Inspectors of Jails.
Who to constitute, powers and duties of, §§ 4729–4733; 1142.

Institution for the Deaf and Dumb.
Government of, §§ 1685–1687, 1690; 482.
Admission to, §§ 1688, 1689; 483.
Indebtedness not to be created, § 1691; 483.
Appropriation, §§ 1692, 1693, 1696; 483.
Report, § 1694; 483.
Clothing for pupils, § 1695; 484.
Election and term of board, 17 G. A., ch. 136, § 1; 484.
Teachers and officers not to reside in institution, 17 G. A., ch. 136, § 2; 484.
Labor of inmates, 17 G. A., ch. 136, § 4; 484.

Instructions of the Court.
IN CIVIL CASES: §§ 2784–2789; 742.
May be taken by the jury on retiring, n. § 2797; 747.
Additional, at request of jury, §§ 2800, 2801; 748.
Verdict against, to be set aside, n. § 2837; 756.
What sufficient assignment of error on, n. § 3207; 848.
IN CRIMINAL CASES, §§ 4440, 4441; 1095.
Duty of court to give, n. § 4420; 1089.

Instrument in Writing.
Constituting power of attorney, may be recorded; how revoked, § 1696; 556.
Affecting homestead, how to be executed, § 1990; 561.
Assignment of, § 2084; 585.
Not affected by private seal, § 2112; 592.
Given for security of public or individual, suit on, by party to be secured, § 2552; 682.

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Instrument in Writing.—*Continued.*
Suit on, by or against parties thereto by names therein designated, § 2558; 684.
Failure to attach copy of, to petition, ground of demurrer, § 2648; 710.
Verification of pleadings by attorney, in action upon, § 2672; 718.
Signature of, deemed genuine unless denied under oath, § 2730; 730.
To be filed in action before justice, § 3532; 900.
Action on, in justice's court, § 3539; 904.
Written portion to control printed portion, § 3651; 922.
Testimony of subscribing witness not conclusive as to execution of, § 3654; 922.
Not acknowledged, receivable in evidence, n. § 3659; 924.

Instrument of Adoption.
Acknowledgment and recording of, §§ 2308, 2309; 631.

Instruments Affecting Real Property.
Recording of, §§ 1941–1947; 547.
Entry of, on transfer book, §§ 1948–1954; 551.
Acknowledgment of, § 1955–1965; 552.
——— legalized, §§ 1966–1969; 555.
Forms of, § 1970; 556.
Introduction of, in evidence, §§ 3659–3662; 924.

Instruments for Counterfeiting.
Making or having in possession, punished, §§ 3924, 3931; 993.

Instruments, Negotiable.
See NEGOTIABLE INSTRUMENTS.

Insurance Companies.
Kinds of, § 1132; 286.
Taxation of, § 8 7; 194.
Formation of, §§ 1122, 1123; 282.
Capital required, §§ 1124, 1125; 283.
Directors and officers, §§ 1126–1129; 284.
Investments, examination of assets, insurance policies, transfer of stock, §§ 1130–1134; 285.
Capital increased; dividends; real estate, §§ 1135–1137; 287.
Mutual companies, §§ 1138–1140; 288.
Annual statements, §§ 1141–1143; 289.
Foreign companies, § 1144; 291.
Risks, agents, §§ 1145–1148; 292.
Examination by auditor, §§ 1149–1152; 293.
Fees, §§ 1153, 1154, 1156; 295.
Publication of certificate of auditor, § 1155; 296.
Publication of statements, §§ 1157, 1158; 296.
Mutual and stock plans not to be combined, § 1159; 297.
Mutual associations, reports, fees, etc., of, § 1160; 297.
Examination of form of policies, by auditor, 17 G. A., ch. 39; 297.

Insurance Companies.—*Continued.*
Publication of false statements, 17 G. A., ch. 111; 298.
Forfeiture of policies, 18 G. A., ch. 210; 299.
Soliciting agents, applications, policies, 18 G. A., ch. 211; 300.
LIFE, see LIFE INSURANCE COMPANIES; §§ 1161–1183; 301.
Place of bringing action against, § 2584; 689.
Burning of property with intent to injure insurer, punished, § 3888; 982.
Sinking or destroying raft, boat, or vessel, or lading to be sunk or destroyed, to defraud insurer, punished, §§ 4082, 4083; 1030.
Making false affidavit or protest by officer or owner of vessel to defraud insurer, punished, §§ 4084, 4085; 1030.

Insurrection.
Among convicts of penitentiary, suppression of, § 4798; 1154.

Intent to Defraud.
How stated in an indictment, § 4313; 1073.

Interchange.
Of judges of district and circuit courts, § 175; 40.
Of justices of the peace, § 3629; 916.

Interest.
On state warrants, § 78; 17.
On state bonds, how paid, § 82; 18.
On county bonds, how paid, § 291; 64.
On county warrants, § 328; 80.
On school fund, 18 G. A., ch. 12; 528; and § 1882; 533.
Rate of, §§ 2077, 2078; 580.
Taking of higher rate prohibited, § 2079; 580.
Forfeiture in action upon contract for illegal rate, § 2080; 582.
Assignee may recover illegal interest from usurer, § 2081; 584.
On protest of bills of exchange, § 2096; 588.
On verdict to day of judgment, entered as costs, § 2948; 785.
On judgments when stayed, to be ten per cent., § 3061; 813.
Rebate of, in case of redemption, § 3106; 824.
Rebate of, on claims paid on sale under foreclosure, § 3325; 869.

Interest in Suit.
Not to exclude witness, § 3638; 918.
What sufficient to disqualify witness in action by executor, etc., n. § 3639; 918.
May disqualify witness, Const., Art. 1, § 4; 1215.

Interlineation.
Amendments to pleadings not to be made by, § 2692; 724.

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Internal Improvements.
Occupying claimants upon lands granted for, § 1987; 560.
Mechanics' liens upon, 16 G. A., ch. 100, §§ 3, 5; 596.

Internal Revenue License.
No defense in prosecution for illegal sale of liquors, n. § 1543; 429.

Interpleader.
In action for recovery of personal property, §§ 2572, 2573; 686.

Interrogatories.
May be annexed to pleadings; answers to, §§ 2693–2700; 724.
Submitted to jury for special findings, §§ 2808, 2809; 749.
To garnishee, §§ 2980, 2982; 796.
For taking depositions on commission, §§ 3723, 3727, 3728; 936.

Intervenor.
Cannot have change of venue until intervention is allowed, n. § 2590; 691.
Who may become; rights and liabilities of, §§ 2683–2685; 720.
In action to recover personal property, § 3228; 853.

Intervention.
By whom allowed; how tried; effect of, §§ 2683–2685; 720.
In attachment proceedings, § 3016; 804.
In actions to recover personal property, § 3228; 853.

Intestate.
Distribution and descent of property of, §§ 2436–2464; 682.

Intoxicated Person.
Penalty for selling liquor to, § 1539; 426.
Sale of liquor to, punished, § 4044; 1019.

Intoxicating Liquors.
Regulation of sale of, by cities, § 463; 108.
Sale or manufacture prohibited; declared nuisance; punishment, §§ 1523–1525; 422.
Importer may sell in original packages, § 1524; 423.
Permits to sell, §§ 1526–1538; 423.
Sale or giving to minors or intoxicated person, § 1539; 426.
Sales without permit, § 1540; 427.
Mixing with beer, wine, or cider, prohibited, § 1541; 428.
Owning or keeping with intent to sell, § 1542; 428.
Building declared nuisance, § 1543; 429.
Information, search warrant, seizure, destruction, §§ 1544–1547; 430.
Intoxication punished, § 1548; 433.
Requisites of indictment or information, § 1549; 433.
Contracts or payments for, void, § 1550; 434.

Intoxicating Liquors.—*Continued.*
Prosecutions, § 1551; 436.
Liability on bond, § 1552; 436.
Bringing within the state without certificate, § 1553; 436.
Construction of law, meaning of term, §§ 1554, 1555; 436.
Action for damages from sale of, §§ 1556, 1557; 437.
Judgment a lien, § 1558; 438.
False statements punished, § 1559; 439.
Sale within two miles of city limits or place of election, 17 G. A., ch. 119; 439.
Furnishing or giving to voters, prohibited, 18 G. A., ch. 82; 441.
Sale of, by pharmacists, 18 G. A., ch. 75, §§ 8, 9; 450.
Sale of, within three miles of Agricultural College prohibited, § 1620; 469.
Drinking of, by juror, vitiates verdict, n. § 2837; 756.
Taking from officer by replevin, unlawful, n. § 3915; 991.
Sale of, to Indians or intoxicated persons punished, § 4044; 1019.

Intoxication.
Persons found in state of, punished, § 1548; 433.
Liability for damages caused by, §§ 1556, 1557; 437.
As a defense to charge of breaking and entering, etc., n. § 3891; 983.

Inventory.
Of property of absconding parent, husband, or wife, § 1346; 378.
Attached to assignment for benefit of creditors, § 2117; 593.
Of property of minor, made by guardian, § 2248; 624.
Of Property of Decedent:
By special administrator, § 2379; 641.
To be filed by general administrator, § 2370; 642.
Supplemental, when to be made, § 2376; 643.
Of partnership property in case of attachment, § 2973; 793.
Of effects of a dissolved corporation, § 3365; 875.

Investments.
In what to be made when not otherwise provided, §§ 251–254; 55.
Of life insurance companies, §§ 1179–1181; 308.

Iowa National Guard.
Active militia to be so called, 18 G. A., ch. 74, § 9; 261.

Iowa State University.
See State University, §§ 1585–1603; 461.

Iowa Weather Service.
Established, director, reports, appropriation, 17 G. A., ch. 45; 465.

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Issue.
Term includes what, § 45, ¶ 7; 9.
Of marriage subsequently annulled, § 2234; 621.

Issues in Actions.
By occupying claimants, how tried, § 1979; 519.
Upon complaint by apprentice against master, §§ 2290, 2291; 629.
On complaint against apprentice, §§ 2296–2299; 630.
In proceedings to appoint guardian of child of vicious parents, § 2304; 630.
Equitable, in actions by ordinary proceedings, how tried, § 2517; 667.
To be made up before change of place of trial, § 2591; 692.
On separate causes of action joined in same petition, may be separately tried, § 2630; 706.
General, abolished, § 2644; 708.
Kinds of, §§ 2737, 2738; 731.
How tried, §§ 2739–2744; 732.
Of fact in ordinary actions, how tried, § 2741; 732.
Court to instruct jury as to, n. § 2789; 743.
Reference of, §§ 2815–2830; 750.
In garnishment proceedings, § 2987; 798.
Affecting real property in actions before justices, transfer of, §§ 3533–3536; 903.
Upon indictments, how tried, §§ 4347–4351; 1079.

Itinerant Venders.
Of drugs, license of, 18 G. A., ch. 75, § 10; 451.

Jail.
Sheriff to have charge of, § 339; 82.
City or town may use, § 485; 121.
Suffering prisoner to escape from, punished, § 3953; 999.
Assisting prisoner to escape from punished, §§ 3956, 3957; 999.
Breaking and escaping from, punished, § 3959; 1000.
Confinement of vagrants at hard labor in, § 4142, 16 G. A., ch. 69; 1043.
To be used as prison, in what cases, § 4723; 1141.
Duty of keeper of, § 4724; 1141.
Calendar of prisoners in, §§ 4725, 4726; 1141.
Bedding, clothing, etc., to be furnished prisoners, § 4727; 1142.
Removal of prisoners in case of fire, § 4728; 1142.
Inspectors of, who constitute, duties and powers, §§ 4729–4733; 1142.
Punishment of refractory prisoners, § 4734; 1142.
Expenses of, how paid, § 4735; 1143.
Imprisonment in, at hard labor, §§ 4736–4743; 1143.

Jailor.
Appointed by sheriff, cannot recover compensation from county, n. § 3789; 953.
Suffering prisoner to escape, punished, §§ 3953, 3955; 999.

Joinder in Demurrer.
What deemed, § 2652; 713.

Joinder of actions.
Not to be made in action on mechanic's lien, or for divorce, §§ 2510, 2511; 666.
When allowable, §§ 2630–2634; 706.
Of different kind not allowed in replevin, § 3226; 853.
Not allowed in action for recovery of real property, § 3245; 857.
Not allowable in partition, § 3277; 863.
Not allowable in quo warranto proceedings, § 3346; 873.
Not allowable in proceedings by mandamus, § 3380; 878.
No allowable in action of forcible entry and detainer, § 3622; 915.

Joinder of Parties.
When allowable, §§ 2545, 2547–2550; 680.
Of guardian with insane person as plaintiff or defendant, § 2571; 686.
Of co-parties on appeal, § 3176; 839.

Joint Action.
For damages against persons for causing intoxication, n. § 1557; 437.
Against seller of liquors and owner of premises, n. § 1558; 438.

Joint Conventions.
Of general assembly for electing senator and canvassing votes for governor, § 26; 5.

Journals.
Of executive council, § 119; 25.
Of Houses of General Assembly:
Printing and distribution of, 16 G. A., ch. 159, §§ 4–8; 29.
As evidence, § 3717; 935.
To be kept and published, Const., Art., 3, § 9; 1226.
Dissent of members to be entered upon, Const., Art. 3, § 10; 1226.

Judge-Advocate.
Of militia brigade, appointment of, 18 G. A., ch. 74, § 32; 265.

Judge of Supreme, District, or Circuit Court.
Not to practice as an attorney, § 187; 43.
Disqualification by interest or relationship, § 190; 43.
May administer oaths and take acknowledgments, § 277; 59.

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Judge of Supreme, District or Circuit Court.—*Continued.*
Oath of; not required to give bond, §§ 673, 674; 171.
May issue subpœnas for witnesses upon trial of contested state elections, § 723; 178.
Resignation of, to whom made, § 782; 186.
May commit child to State Reform School, §§ 1656–1659 478.
Acknowledgment of instruments before, § 1955; 552.
May solemnize marriage, §§ 2193, 2194; 612.
May send child to Home for the Friendless, 17 G. A., ch. 176; 632.
To make allowance as to amount of property to be attached, § 2955; 789.
May grant writ of certiorari in vacation, § 3217; 850.
Granting of injunction by, §§ 3389–3392; 881.
Proceedings before, to vacate injunction, §§ 3399–3402; 882.
Proceedings before, to punish violation of injunction, §§ 3403–3407; 883.
Proceedings before, in habeas corpus, §§ 3451–3459, 3469; 891.
Action of, not to be questioned in habeas corpus, § 3483; 894.
To file papers and order in habeas corpus proceedings with clerk, § 3490; 894.
Competent as a witness, § 3645; 920.
Falsely assuming to be, punished, § 3962; 1000.
Stirring up controversies punished, § 3964; 1001.
Oppressing by color of office, punishment for, § 3969; 1001.
Included in the term magistrate, § 4108; 1037.
Liable to impeachment, Const., Art. 3, § 20; 1227.

Judges of Supreme Court.
Quorum of, § 139; 32.
Opinions of, to be filed, § 143; 33.
Number of, 16 G. A., ch. 7; 33; Const., Art. 5, §§ 2, 10; 1233.
To receive copies of supreme court reports, § 159; 35.
When to be elected, § 582; 157.
To administer oath of office to governor and lieutenant-governor, § 671; 170.
Approval of appeal bond by, § 3187; 843.
May order additional appeal bond, § 3188; 844.
May grant petition for re-hearing, § 3201; 847.
May grant writ of certiorari in vacation, § 3217; 850.
Compensation of, § 3769; 946.
Salary of, Const., Art. 5, § 9; 1235.
Election and term of, Const., Art. 5, §§ 3, 11; 1233.

Judges of District and Circuit Courts.
To fix times of holding terms, § 165; 38.
May order adjournment of court, § 169; 39.
May interchange, § 175; 40.
To sign record of court, § 176; 40.
May suspend clerk or sheriff from office, §§ 756–758; 182.
May appoint guardian *ad litem* for minor, § 2566; 685.
May appoint guardian to bring action for insane person, § 2569; 686.
Being party to an action, ground for change of place of trial, § 2590; 691
May appoint referee in vacation, § 2818. 751.
May make order of reference in vacation, § 2825; 753.
Signing of bill of exceptions by, § 2835; 755.
May confirm sale of property in vacation, § 2893; 774.
Appointment and control of receiver by, §§ 2903–2905; 778.
May direct mode of serving notice of motion, § 2921; 781.
Order of, may issue in vacation, §§ 2923, 2924; 781.
May require bond upon granting order, § 2925; 781.
May vacate attachment for failure to file new bond, § 2960; 790.
May cause defendant in attachment to be examined as to property, § 2968; 793.
May appoint receiver of attached property, § 2970; 793.
May appoint receiver of attached partnership property, § 2974; 794.
May grant specific attachment, § 3002; 802.
May appoint receiver of partnership property levied on under execution, § 3054; 811.
May grant order for examination of debtor, § 3137; 828.
Orders by, reviewable on appeal, § 3165; 836.
Certificate of, to entitle to review on appeal, § 3170; 837.
Certificate of, as to question involved in appeal, § 3173; 838.
May grant writ of *certiorari* in vacation, § 3217; 850.
May examine defendant in replevin suit as to disposition of property, §§ 3233, 3243; 855.
Application to, for leave to bring action in *quo warranto*, § 3348; 873.
May make order as to perpetuating testimony, § 3747; 940.
Compensation of, § 3774; 947.

Judges of District Court.
To receive copies of supreme court reports, § 159; 35.

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Judges of District Court.—*Continued.*
When to be elected, §§ 584, 585; 157.
To approve bond of district attorney, § 680; 173.
Prejudice of, ground for change of venue in criminal cases, § 4369; 1082.
May transfer criminal cause to another county, §§ 4383–4385; 1084.
Election and term of, Const., Art. 5, §§ 5, 11; 1234.
Shall be conservators of the peace, Const., Art. 5, § 7; 1234.
See, also, JUDGE.

Judges of Circuit Court.
To receive copies of supreme court reports, § 159; 35.
In counties having two county seats, to hold probate terms at each, § 164; 38.
Election of, § 586; 157.
Application to, for approval of official bonds, § 681; 173.
To appoint commissioners of insanity, § 1395; 388.
To appoint commission to inquire into insanity of patient in hospital, § 1442; 400.
May transfer certain matters to district court, when, § 2317; 635.
Proceedings by, in matter of discovery of assets of estate, §§ 2379–2381; 644.
Duty of, as to escheats, § 2461; 658.
To be an inspector of jails, § 4729; 1142.
See, also, JUDGE.

Judges of Superior Courts in Cities.
Election, qualification, duties, compensation, etc., of, 16 G. A., ch. 143; 140.

Judges of Court of Contested Elections.
For trial of contested county elections, §§ 695, 700; 175.
For trial of contested state elections, § 722; 178.

Judges of Election.
Jury lists to be returned by, § 238; 52.
Appointment and qualification of, §§ 606-610; 161.
May appoint constable to preserve order, § 612; 162.
May commit offenders to jail, § 613; 162.
To receive and deposit ballots, §§ 617, 618; 162.
Shall challenge and examine voters and administer oath to elector, §§ 619, 620; 162.
Canvass of votes by, §§ 622–633; 163.
Neglect or misconduct of, punished, §§ 4003–4006; 1008.

Judgment.
Entered in vacation void, n. § 177; 40.
May be entered in vacation by consent, § 183; 42.
On verdict rendered after opening of court in another county, §§ 185, 186; 42.

Judgment.—*Continued.*
In superior courts in cities, how made liens, 16 G. A., ch. 143, § 18; 143.
Of court for trying contested county elections, §§ 711, 715; 177.
——— appeals from, § 716; 177.
——— judgment on bond on affirmance of, § 717; 178.
Of court for trial of contested state elections, § 727; 179.
On appeal in proceedings to assess damages for taking private property, § 1257; 338.
Against railway corporations, for injuries, to be liens, § 1309; 358.
For damages from intoxication, liens of, § 1558; 438.
Against school districts, payment of, § 1787; 506.
Interest on money due on, § 2078; 580.
In favor of school fund in case of usury, § 2080; 582.
Are assignable, § 2084; 585.
Upon claims against estate of insolvent, § 2121; 594.
Discharging apprentice, § 2291; 629.
In proceedings against apprentice, § 2299; 630.
Against decedent may be enforced, against property without being filed as claim, n. § 2421; 650.
Against administrators for payment of legacies, § 2435; 652.
Against administrators for costs, § 2477; 660.
Against heirs and devisees jointly for costs, § 2485; 661.
Against several executors, § 2489; 662.
Action upon, within what time may be brought, § 2521; 668.
Not to be annulled by equitable proceedings, § 2522; 669.
Limitation of actions on, § 2529; 671.
In cases where counter claim, barred by the statute, is pleaded as a defense, § 2540; 678.
Assignee of, takes subject to equities, n. § 2546; 680.
Joint, set-off of, n. § 2550; 681.
Actions against persons jointly and severally bound by, § 2550; 681.
Against parties jointly bound not to bar proceedings against others, § 2550; 681.
Against partnerships, how enforced, § 2553; 683.
Against prisoners in penitentiary, not to be rendered until defense made, § 2559; 684.
Against married women, how enforced, § 2562; 684.
Not to be rendered against minor until defense made, § 2565; 685.
In actions where all defendants are not served, § 2627; 705.
Affecting real property, copies of, to be filed in proper county, § 2629; 706.

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Judgment.—*Continued.*
Prayer for, may be based upon several counts, § 2646; 708.
Sufficiency of prayer for, n. § 2646; 708.
Motion in arrest of, when allowable, § 2650; 712.
Prayer for, not necessary in answer, § 2658; 715.
Not to be reversed for errors not affecting substantial rights, § 2690; 724.
Upon failure to answer interrogatories attached to pleading, § 2699; 725.
How pleaded, § 2714; 727.
For costs of continuance, § 2748; 735.
Upon special findings of facts by jury, § 2809; 759.
On report of referee, § 2821; 751.
For costs in case of dismissal of action, § 2848; 764.
DEFINED, § 2849; 764.
On matter in abatement, § 2851; 764.
Setting off of individual, against joint, n. § 2853; 765.
In divorce not to be rendered by agreement, § 2861; 766.
Entry of, by clerk, § 2864; 766.
Satisfaction of, by clerk, § 2865; 766.
Complete record of, in case involving title, § 2866; 767.
Discharge of, on motion, § 2867; 767.
Assignment of, set aside, § 2867; 767.
BY DEFAULT, §§ 2869–2875; 767.
On default, motion to set aside, § 2871; 768.
Upon service by publication, security required, new trial granted, etc., §§ 2876–2881; 770.
Service of copy of, upon defendant served by publication, § 2879; 771.
Personal, not to be rendered against defendant served by publication, § 2881; 771.
LIEN OF, §§ 2882–2885; 772.
Filing of transcript of, to effect lien in another county, §§ 2884, 2885; 773.
In federal court, lien and satisfaction of, 17 G. A., ch. 129; 773.
BY CONFESSION, §§ 2894–2897; 775.
Offer to confess, §§ 2898, 2899; 776.
Upon offer to compromise, §§ 2900, 2901; 777.
In summary proceedings, §§ 2906, 2910; 779.
Upon bond for costs, § 2932; 782.
Apportionment of costs in, § 2933; 783.
Interest on, to be added to costs, § 2948; 785.
On attachment for debts not due, § 2958; 790.
Can be attached only by garnishment, n. § 2967; 792.
In garnishment proceedings not to be rendered until notice to principal defendant, § 2975; 794.
What sufficient assignment of, in case of garnishment, § 2976; 795.

Judgment.—*Continued.*
AGAINST GARNISHEE for failure to appear, § 2984. 2985; 797.
——— on answer, §§ 2988–2993; 798.
Against defendant and sureties on bond for release of attachment, § 2995; 800.
In attachment proceedings, satisfaction of, by sale, etc. § 3011; 803.
Execution may issue on, until barred, § 3025; 806.
How enforced, § 3026; 806.
Execution to be issued upon, by clerk, § 3029; 807.
Filing of transcript of, in another county. § 3031; 807.
Copy of, to be attached to execution, when, § 3036; 808.
Against principal and surety, § 3039; 808.
To recite order of liability of principal and surety, § 3042; 809.
May be levied on and sold or assigned under execution, § 3046; 809.
Against municipal corporation, how enforced, § 3049; 810.
Stay of execution upon; to bear ten per cent. interest after stay, § 3061; 813.
Stay bond has effect of, § 3064; 814.
How enforced against real estate of decedent, §§ 3092–3096; 821.
Mutual, may be set off, § 3097; 821.
Stay of, waives right to redemption, § 3102; 822.
Vests in junior creditor on redemption, § 3109; 824.
Revivor of, §§ 3130, 3134; 827.
Proceedings to subject property to payment of, §§ 3150–3153; 830.
Proceedings to vacate or modify in court where rendered, §§ 3154–3162; 831.
Of district or circuit court, appeals from, §§ 3163–3215; 835.
Affirmance of, on appeal, §§ 3181–3183; 840.
On appeal in supreme court, §§ 3194–3202; 845.
In supreme court, merges judgment rendered below, n. § 3194; 845.
In proceedings by certiorari, § 3222; 851.
Against sureties on replevin bond, § 3229; 854.
In action to recover personal property, §§ 3238–3244; 855.
In replevin, exemption of, from execution, § 3244; 857.
In action to recover real property, §§ 3265, 3266, 3267; 859.
In partition proceedings, §§ 3289, 3296; 865.
On foreclosure of mortgage, §§ 3321; 868.
Of forfeiture and eviction for waste, § 3333; 871.

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Judgment.—*Continued.*
In proceedings in *quo warranto*, § 3353–3359; 874.
On bond of public or corporate officer, effect of, § 3369; 875.
For penalty or forfeiture by collusion, § 3372; 876.
In proceedings by mandamus, § 3381–3384; 878.
Proceedings to enjoin action on, §3396; 882.
Of controversy submitted without, or in action, §§ 3412, 3414; 884.
Upon award, §§ 3428, 3429; 887.
In action against boat or raft, § 3439; 889.
In case of writ of error from justice of the peace, §§ 3603, 3604; 912.
BEFORE JUSTICE;
By default, §§ 3540.3543; 904.
When to be entered, § 3552; 905.
Where sum found exceeds jurisdiction, §§ 3553, 3554; 906.
Set-off of, §§ 3555–3565; 906.
By confession, § 3566; 906.
Filing transcript of, with clerk of circuit court, §§ 3567, 3568; 907.
Execution upon, § 3569; 907.
Appeal from, §§ 3575–3596; 907.
In action of forcible entry and detainer, § 3619; 914.
IN CRIMINAL CASES:
Of death, how executed, 17 G. A., ch. 165; 972.
Upon special verdict, § 4477; 1101.
Upon verdict or plea in, §§ 4495–4511; 1104.
Arrest of, §§ 4491–4494; 1104.
On two or more offenses, § 4503; 1106.
To pay fine, may also direct imprisonment, § 4509; 1106.
Of imprisonment, how executed, §§ 4512–4517; 1107.
For a fine, how enforced, § 4518; 1108.
For abatement of nuisance, or anything other than payment of money, how enforced, § 4519; 1108.
Appeal from, §§ 4520–4545; 1108.
In supreme court on appeal, § 4538; 1110.
For fines, when liens, § 4609; 1123.
——— stay of execution on, § 4610. 1123.
UPON TRIAL ON INFORMATION before justice, § 4688; 1134.
In proceedings against putative father of illegitimate child, § 4721; 1140.
Of imprisonment at hard labor, n. § 4736; 1143.
In favor of penitentiary, how collected, § 4790; 1153.

Judgment Debtor.
Garnishment of, § 2976; 795.
Proceedings against, auxiliary to execution, for discovery of property, §§ 3135–3149; 828.

Judgment Debtor.—*Continued.*
Equitable proceedings to reach property or credits of, § 3150–3153; 830.

Judgment Docket.
To be kept by clerk of court, § 197; 44.

Judicial Department.
Of State Government, Const., Art. 5; 1233.

Judicial Districts.
To remain as fixed, § 163; 38.
How constituted and changed, Const., Art. 5, § 10; 1235.

Judicial Notice.
To be taken of incorporation of city or town, § 424; 98.
Of statutes and rules to be taken by court, § 2708, 2709; 726.
Taken of city charters, when, n. § 2716; 728.
Matter of which taken, need not be pleaded, § 2722; 729.

Judicial Power.
Where vested, Const., Art. 5, § 1; 1233.

Judicial Proceedings.
To be public, § 189; 43.

Judicial Sale.
Purchaser at, has color of title, § 1982; 559.
See SALE UNDER EXECUTION.

Jurisdiction.
Of the state, §§ 1–3; 1.
Of the United States over lands owned by it, § 4; 1.
Of district and circuit courts, §§ 161, 162; 38.
Of county over stream forming boundary, § 280; 61.
Of city, to include water-works, § 472; 114.
Of mayor of city or town, § 506, 18 G. A., ch. 189; 128.
Of proceedings for removal or suspension from office, § 747; 181.
In action for divorce, §§ 2220–2230; 617.
In proceedings to sell real estate of minors, n. §§ 2257, 2258; 624.
Of court of probate, §§ 2312–2321; 634.
Of court in case of application of administrator to sell real estate, n. § 2389; 645.
Presumptions in favor of, n. § 2604; 697.
Judgment without, void, n. § 2604; 697.
Presumption of, upon service by publication, n. § 2618; 701.
Want of, ground of demurrer, § 2648; 710.
Facts conferring, need not be pleaded, § 2714; 727.
Upon service by publication, presumption not entertained in favor of, n. § 2870; 768.

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Jurisdiction.—*Continued.*
Of supreme court, appellate, § 3163; 835.
Of federal courts over maratime torts, n. § 3432; 888.
Of Justices.
In civil cases not exclusive, n. § 3508; 898.
Extent of, §§ 3507, 3508; 898.
Upon defective service, n. § 3520; 901.
In criminal actions, § 4660; 1130.
Of Public Offenses, §§ 4155–4164; 1044.
Facts constituting, how pleaded and proved, § 4308; 1072.
Of supreme court, Const., Art. 5, § 4; 1233.
Of district court, Const,, Art. 5, § 6; 1234.
Of justices of the peace, Const., Art. 11, § 1; 1242.

Jurors.
Competency, exemption, selection, etc., of, §§ 227–244; 51.
Grand and trial, number of, § 231; 52.
Term of service of, § 239; 53.
Certificates issued to, for services, § 245; 54.
Selection of, in superior courts of cities, 16 G. A., ch. 143, § 15; 143,
Members of Iowa National Guard exempt from duty as, 18 G. A , ch. 74, § 19; 264.
Firemen exempt from service as, § 1860; 441.
To settle disagreement as to homestead, how summoned, etc., § 2002; 565.
How Selected, § 2761; 738.
Challenges to, §§ 2762–2777; 738.
Mistake in number of, fatal, n. § 2761; 738.
Parties may agree to take verdict of majority of, § 2778; 740.
Rules regarding, §§ 2790–2802; 746.
Effect of sickness of, § 2793; 746.
Affidavits of, when receivable in support of motion for new trial, n. § 2858-761.
Rules relating to, applicable to court, § 2863; 766.
Punishable for misbehavior as for contempt, § 3492; 895.
In Justice's Court, §§ 3547, 3548; 905.
Fees of, § 3811; 960.
Fees to be taxed as costs, § 3812; 960.
Bribery of, punished, §§ 3944, 3945; 997.
Corruption of, punished, §§ 3946, 3947; 998.
In Criminal Cases, challenges to, §§ 4404–4410; 1086.
Having personal knowledge, must so declare, § 4433; 1093
Number of, necessary to constitute legal jury, n. Const., Art. 1, § 9; 1216.

Jury.
May be summoned at special term of court, § 166; 39.
Verdict of, after opening of court in another county, § 185; 42.
Exemption from service upon, §§ 228, 229; 51.
Lists, how made and returned, §§ 234-238; 52.
Coroner's, what is, §§ 352–360; 84.
Defendant not entitled to, on trial for violation of city ordinance, 18 G. A., ch. 77; 121.
In police court, selection of, etc., § 542; 139.
In superior courts in cities, 16 G.A., ch. 143, §§ 14–16; 142.
Members of Iowa National Guard exempt from service upon, 18 G. A., ch. 74, § 19; 264.
For appraisement of damages for property taken for mill-dams and races, §§ 1190–1195; 321.
To assess damages for taking of private property, §§ 1244, 1245; 334.
Firemen exempt from service on, § 1560; 441.
Trial by, may be had in proceedings to probate will, § 2340; 637.
Trial by, in case of claims against estate of decedent, § 2411; 649.
Right to trial by, does not exist in actions for divorce, n. § 2511; 666.
Trial by, waived by not objecting to improper bringing of action in equity, n. § 2519; 668.
Inability to obtain, ground for change of place of trial, § 2590; 691.
Fees of, to be paid by county from which change is taken in civil actions, § 2597; 694.
What issues to be tried by, § 2740; 732.
Selection of, §§ 2761–2778; 738.
Vacancy in, caused by challenge, how filled, §§ 2772, 2775; 739.
Agreement of parties to take verdict of majority of; formation of struck jury, § 2778; 740.
Swearing of, § 2779; 741.
Need not be re-sworn after allowance of change in issues, n. § 2779; 741.
Instructions to, §§ 2784–2789; 742.
View of premises by, § 2790; 746.
To be kept in charge of officer, § 2791; 746.
Separation of, during trial, § 2792; 746.
Effect of sickness of member of, § 2793; 746.
Discharged, when, § 2794; 747.
What papers to be taken by, on retiring, § 2797; 747.
May ask information of court, § 2801; 748.
Food and lodging for, " 2802; 748.
Verdict of, how rendered; form, etc., §§ 2803–2813; 748.

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Jury —*Continued.*
Right of trial by, infringed by compulsory reference in law actions, n. § 2816; 751.
Trial by, how waived, § 2844; 763.
To distinguish, in verdict, as to matter in abatement, § 2851; 764.
To assess the damages in case of default, § 2872; 769.
Party in default not entitled to, § 2872; 769.
May find value of property in replevin proceedings, § 3238; 855.
Verdict and findings of, in real actions, §§ 3258, 3263, 3265; 859.
Action of, not to be questioned in habeas corpus proceedings, § 3483; 894.
In Justice's Court, trial by, §§ 3537, 3541, 3551; 904.
May make comparison of handwriting, § 3655; 922.
In Criminal Cases:
In trial for murder, shall ascertain degree of crime, § 3851; 971.
To designate punishment, on conviction of murder in the first degree, 17 G. A., ch. 165, § 2; 972.
To inquire as to pregnancy or insanity of person sentenced to death, 17 G. A., ch. 165, § 7; 972.
Formation of, §§ 4389–4397; 1085.
Challenge of, §§ 4398–4418; 1086.
Discharge of, to commit defendant for higher charge, §§ 4430, 4431; 1093.
View of premises by, § 4432; 1093.
To determine law and fact in prosecution for libel, § 4102; 1036; and § 4438; 1094.
Separation and admonition of, §§ 4434, 4435; 1094.
Retirement of, on deliberation, § 4442; 1095.
Discharge of, § 4443–4451; 1096.
Conduct of, after submission of case, §§ 4452–4459; 1097.
Verdict of, §§ 4460–4478; 1098.
Upon Information, before Justice:
Selection of, §§ 4672–4684; 1132.
Method of trial by, §§ 4683–4687; 1133.
Number of jurors necessary to constitute legal, n. Const., Art. 1, § 9; 1216.
Fee of, provision requiring party to pay, not unconstitutional, n. Const., Art. 1, § 9; 1216.
Right of trial by, Const., Art. 1, § 9; 1216.
Trial, right to in criminal prosecutions, Const., Art. 1, § 10; 1218.
Trial to determine damages from taking private property for public use, Const., Art. 1, § 18; 1220.

Justice of the Peace.
Entitled to copy of session laws, § 40; 7.
Disqualified by interest or relationship to party, § 190; 43.
May administer oaths and take acknowledgments, § 277; 59.

Justice of the Peace.—*Continued.*
Proceedings before, under warrant of coroner, § 363; 85.
May perform duties of coroner, § 367; 86.
Number to be elected, § 389; 89.
Election of, § 590; 158.
Additional, election of, § 592; 158.
How voted for, § 593; 158.
Bonds of, § 672, 172.
Proceedings to remove for failure to give new bond, § 778, 185.
Vacancy in office, how filled, §§ 794, 795; 188.
Duty of, in estray matters, §§ 1465–1468; 406.
Failure of, to perform duty as to estrays, penalty for, § 1478; 408.
Duty of, as to lost goods, vessels, rafts, lumber, etc., §§ 1512–1517; 419.
Action before, against person taking up boat, or the finder of lost goods, for penalty, § 1522; 422.
Proceedings before, to seize and condemn liquors illegally held, §§ 1544–1547; 430.
Duties of, in connection with board of health, 18 G. A., ch. 151, §§ 20, 23; 455.
May send boy or girl convicted of crime to judge to be sentenced to Reform School, § 1654; 478.
Acknowledgment of instruments before, §§ 1955, 1956; 552.
To enter unclaimed property in estray book, § 2178; 607.
May solemnize marriage; certificate of, § 2193; 612.
May send child to Home for the Friendless, 17 G. A., ch. 176; 632.
Judgment of, within what time action on may be brought, § 2521; 668.
Provisions as to attachments applicable in proceedings before, §§ 3023, 3024; 806.
Provisions as to indemnifying bond applicable to executions issued by, § 3060; 813.
Provisions as to executions applicable in proceedings before, § 3129; 827.
May issue warrant for seizure of boat or raft, § 3433; 888.
Proceedings before, in Civil Cases:
Jurisdiction, §§ 3507, 3508; 898.
Place of bringing suit, §§ 3509–3514; 899.
Docket entries, § 3515; 900.
Parties; commencement of action; notice; service; costs, etc., §§ 3516–3523; 900.
Appearance, §§ 3524, 3525; 902.
Continuance, §§ 3526–3529; 902.
Pleadings, §§ 3530, 3532; 902.
Counter claim, how made, § 3531; 903.
Change of venue, §§ 3533, 3534; 903.

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Justice of the Peace.
PROCEEDINGS BEFORE, IN CIVIL CASES.—*Continued.*
Transfer of cause involving title to real property, §§ 3535, 3536; 903.
Trial, §§ 3537–3551; 904.
Judgment, §§ 3552–3566; 905.
Transcript of judgment, §§ 3567, 3568; 907.
Executions, §§ 3569–3574; 907.
Appeals, §§ 3575–3596; 907.
Writs of error, §§ 3597–3604; 911.
Recovery of specific property, and attachment, §§ 3605–3610; 913.
Forcible entry and detainer, §§ 3611–3624; 913.
General provisions, §§ 3625–3635; 915.
Certificate of, as evidence, § 3714; 934.
Depositions to be used before, how taken, §§ 3727–3744; 937.
To pay witness fees, uncalled for, into treasury; penalty for failure, §§ 3815, 3816; 962.
FEES OF, § 3804; 959.
———how paid in criminal cases, § 3806; 959.
——— in proceedings as to estrays, or trespassing animals, §§ 3821, 3822; 963.
Person falsely assuming to be, punished, § 3962; 1000.
Stirring up controversies punished, § 3964; 1001.
Failing to pay over, making false returns as to, or appropriating fees, punished, §§ 3970–3972; 1001.
To report forfeited recognizances, § 3974; 1002.
May issue warrant to search gambling house, § 4027; 1014.
Included within term magistrate, § 4108; 1037.
PROCEEDINGS AND TRIALS BEFORE, IN CRIMINAL ACTIONS:
Jurisdiction, § 4660; 1130.
Informations, §§ 4661–4665; 1131.
Arrest of defendant, § 4666; 1131.
Bringing before justice; pleas, §§ 4667–4669; 1132.
Change of venue, §§ 4670, 4671; 1132.
Selection and empaneling of jury, §§ 4672–4682; 1132.
Trial, §§ 4683–4687; 1133.
Judgment, §§ 4688–4692; 1134.
Execution of judgment, §§ 4693–4696; 1135.
Appeal, bail, witnesses bound over; §§ 4697–4701; 1135.
Trial and judgment on appeal, §§ 4702–4706; 1136.
What offenses triable originally before, Const., Art. 1, § 11; 1218.
Jurisdiction of, Const., Art. 11, § 1; 1242.

Justification.
In actions for injury to person, character or property does not preclude mitigating circumstances, § 2682; 719.
Of words charging crime, what sufficient evidence of, n. § 2682; 719.
Matter of, must be specially pleaded. § 2718; 728.
In prosecution of libel, the truth may be shown by way of, Const., Art. 1, § 7; 1216.

Keepers of Jails.
Duties of, §§ 4724–4723; 1141.

Kidnapping.
Punishment for, § 3869; 978.
Jurisdiction of offense, § 4162; 1045.

Labor.
UPON HIGHWAYS:
Who required to perform, § 983; 249.
Notice, certificate, § 984; 249.
Penalty for failure to perform; recovery, § 985; 250
Contracts payable in, §§ 2097, 2098; 588.
Mechanics' liens for, 16 G. A., ch. 100, § 3; 596.
Stay not allowed upon judgment for, § 3063; 814.
May be required of prisoners, §§ 4736–4743; 1143.

Laborer.
Mechanic's lien upon railway in favor of, n. 16 G. A., ch. 100, § 3; 596.
Judgment for wages of, not to be stayed, § 3063; 814.

Land.
Term includes what, § 45, ¶ 8; 9.
Measure of, § 2041; 574.
Subject to mechanic's lien, 16 G. A., ch. 100, § 4; 597.

Lands.
School, University, or public, effect of sale of, for taxes, 17 G. A., ch. 101; 229.
Of University, accounts and sales of, §§ 1594–1599; 463.
Of Agricultural College, leasing of, 15 G. A., ch. 71; 468.
Of minors, leasing of, by guardians, § 2250; 624.
See, also, REAL PROPERTY.

Land Office.
State, §§ 83–93; 19.
——— transfer of, to office of secretary of state. 18 G. A., ch. 206; 21.
Receipt or certificate of register or receiver of, as evidence, §§ 3709, 3710; 933.

Landlord.
Tenant not to acquire title against, § 1983; 559.
AND TENANT, general provisions as to, §§ 2011–2018; 568.

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Landlord.—*Continued.*
Lien of, § 2017; 569.
Attachment by; action to recover personal property taken under, § 2575, 687.
May be substituted in action to recover real property, §§ 3252, 3253; 858.

Language.
Foreign, teaching of, in common schools, § 1763; 501.

Larceny.
Assault with intent to commit, punished, § 3874; 979.
Selling or concealing mortgaged property, deemed, § 3895; 984.
WHAT CONSTITUTES; punishment for, § 3902; 986.
From house, store, etc., in night time, § 3903; 987.
——— in day time, § 3904; 987.
From building on fire or from the person, § 3905; 988.
By personating another, § 3906; 988.
By appropriating property, found, § 3907; 988.
BY EMBEZZLEMENT:
By public officer, § 3908; 988.
By agent or clerk, § 3909; 989.
By common carrier, § 3910; 989.
RECEIVING STOLEN GOODS:
Punishment for first offense, § 3911; 990.
———for second offense, § 3912; 990.
Conviction of the principal need not be shown, § 3913; 990.
Value of stolen property, how determined, § 3914; 990.
Taking away and secreting property held by officer under process, § 3915, 3916; 991.

Lard.
From diseased hogs, regulation of sale of, 18 G. A., ch. 137; 1019.

Law.
Due process of, Const., Art. 1, § 9; 1216.

Laws.
Printing of, §§ 35–37; 6.
Distribution and sale of, §§ 39–43; 7.
Compensation for publication of, § 44; 8.
Written, how introduced in evidence; not written, how proved, § 3719; 935.
Of general nature, to have uniform operation, Const., Art. 1, § 6; 1215.
Impairing obligation of contracts, not to be passed, Const., Art. 1, § 21; 1222.
Style of, Const., Art. 3, § 1; 1224.
When to take effect, Const., Art. 3, § 26; 1227.
To embrace but one subject, expressed in title; Const., Art. 3, § 29; 1228.
To be general and uniform; local and special, when allowed, Const., Art 3, § 30; 1228.
Inconsistent with constitution, void Const., Art. 12, § 1; 1244.

Laws.—*Continued.*
Not inconsistent with constitution, not to be affected thereby, Const., Art. 12, § 2; 1244.
See, also, ACTS.

Law Department of University.
Graduates of, admitted to practice; § 209, 47.

Laying out of Highways.
By commissioner, method of, §§ 931–933; 238.

Lead Mines.
Drainage of; §§ 1229–1235; 330.

Lease.
Forfeited by violation of two mile limit liquor act; 17 G. A., ch. 119, § 8; 440.
Assignment of, carries landlord's lien; n. § 2017; 569
Of tenant or cropper, expires when, § 2019; 569.
Assignment of, n. § 2084; 585.
For one year, need not be in writing, § 3664; 926.
Of building used as house of ill fame, void, § 4014; 1011.
Of agricultural lands, not valid for longer period than twenty years, Const., Art. 1, § 24; 1223.

Leasehold Interest.
Homestead may be claimed in, n. § 1988; 560.
Mechanic's lien upon, 16 G. A., ch. 100, § 4; 597.
Sale of, under execution, may be redeemed from, when, §§ 3098, 3099; 821.

Leasing.
Of extensions, by railway companies, § 1299; 356.
Of lands of Agricultural College, 15 G. A., ch. 71; 468.
Of building for house of ill fame, punished, § 4015; 1011.
Of convict labor, 18 G. A., ch. 149; 1156

Leave to Amend.
When necessary, n. § 2689; 721.

Legacies.
Payment of, by administrator, § 2420; 650
Specific, payment of, §§ 2429–2435; 651.

Legatee.
Embraces devisee, § 2336; 637.

Legislative Department.
Of state government, Const., Art. 3, § 1; 1224.

Legislative Power.
Cannot be delegated to people by general assembly, n. Const., Art. 3, § 1; 1224.

Legislative Proceedings.
How proved, § 3717, 935.

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Legislature.
Members of, when to be elected, § 587, 588; 157.
Right of control over corporation by, § 1090; 275.
Control of railways by, § 1306; 357.
May control railways constructed by aid of taxes, 16 G. A., ch. 123, § 9; 372.
Journals of, as evidence, § 3717; 935.
May repeal law authorizing the contracting of state debt; Const., Art. 7, § 6; 1227.
Shall provide for the taxation of corporations, Const., Art. 8, § 2; 1237.
See, also, GENERAL ASSEMBLY.

Lessee.
Of railway, liability of, § 1278; 346.
May have a homestead interest, n. § 1988; 560.
Of railway or other company, place of bringing action against, § 2582; 689.
Holding over, action of forcible entry and detainer against, § 3611; 913.

Lessor.
Property of, to be listed and taxed to, § 803; 193.

Letters of Administration.
With will annexed, granted, § 2348; 638.
To whom granted, § 2354; 640.
In another state, effect of, etc., §§ 2368, 2369; 642.
Revocation of, § 2503; 668.

Letters Patent.
Action to amend for fraud, etc., § 3345; 872.

Levee.
Malicious injury to, punished, § 3991; 1006.

Levy of Attachment.
On partnership property, §§ 2973, 2974; 793.
Not rendered void by defective return, n. § 3010; 803.
On real property, entry of, in incumbrance book, § 3012; 806.
Against husband upon property of wife, n. § 3022; 806.

Levy of Execution.
How effected, §§ 3043–3050; 809.
Does not expire with execution, n. § 3037; 808.
Operates as satisfaction of debt, n. § 3044; 809.
Excessive, sale under, set aside, n. § 3045; 809.
On property of partnership, §§ 3053, 3054; 811.
Officer making, may require indemnifying bond, when, §§ 3055–3057; 812.

Levy of Taxes.
To pay county bonds, §§ 291, 293; 65.

Levy of Taxes.—*Continued.*
To pay funding bonds, 17 G. A., ch. 58, § 3; 66.
By vote of people, §§ 309–319; 75.
By board of supervisors, § 796; 189.
——— time and method of making, §§ 839, 840; 205.
For school purposes, §§ 1777–1780; 503.
Erroneous, recovery of property seized under, n. § 3225; 852.

Lewdness.
Punishment for, § 4012; 1010.

Liability.
Of husband or wife for contracts of the other, § 2203; 613.
Civil or criminal, as excuse to witness for refusing to testify, §§ 3646, 3647; 921.

Liabilities.
Of estates of decedents, contingent, § 2414; 649.

Libel.
Survival of action for, n. § 2525; 669.
Pleadings in action for, §§ 2681, 2682; 719.
Defined, §§ 4097, 4100; 1036.
Person making or publishing, punished, § 4098; 1036.
In prosecutions for, truth given in evidence, § 4099; 1036; and Const., Art. 1, § 7, 1216.
What is publication of, § 4101; 1036.
Jury may determine law and facts, § 4102; 1036; and § 4438; 1094.
Indictment for, need not set forth extrinsic facts, § 4310; 1072.

Liberation of Poor Convicts.
Conditions of, §§ 4611, 4612; 1123.
Not to be made when defendant may be put at hard labor, § 4741; 1144.

Liberty.
Right of enjoying and defending, Const., Art. 1, § 1; 1214.
Of speech and the press, Const., Art. 1, § 7; 1216.

Librarian of State Library.
Duties of, §§ 1890–1897; 535.
Compensation of, § 3762; 944.

Library.
Of state, see STATE LIBRARY, §§ 1885–1899; 534.
Public, entitled to public documents, § 131; 28, and § 461; 107.
——— may be maintained by city, § 461; 107.
Of congress, public documents to be sent to, § 64; 14; and 16 G. A., ch. 159, § 10; 30.

License.
Of attorney, revocation of, §§ 217–223; 50.
In what cases city may require, for prosecution of business, § 463; 108.

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License.—*Continued.*
Of peddlers, how procured, §§ 906, 907; 231.
For public shows, 16 G. A., ch. 131; 232.
For erection of toll bridge, §§ 1003–1010; 254.
For ferry, §§ 1011–1018; 255.
FOR FERRY OR TOLL BRIDGE:
To be recorded, § 1019; 257.
Application for, § 1022; 257.
Forfeiture of, § 1024; 257.
For construction of mill-dam or race, § 1198; 323.
—— forfeiture of, § 1199; 323.
For itinerant venders of drugs, 18 G. A., ch. 75, § 10; 451.
For marriage, §§ 2187–2192; 611.
TO MINE:
Protected by action, n. § 3246; 857.
Valid, though in parol, if possession is taken, n. § 3665; 927.
Carrying on business without, punished; § 4016; 1020.

Liens.
Of attorneys, when allowed; how released, §§ 215, 216; 48.
Of assessments by city for improvements, §§ 478, 480; 117.
Of taxes upon real property, § 865; 211.
—— as between vendor and vendee, § 853; 208.
Of vendors, how preserved, § 1940; 546.
How affected by change of homestead, § 2000; 565.
OF MECHANICS, see MECHANICS' LIENS, 16 G. A., ch. 100; 596.
Upon property of political corporations, 15 G. A., ch. 23; 603.
Of warehousemen, carriers, etc., for charges, §§ 2177–2180; 607.
Of livery stable keepers, n. § 2177; 607.
Of livery stable keepers and herders, 18 G. A., ch. 25; 609.
Of hotel keepers, 18 G. A., ch. 181, § 2; 610.
May be created by husband or wife in favor of the other, § 2206; 614.
Upon personal property, specific attachments in actions to enforce, § 3000; 802.
Creditors having, may redeem property from sale under execution, § 3103; 823.
Of redeeming creditors held satisfied, §§ 3114–3117; 825.
Created by proceedings to subject property to payment of judgment, § 3152; 830.
Preserved in proceeding to vacate or modify judgments, § 3159; 834.
How disposed of, in case of partition, §§ 3284–3288; 864.
Of mortgages not merged in judgment of foreclosure, n. § 3321; 868.
Holder of, may have assignment of mortgage upon paying off claim; § 3323, 869.

Liens.—*Continued.*
On property sold under foreclosure, payment of, § 3325; 869.
Against rafts, etc., for claims, § 3446; 890.
Of undertakings of bail, §§ 4606–4608, 1123.
Of judgment for fines, § 4609; 1123.
Created in proceedings against putative father of illegitimate children, § 4717; 1139.
OF ATTACHMENTS:
Force and priority of, n. § 2969; 793.
On partnership property, § 2974; 794.
Discharged by bond, n. § 2994; 800.
OF EXECUTIONS:
On personal property, attach only upon levy, § 3045; 809.
On partnership property, § 3054; 811.
OF JUDGMENTS:
Of superior courts in cities, 16 G. A., ch. 143, § 18; 143.
Against railway companies for injuries, § 1309; 358.
For damages under liquor law, § 1558; 438.
Do not attach to homesteads, n. § 2882; 772.
Do not attach to survivor's interest in homestead, n. § 2907; 567.
In state courts of record, §§ 2882–2885; 772.
In federal courts, 17 G. A., ch. 129; 773.
Not released by stay of execution, § 3071; 815.
Against decedent, how enforced, §§ 3092–3096; 821.
Lost by judgment in supreme court, n. § 3194; 845.
OF LANDLORDS:
For rent, §§ 2017, 2018; 569.

Lieutenant-governor.
Canvass of votes for, by joint convention, § 26; 5.
When to be elected, § 580; 157.
Oath of office of, § 671; 170.
Not required to give bond, § 674; 171.
When to qualify, § 685; 173.
Contesting election of, § 737; 179.
Election and term of, Const., Art. 4, § 3; 1231.
Election of, by general assembly, Const., Art. 4, § 4; 1231.
Contested elections for, Const., Art. 4, § 5; 1231.
Who eligible to office of, Const., Art. 4, § 6; 1231.
Person holding office disqualified to act as, Const., Art. 4, § 14; 1232.
Official term of, mileage and compensation, Const., Art. 4, § 15; 1232.
Shall act as governor, when, Const., Art. 4, § 17; 1232.
Shall be president of senate and have casting vote, Const., Art. 4, § 18; 1232.

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Lieutenant-governor.—*Continued.*
In case of death or disqualification of, while acting as governor, who to take place of, Const., Art. 4, § 19; 1232.

Life.
Right of enjoying and defending, Const., Art. 1, § 1; 1214.

Life Estate.
Disposition of, on sale of property in partition, § 3306; 866.

Life Insurance.
Not subject to debts of deceased, disposition of, § 1182; 308; and § 2372; 643.

Life Insurance Companies.
Duration of, § 1069; 271.
Organization of, §§ 1161–1163; 301.
Agents of, §§ 1164–1166; 302.
Annual statements of, §§ 1167, 1168; 303.
Deposits and certificate of, §§ 1169–1171; 305.
Examination by auditor, § 1172; 306.
Securities to vest in state, § 1173; 306.
Change of securities; interest, §§ 1174, 1175; 307.
Auditor's report, § 1176; 307.
Penalty for doing business without certificate, §§ 1177, 1178; 307.
Investment of funds, real estate, §§ 1179–1181; 308.
Policy exempt from execution, § 1182; 308; and § 2372; 643.
Fees, § 1183; 309.
Defenses to actions on policies, 16 G. A., ch. 55; 309.

Light and Air.
No easement in, § 2032; 573.

Lime.
Weight of, per bushel, § 2049; 575.

Limit of Indebtedness.
Of state, Const., Art. 7, §§ 1, 2; 1236.
Of political and municipal corporations, Const., Art. 11, § 3; 1242.

Limits of City.
Extension of, by council, 18 G. A., ch. 56; 99.
Extension of, by vote, 16 G. A., ch. 47; 101.

Limits of Homestead.
How changed, § 2000; 565.

Limitation.
Periods of, in settlement of estates reckoned from when, § 2349; 638.
Of time within which administration may be granted, § 2367; 641.
Of claims against estates of decedents, § 2421; 650.
Of time of application to set aside default, § 2871; 768.
Of executions on judgments before justices, § 3567; 907.
Of time for appeal in criminal cases, § 4522; 1108.

Limitation of Actions.
For recovery of fines by cities, § 486; 121.
For recovery of property sold for taxes, § 902; 230.
For damages caused by intoxication, n. § 1557; 437.
Not to apply to action for school fund, § 1880; 532.
On bond of inspector of shingles and lumber, § 2071; 579.
Against wife for family expenses, n. § 2214; 615.
To question validity of sale by guardian, § 2265; 626.
For recovery of real property sold by executor, § 2401; 647.
GENERAL PROVISIONS, § 2529-2542; 671.
Periods of, in particular cases, § 2529; 671.
For relief on ground of fraud, mistake, or trespass, commences to run when, § 2530; 674.
On open account, commences to run when, § 2531; 675.
What deemed commencement of action, § 2532; 675.
Non-residence not included, § 2533; 676.
When action is barred in another country, § 2534; 676.
In case of death of party entitled to cause of action, § 2536; 677.
When new suit is brought, § 2537; 677.
Not applicable to bank notes, § 2538; 677.
Admission or new promise to revive debt, § 2539; 677.
Counter claim pleaded, although barred, § 2540; 678.
Not to run while action is stayed by injunction or prohibition, § 2541; 678.
Provisions not applicable in actions in favor of school fund, § 2542; 678.
For assignment of dower, n. § 2444; 655.
Execution not to issue after judgment barred, § 3025; 806.
For writ of certiorari, § 3224; 851.
For use and occupation in real actions, § 3261; 859.
In criminal prosecutions, §§ 4165–4170; 1046.

Limited Partnerships.
Provisions as to, §§ 2147–2170; 603.

Link.
Standard length of, § 2040; 574.

Liquids.
Measure of, §§ 2044, 2045; 574.

Liquors.
Sale of, near encampment of militia may be prohibited, 18 G. A., ch. 74, § 22; 264.

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Liquors —*Continued.*
Not to be sold at fairs of agricultural societies, § 1114; 281.
Intoxicating, see INTOXICATING LIQUORS, §§ 1523–1559; 422.
Drinking of, by juror, vitiates verdict, n. § 2837; 756; and n. § 4489; 1103.
Adulterated or drugged, sale of, punished, § 4040; 1018.

Lis Pendens.
Third persons affected with notice of, §§ 2628, 2629; 705.

List of Lands.
Certified by register of state land office, § 93; 20.

Lists of Jurors.
How made and returned, §§ 234–238; 52.

Listing of Property for Taxation.
By owner, guardian, &c., §§ 803–806; 193.
By assessor, §§ 822–826; 199.

Livery Stable Keeper.
Lien of, for charges, 18 G. A., ch. 25, n. § 2177; 609.

Loan and Building Associations.
See MUTUAL BUILDING ASSOCIATIONS, §§ 1184–1187; 310.
Listing and taxation of shares in, 16 G. A., ch. 163; 196.

Loans.
By municipal corporations, § 500; 126.
Of the school fund, §§ 1861–1868; 528.
Of money, rate of interest allowed on, §§ 2077, 2079; 580.
Of money of minor, by guardian, § 2250; 624.

Local Boards of Health.
See STATE BOARD OF HEALTH, 18 G. A., ch. 151, §§ 13–24; 453.

Local Laws.
When not allowable, Const., Art. 3, § 30; 1228.

Lodges of Odd Fellows or Masons.
Associations for the incorporation of, § 1091; 276.

Logs.
Taking up of, when adrift, §§ 1509–1511; 418.

Loss of Property.
Administrator not accountable for, § 2473; 660.

Loss of Service of Child.
Resulting from injury or death, who may sue for, § 2556; 683.

Losses to School Fund.
Liability of state for, Const., Art. 7, § 3; 1236.

Lost Bond.
Action upon, by ordinary proceedings, § 2512; 666.

Lost Boundaries.
Application for survey to restore, 15 G. A., ch. 8; 862.

Lost Goods.
Taking up of boats, rafts, or lumber, §§ 1509–1513; 418.
Disposition of goods, money, or notes, by finder, §§ 1514, 1515; 420.
Advertising, compensation, proceeds, penalties, §§ 1516–1522; 421.

Lost Pleadings.
Substitution of, § 2735; 731.

Lots.
IN TOWN PLATS:
Description and conveyance of, § 566; 147.
Selling without platting, penalty for, § 572; 151.
Filling up, and draining, by city, § 480; 118.
Instruments affecting; how recorded, § 1947; 550.

Lottery.
Establishment and advertisement or sale of tickets of, punishment, § 4043; 1019.
Shall not be authorized by state, Const., Art. 3, § 28; 1228.

Lumber.
Taking up of, when adrift, §§ 1509–1511; 418
Inspection of, §§ 2069–2074; 578.
Burning or destruction of, § 3886; 982.

Lunatic Asylum.
See HOSPITAL FOR THE INSANE, §§ 1383–1394; 385.
Service of notice on person confined in, § 2615, 2616; 700.

Lunatics.
Redemption of property of, from tax sale, § 892; 222.
Limitation of action by, for recovery of property sold for taxes, 902; 230.
Guardianship of, §§ 2272–2279; 627.
Competency of witnesses in actions against guardians of, § 3639; 918.
See, also, INSANE PERSONS.

Lyceums.
Associations for the incorporation of, § 1091; 276.

Machinery.
Mechanic's lien for, 16 G. A., ch. 100, § 3; 596.
Malicious injury to, punished, § 3978; 1003.

Magazines.
For keeping of combustibles, provided or licensed by city, § 456; 106.

Magistrates.
Certificates of marriages solemnized before, § 2194; 612.

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Magistrates.—*Continued.*
Who are, duties and powers of, § 4103; 1037.
Proceedings before, for security to keep the peace, §§ 4115–4123; 1039.
Action of, in suppressing riots, §§ 4149–4154; 1044.
Proceedings before, against fugitive from justice, §§ 4176–4182; 1048.
Proceedings before, upon arrest, §§ 4219–4225; 1054.
Proceedings before, upon preliminary examination, §§ 4226–4244; 1056.
Admitting defendant to bail, upon binding over, §§ 4245–4247; 1058.
Binding witnesses to appear, §§ 4248–4251; 1059.
Return of papers of preliminary examination, § 4252; 1059.
May order information filed, § 4253; 1059.
May tax costs against prosecutor, § 4254; 1060.

Maim.
Assault with intent to, punished, § 3874; 979.

Maiming or Disfiguring.
Punished, § 3857; 975.

Maintenance.
In actions for divorce, §§ 2226–2229; 618.

Majority of Minor.
Time of attaining, §§ 2237–2239; 621.

Maker.
Of notes and bills, action against, § 2083; 585.
Of instruments payable in labor, property or money, tender by, §§ 2098–2103; 589.

Male Animals.
Running at large, may be taken up, § 1447; 401.

Males.
Time of majority of, § 2237; 621.

Mal-treatment.
Of adopted child, § 2311; 632.

Malice.
Unproved allegation of truth as a defense in action for slander or libel, does not amount to, § 2682; 719.
To affect damages must be averred, § 2727; 729.

Malice Aforethought.
As an element of murder, § 3848; 970.

Malicious Mischief and Trespass.
Injuries to domestic animals, § 3977; 1003.
——— to dams, locks, machinery or fire engines § 3978; 1003.
——— to bridges, railways, highways or telegraphs, § 3979; 1003.
——— to rafts, logs, or lumber, §3980; 1004.

Malicious Mischief and Trespass.—*Continued.*
Injuries to trees, fences, or crops, § 3981; 1004.
——— to monuments, mile-stones, sign-boards or lamps, § 3982; 1004.
Trespass and taking away property, § 3983; 1005.
Upon gardens, orchards, or improved lands, § 3984; 1005.
Injuring or defacing buildings, or destroying or secreting goods, § 3985; 1005.
Tearing down notices or advertisements, § 3987; 1006.
Defacing public buildings, § 3986; 1005.
Taking of wood by boat, vessel or raft, § 3988; 1006.
Injuring monuments of state boundary, § 3989; 1006.
Obstructing railways, § 3990; 1006.
Injuring levees, § 3991; 1006.
Obstructing ditches or drains, § 3992; 1006.
Obstructing or defacing highways, § 3992½; 1007.

Malicious Prosecution.
Husband cannot be joined in action by wife for, n. § 2211; 614.

Malicious Threats.
Punishment for, § 3871; 979.

Malicious Trespass.
See MALICIOUS MISCHIEF AND TRESPASS, §§ 3983, 3984; 1005.

Mandamus.
To compel levy and collection of tax to pay judgment, n. § 3049; 810.
Action of, §§ 3373–3385; 876.

Manslaughter.
Punishment for, § 3856; 975.

Manufacture of Intoxicating Liquors.
Prohibited, §§ 1523–1525; 422.

Manufacturers.
Taxation of property of, § 816; 197.

Maps.
Of coal mines, to be furnished to inspector, 18 G. A., ch. 202. § 7; 444.
Published, as presumptive evidence, § 3653; 922.
In office of surveyor-general, copies of as evidence, § 3707; 933.

Mariners.
May make verbal will, § 2325; 636.

Markets.
May be established by city, § 456; 106.
Regulation of, by city council, § 526; 133.

Marks.
Of domestic animals, §§ 1479–1481; 408.

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Marriage.
Of survivor in possession of homestead, does not affect right, n. § 2007; 567.
Contract of, when valid; license for; penalty; certificate, etc., §§ 2185–2201; 611.
Rights acquired by, forfeited by divorce, § 2230; 620.
Minors attain majority by, § 2237; 621.
Contracts in consideration of, to be in writing § 3664; 926.
License, fee for, § 3787; 951.
Fee for solemnizing, § 3828; 965.
Bars prosecution for seduction, § 3868; 978.
Record proof of, not necessary in prosecution for adultery, n. § 4008; 1009.
Evidence of, in case of bigamy, n. § 4009; 1010.
Within prohibited degrees, constitutes incest, § 4030; 1015.
Evidence of, in case of incest, n. § 4030; 1015.

Marriages.
Registry of, 18 G. A., ch. 151, §§ 3–8; 452.
Illegal, annulling, §§ 2231–2236; 620.

Married Women.
Property of, how listed for taxation, § 803; 193.
May sue for damages caused by intoxication, § 1557; 437.
Conveyance of real property by, §§ 1935–1937; 545.
Property rights and liabilities of, §§ 2202–2215; 613.
May act as executors, § 2345; 638.
May sue and be sued; attachment or judgment may be enforced against, § 2562; 684.
May prosecute or defend for husband, when, §§ 2563, 2564; 684.

Marrying Husband or Wife of Another.
Punished, § 4011; 1010.

Marshal.
Of incorporated towns, appointment and powers of, § 515; 130.
Of cities of second class, election, powers and duties of, §§ 532, 533; 135.
Of cities of the first class, election, powers and duties of, §§ 535, 537; 137.
Of cities, method of compensation of, 17 G. A., ch. 56; 145.
May execute warrant against boat or raft, § 3436; 880.
Of city or town, is a peace officer, § 4109; 1038.
Care of prisoners by, while at labor, §§ 4759–4773; 1143.

Mason-work.
Standard perch of, § 2050; 576.

Master and Apprentice.
Provisions as to, §§ 2280–2306; 628.

Materials.
Mechanic's lien for, 16 G. A., ch. 100, § 3; 596.

Matter in Confession and Avoidance.
How pleaded, § 2718; 723.

Maximum Rates.
Of railways, for transportation of passengers and freight, §§ 1304, 1305; 357; and 15 G. A., ch. 68; 363.

Mayor.
Entitled to copy of session laws, § 40; 7.
Jurisdiction of, § 506, 18 G. A., ch. 189; 128.
Of incorporated town, §§ 511, 512; 129.
Of city, election, powers and duties of; salary, § 517–519; 130.
Of cities of the second class, § 531; 135.
Of cities of the first class, § 534; 136.
May arrest person committing offense, § 537; 138
To act as police judge, § 547; 140.
May solemnize marriage; certificate of, §§ 2193, 2194; 612.
Consent of, to adoption of child, § 2308; 631.
May send child to Home for the Friendless, 17 G. A., ch. 176; 632.
Service of notice on, § 2612; 699.
Exercising jurisdiction of justice, compensation of, n. § 3806; 959.
To report forfeited recognizances, fines, etc., § 3974; 1002.
Included within term, "magistrate," § 4108; 1037.

Measure.
Standard of; subdivision and multiples of, §§ 2037–2051; 574.

Measures and Weights.
Superintendent of, §§ 2052–2056; 576.

Mechanic.
Entitled to lien, 16 G. A., ch. 100, § 3; 596.
Judgment for wages of, cannot be stayed, § 3063; 814.

Mechanics' Liens.
On homestead, § 1991; 562.
WHO ENTITLED TO; HOW SECURED; EXTENT; PRIORITY, 16 G. A., ch. 100; 596.
Action on, to be by equitable proceedings, § 2510; 666.
Limitation of action to enforce, § 2520; 671.
Action to foreclose, where brought, § 2578; 687.
What shall be the trial term in actions on, § 2745; 735.
Holder of, not entitled to redeem from execution sale, § 3103; 823.

Medical Schools or Colleges.
Delivery of dead bodies to, §§ 4018–4020; 1012.

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Medical Works.
As evidence n. § 3653; 922.
Medicines.
Regulation of sale of, See PRACTICE OF PHARMACY, 18 G. A., ch. 75; 448.
Meeting for Worship.
Disturbance of, punished, § 4023; 1013.
Meetings.
Of district townships, time of holding, powers of, § 1717; 490.
Of school districts, organization and adjournment of, § 1789; 507.
Member of Family.
Service of notice by leaving copy with, § 2603; 697.
Members of Board of Supervisors.
Individually liable for issue of bonds in excess of limit, 16 G. A., ch. 125, § 2, 64.
Not required to give bond, § 674; 171.
Compensation of, § 3791; 954.
Members of Fire Companies.
Exempt from military duty, poll tax, and jury service, §§ 1560–1563; 441.
Members of General Assembly.
Not to be questioned for language used in debate, § 11; 2.
Compensation of, § 12; 2; and Const., Art. 3, § 25; 1227.
Election of, §§ 587, 588; 157.
Certificates of election of, §§ 642, 648; 167.
Abstract and canvass of votes for, §§ 646, 647; 167.
Oath of office of, § 672; 171.
Not required to give bond, § 674; 171.
Contesting elections of, §§ 730–736; 179.
Special election to fill vacancies, § 789; 187.
Not eligible to office of regent of University, § 1603; 464.
——— of trustee of Agricultural College, § 1605; 465.
——— of trustee of Soldiers' Orphans' Home, § 1625; 470.
——— of trustee of Reform School, § 1644; 476.
——— of trustee of College for the Blind, § 1665; 480.
Not required to appear to civil action during session, § 2626; 704.
Offering bribes to, or accepting bribes by, punished; disqualification, §§ 3939–3941; 996.
Election, elegibility and number of, Const., Art. 3, §§ 3-6; 1225.
Attendance of, how enforced, Const., Art. 3, § 8; 1225.
May dissent or protest, Const., Art. 3, § 10; 1226.
Privileged from arrest, Const., Art. 3, § 11; 1226.
Not to be appointed to civil office, Const., Art. 3, § 21; 1227.
Members of General Assembly.—*Continued.*
Persons holding office not eligible as, Const., Art. 3, § 22; 1227.
Oath of, Const., Art. 3, § 32; 1230.
Maximum number; apportionment of, Const., Art. 3, §§ 34, 35; 1230.
Merchants.
Taxation of property of, § 815; 196.
Forwarding and commission, lien of, for charges; sale of unclaimed property by, etc., §§ 2177–2180; 607.
Merger.
Of civil action in public offense, § 2526; 670.
Of mortgage in judgment, n. § 2882; 772.
Of judgment of lower court in judgment on appeal bond, n. § 2882; 772.
Of mortgage in judgment on debt alone, n. § 3320; 868.
Merits.
Decision to be upon, § 2845; 763.
Message of Governor.
Printing and distribution of, 16 G. A., ch. 159; 28.
To be made to regular session of general assembly, Const., Art. 4, § 12; 1232.
Messengers.
Sent for election returns, § 634; 165; and § 649; 168.
Compensation of, § 3827; 965.
Midwives.
Registry of, 18 G. A., ch. 151, § 3; 452.
Mile.
Length of, § 2040; 574.
Mileage.
Of members of general assembly, § 12; 2.
Of trustees, regents, and visiting committees, 17 G. A., ch. 92; 965.
Of lieutenant governor, Const., Art. 4, § 15; 1232.
Military Duty.
Firemen exempt from, § 1560; 441.
Liability to, Const., Art. 6, §§ 1, 2; 1235.
Military Power.
Subordinate to civil power, Const., Art. 1, § 14; 1220.
Military Record.
To be kept by governor, § 57; 13.
Militia.
GENERAL PROVISIONS, 18 G. A., ch. 74; 260.
Offenses in, triable without indictment, Const., Art. 1, § 11; 1218.
Who constitute; officers, etc., Const., Art. 6; 1235.
Milk.
Diluted or adulterated, sale of, punished, § 4042; 1018.

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Mill-dams and Races.
Taking of private property for, §§ 1188–1206; 321.
To be provided with fish-ways, 17 G. A., ch. 188; 18 G. A., ch. 123; 411.

Mills.
Malicious injury to, punished, § 3978; 1003.

Millet Seed.
Weight of, per bushel, § 2049; 575.

Mineral.
Digging and carrying away, punished, § 3983; 1005.

Miners.
Right of access to scales, machinery, etc., 18 G. A., ch. 202, § 17; 446.

Mining Lease.
Person in possession under, is tenant at will, n. § 2014; 568.

Minister of the Gospel.
Not liable to jury service, § 228; 51.
May solemnize marriages, certificate of, §§ 2193, 2194; 612.
Not to testify as to privileged communications, § 3643; 920.

Minister of United States.
Acknowledgments before, § 1957; 553.

Ministry.
Taxes for support of, not to be levied, Const., Art. 1, § 3; 1215.

Minors.
Redemption of property of, from tax sale, § 892; 222.
Limitation of actions by, to recover property sold for taxes, § 902; 230.
Rights of, as to establishment, etc., of highways, § 951; 241.
Taking property of, for works of internal improvement, § 1246; 336.
Selling or giving liquors to, penalty for, § 1539; 426.
Damages recovered by, in action for intoxication, to whom to be paid, § 1557; 437.
Guardian of, to act in relation to walls in common, § 2030; 572.
Consent of parent or guardian to marriage o , § 2191; 611.
ATTAIN MAJORITY WHEN; CONTRACTS OF; PAYMENTS TO, §§ 2237–2240; 621.
May recover for injury causing loss of time, n. § 2237; 621.
Guardianship of, § ; 2241–2271; 623.
May be bound as apprentices, §§ 2280–2283; 628.
Master of, shall educate and clothe, § 2306; 631.
As executors, § 2346; 638.
Limitation of actions extended in favor of, § 2535; 676.
Actions by, how brought, § 2565; 685.
Defense for, how made, § 2566; 685.

Minors.—*Continued.*
Appointment of guardian *ad litem* for, § 2567, 2568; 685.
Service of original notices on, § 2614; 700.
Non-resident, service upon, by publication, n. § 2618; 701.
Answer of guardian of, § 2656; 715.
Vacating judgment against, for erroneous proceedings, § 3154, 3157; 831.
May maintain action for waste or trespass upon inheritance, § 3338; 872.
Not to be permitted to remain in saloons, 15 G. A., ch. 59; 1019.

Minority.
Period of, §§ 2237; 621.

Minutes of Evidence.
On preliminary examination before magistrate, § 4241; 1057.
To be kept by clerk of grand jury, § 4275; 1063.
On preliminary examination, to be laid before grand jury, § 4289; 1065.
Before grand jury, to be returned with indictment, § 4293; 1066.
Failure to return with indictment, ground for setting aside, § 4337; 1077.
To be kept, on criminal trials, § 4436; 1094.

Miscarriage.
Punishment for procuring, § 3864; 977.

Misdemeanor.
Officer contracting debt beyond appropriation, guilty of, 17 G. A., ch. 67, § 3; 30.
Officer of institution being interested in contracts, guilty of, 17 G. A., ch. 144; 31.
Attorney refusing to pay over money, guilty of, § 224; 50.
Notary failing to deposit records, guilty of, § 264; 57.
Person violating regulation of board of health, guilty of, § 419; 95.
Within cemetery, what deemed; punishment of, 17 G. A., ch 106, § 2; 96.
Officers of counties, cities, or towns improperly appropriating moneys or issuing bonds, guilty of, § 558; 147.
Officer failing to give bond, guilty of, § 684; 173.
Officer exercising duties after suspension, guilty of, § 761; 182.
Peddler without license, punished for, § 907; 231.
Person exhibiting show without license, guilty of, 16 G. A., ch. 131; 232.
Officer failing to perform duty as to security of the revenue, guilty of, § 919; 235.
Keeping false books by corporation deemed, § 1075; 272.
Officers of insurance company guilty of, when, § 1147; 293.

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Misdemeanor.—*Continued.*
Person falsely advertising as savings bank, guilty of, 15 G. A., ch. 60, § 21; 317.
Neglect or misconduct of telegraph operators deemed, § 1328; 375.
Abuse of insane person by custodian deemed, § 1415; 3 4.
Failure of duty of officer as to insane person deemed, § 1445; 401.
Relieving stock from distraint deemed, 18 G. A., ch. 188, § 2; 404.
Person unlawfully manufacturing intoxicating liquors, guilty of, § 1525; 423.
The unlawful sale, mixing, or keeping with intent to sell, of intoxicating liquors, deemed, §§ 1540–1542; 427.
Intoxicated person guilty of, § 1548; 433.
Unlawful sale of liquors within two miles of city limits, or place of election, or on election day, deemed, 17 G. A., ch. 119, § 5; 18 G. A., ch. 82; 440.
Neglect of bank officers to make statements, deemed, § 1574; 457.
Fraud of partner in limited partnership deemed, § 2165; 605.
Unlawfully issuing marriage license, or solemnizing marriage without license, deemed, § 2192; 611.
Justice failing to pay over witness fees, guilty of, § 3816; 962.
Taking illegal fees, deemed, § 3840; 967.
Carrying concealed weapons deemed, § 3879; 980.
Discharging fire-arms near stock deemed, § 3900; 985.
Mixing or selling inflammable oils for illumination deemed, § 3901; 985.
NEGLECT OF DUTY, by public officer, deemed, § 3965; 1001.
PERFORMANCE OF PROHIBITED ACT deemed, § 3966; 1001.
PUNISHMENT FOR, when not otherwise prescribed, § 3967; 1001.
Officer failing to pay over fees guilty of, § 3970; 1001.
Failure of officer to report as to fines, etc., deemed, § 3974; 1002.
Notary public, acting illegally, deemed guilty of, § 3975; 1003.
In relation to delivery, receipt, and disposal of dead bodies, §§ 4018–4020; 1012.
DEFINED, § 4105; 1037.
Refusal or neglect to assist officer in service of notice or suppression of riot, deemed, §§ 4147, 4151; 1043.
LIMITATION OF PROSECUTION FOR, § 4168; 1046.
Presence of defendant not necessary upon trial for, § 4351; 1079.
Judgment for, may be pronounced in absence of defendant, § 4497; 1105.

Misdemeanor.—*Continued.*
Bail of defendant indicted for, before conviction, § 4582; 1117.
Dismissal of action for, bars another prosecution, § 4619; 1125.
Compromising of, by leave of court, §§ 4708–4711; 1137.
What triable upon indictment, what upon information, Const., Art. 1, § 11; 1218.

Misdemeanor in Office.
Clerk failing to issue or make entry of execution, guilty of, § 3030; 807.

Misjoinder.
Of causes of action, how corrected; when deemed waived, §§ 2632–2634; 707.
OF PARTIES:
Not ground of demurrer, n. § 2648; 710.
Not waived by failure to demur or answer, n. § 2650; 712.

Misnomer.
Of defendant in habeas corpus proceeding, § 3473; 893.

Misprision of Treason.
Defined; punishment for, § 3846; 969.

Mistake.
In settlement, by administrator, how corrected, § 2474; 660.
Action on ground of, accrues when, § 2530; 674.
Admission of testimony after case is closed, to cure, § 2799; 747.
Of clerk, proceedings to correct, when brought, § 3156; 833.
Not ground of appeal until acted on by the court below, § 3167; 836.

Mitigating Circumstances.
In action for injury to person, character, or reputation, § 2682; 719.

Mitigation.
Method of pleading matter in, n. § 2655; 713.
Matter by way of, must be so pleaded, n. § 2682; 719.
Of sentence by supreme court on appeal, § 4538; 1110.

Mittimus.
Upon preliminary examination, § 4247; 1058.

Modification of Instructions.
How made, § 2785; 742.

Money.
Evidences of debt circulating as, not barred by statute of limitations, § 2538; 677.
Attached, to be paid to clerk, § 2971; 793.
Collected on execution from another county, how returned, § 3032; 807.
Levied on under execution, may be appropriated without sale, § 3091; 820.

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Money.—*Continued.*
Taking of, constitutes larceny, n. § 8902; 986.
Public, embezzlement of, § 8908; 988.
Embezzlement or conversion of, may be alleged in indictment without describing species, § 4317; 1073.
Deposit of, instead of bail, §§ 4589–4592; 1119.

Money of Account, and Interest.
Denominations, §§ 2075, 2076; 579.
Rate of interest § 2077; 580.
Interest on judgments, § 2078; 580.
Usury prohibited, § 2079; 580.
Forfeiture on contract for usurious interest, § 2080; 582.
Usurer liable to assignee, § 2081; 584.

Moneys and Credits.
Of bankers, taxation of, § 812; 195.

Month.
Term means calendar month, § 45, ¶ 11; 10.

Monuments.
Of boundary, injuries to, punished, § 3 82; 1004.
Of state boundary, injuries to, punished, § 3989; 1006.

Moral Character.
See. CHARACTER.

More Specific Statement.
Motion for, § 2720; 729.

Mortgage.
Taxation of, n. §§ 801, 803; 192.
To school fund, effect of sale of land covered by, for taxes, 17 G. A., ch. 101; 229.
Of property and franchises of railways; may cover what; how executed, §§ 1283–1285; 348.
Of personal property, recording of, § 1923; 542.
Of real property, recording of, § 1941; 547.
Passes as incident upon assignment of note, n. § 1941; 547.
Form for, § 1970; 556.
Takes priority of subsequent landlord's lien, n. § 2017; 569.
Does not defeat right to mechanic's lien, n. 16 G. A., ch. 100, § 2; 596.
Priority of mechanic's lien over, 16 G. A., ch. 100, § 9; 600.
Of property of minor, proceedings to authorize, §§ 2257–2265; 624.
Satisfaction of, by executor of mortgagee, § 2383; 645.
Against property of estate, need not be filed as claim, n. § 2478; 648.
Action on, by equitable proceedings, § 2509; 666.
Limitation of action on, n. § 2529; 671.
Kept alive by promise sufficient to revive debt, n. § 2539; 677.

Mortgage.—*Continued.*
Action for foreclosure of, where brought, § 2578; 687.
Service by publication in action to foreclose, § 2618; 701.
What to be trial term in actions to foreclose, § 2745; 735.
Lien of, not merged in judgment, n. § 2882; 772.
Judgment does not become lien upon, n. § 2882; 772.
Appointment of receiver after foreclosure of, n. § 2903; 778.
On personal property, specific attachment in action to enforce, § 3000; 802.
Holder of, may redeem from sale under execution, § 3104; 823.
Sale of equitable interest of judgment debtor under, § 3142; 829.
Proceedings as to, in partition, §§ 3284–3289; 864.
Given by purchaser in partition proceedings, § 3301; 866.
Of personal property, foreclosure of, §§ 3307–3318; 867.
Of real property, foreclosure of, §§ 3319–3320; 868.
Not merged in judgment on debt alone, n. § 3320; 868.
Not merged in judgment of foreclosure, n. § 3321; 868.
Satisfaction of, by mortgagee or clerk, §§ 3327, 3328; 870.

Mortgagee.
Of personal property, entitled to possession, § 1927; 544.
Of personal property, garnishment of, n. § 1927; 544; and n. § 2975; 794.
Is a "purchaser" under the recording laws, n. § 1941; 547.
Deceased, interest of, deemed personal assets, § 2383; 645.
Possession of, not adverse to mortgagor, n. § 2529; 671.
Right of, to redeem from execution sale, § 3104; 823; and n. § 3102; 822.
Junior, may have assignment in foreclosure proceedings, § 3323; 869.
Penalty against, for not satisfying mortgage, § 3327; 870.

Mortgagor.
Property to be listed to, for taxation, § 803; 193.
Of personal property, retention of possession by, does not render mortgage void, n. § 1923; 542.
Of real property has title and right of possession, § 1938; 546.
Interest of, in lands is estate of inheritance, n. § 1938; 546.
Possession of, not adverse to mortgagee, n. § 2529; 671.
Of personal property, garnishment of interest of, in hands of sheriff, n. § 2976; 79

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Mortgagor.—*Continued.*
Of personal property, interest of, cannot be levied on, n. § 3043; § 9.
Entitled to possession until expiration of period of redemption, n. § 3319; 868.
Liability of, on debt secured by mortgage, n. § 3322; 869.
Destruction or disposal of mortgaged property by, punished, § 3395; 984.

Mother.
Liable for support of children, § 1330; 377.
Seizure of property of, upon abandonment of family, § 1343; 378.
May sue for earnings of minor, n. § 2242; 623.
Intemperate or vicious, guardianship of children of, § 2301; 630.
Inheritance by and from, in case of illegitimate child, §§ 2465–2468; 659.
May bring action for injury or death of child, § 2556; 683.
Of minor, original notice may be served on, § 2614; 700.

Motion.
For correction of error as to kind of proceedings, §§ 2515, 2516; 667.
To correct misjoinder of causes of action, §§ 2632–2634; 707.
ASSAILING A PLEADING, requisites of; time of filing; effect of; when submitted; not to be withdrawn, §§ 2639–2643; 708.
In arrest of judgment, grounds of, § 2650; 712.
To strike, for want of verification, § 2677; 718.
To correct bad pleading, § 2706; 726.
To strike out sham or irrelevant defense, § 2707; 726.
To make bill of particulars more specific, § 2713; 727.
To strike irrelevant or redundant matter, § 2719; 728.
For more specific statement, § 2720; 729.
To show cause why actions should not be consolidated, § 2734; 731.
For continuance, §§ 2750–2756; 736.
FOR NEW TRIAL:
Exceptions to instructions may be included in, § 2789; 745.
When, and how made, § 2838; 761.
Not necessary to entitle to appeal, § 3169; 837.
In arrest, or for judgment *non obstante*, defect cured upon, §§ 2842, 2843; 762.
To discharge judgment, § 2867; 767.
For judgment by summary proceedings, §§ 2906–2910; 779.
DEFINED, in general, § 2911; 780.
Several objects may be included in, § 2912; 780.
Testimony upon, by affidavit, § 2913; 780.

Motion.—*Continued.*
Filing and entrance upon appearance docket; notice of, in vacation, § 2914; 780.
Notice of, to contain what, § 2915; 780.
Service of, and return, §§ 2916–2921; 780.
For security for costs, § 2927; 781.
For judgment upon bond for costs, § 2932; 782.
For additional security in attachment proceedings, § 2960; 790.
To discharge attachment, § 3018; 805.
To correct mistake of clerk, or irregularity in obtaining judgment, § 3156; 833.
To correct error, to be made before appeal, § 3168; 836.
To perfect transcript on appeal, § 3185; 842.
For approval of appeal bond, § 3187; 843.
In supreme court, when heard, § 3208; 848.
To dismiss appeal, §§ 3212, 3213; 848.
To make abstract of title more specific in real action, § 3251; 858.
——— in action for partition, § 3279; 864.
To dissolve or vacate injunction, §§ 3393, 3399–3402; 881.
In arrest of judgment or to set aside verdict, not allowed in justice's court, § 3550; 905.
To suppress depositions, § 3751; 941.
To set aside indictment, §§ 4337–4344; 1077.

Motion Book.
In supreme court, § 3208; 848.

Municipal Corporations.
See CITIES AND TOWNS, §§ 421–551; 97.
May regulate sale of liquors within two miles of limits, 17 G. A., ch. 119, § 9; 441.
Service of notice on, § 2612; 699.
Exemption of, from garnishment, § 2976; 795.
Public property of, exempt from execution, § 3048; 810.
May be compelled to levy tax to pay judgment, § 3049; 810.
Charters of, not to be amended by special acts, n. Const., Art. 3, § 30; 1228.
Limit of indebtedness of, Const., Art. 11, § 3; 1242.

Murder.
Defined; degrees of; punishment for, §§ 3848–3852; 970.
Assault with intent to commit, § 3872; 979.
Defendant convicted of, not entitled to bail, 17 G. A., ch. 103; 1037.
Limitation of prosecution for, § 4165; 1046.

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Murder.—*Continued.*
In first degree, pardon for, how granted § 4712; 1138.
In second degree, party charged with entitled to bail, n. Const., Art. 1, § 12; 1219.
Mutual Building Associations.
Listing and taxation of shares in, 16 G. A., ch 163; 196.
Organization, powers, etc., of, §§ 1184–1187; 310.
Mutual Hail Insurance Companies.
Provisions as to, § 1144; 291.
Mutual Insurance Companies.
Deposit notes; losses; policies; §§ 1138–1140; 288.
Proceedings to wind up, § 1151; 295.
Reports of, fees, etc., 1160; 297.
Mutual Life Insurance Companies.
Capital, etc., of, § 1160; 297.
Organization of, § 1163; 301.
Name.
Of township, change of, §§ 412–414; 94.
Of corporations not for pecuniary profit, change of, 15 G. A., ch. 40; 278.
Of railway company, change of, § 1273; 345.
Effect of mistake in, in recording instruments, n. § 1944; 549.
Of limited partnership, § 2159; 605.
Of defendant, when unknown, how action against, brought, § 2557; 684.
Of defendant, effect of mistake in notice, n. § 2603; 697.
OF PERSONS:
Proceedings to change, §§ 3502–3506; 897.
Special acts for change of, not allowable, Const., Art. 3, § 30; 1228.
Of defendant to be inserted in indictment when found, § 4299; 1069.
Of person injured, not material in indictment, § 4302; 1070.
Of defendant appearing upon arraignment to be inserted in indictment, §§ 4334, 4335; 1076.
Naphtha.
Mixing with illuminating oil, punished, § 3901; 985.
National Banks.
Taxation of shares in, §§ 818–820; 197.
Notes of, receivable for taxes, § 855; 209.
Naturalization of Aliens.—See p. 1184.
Neglect of Duty.
By public officer, deemed misdemeanor, § 3965; 1001.
Negotiable Instruments.
Given for illegal sales of liquors, valid in hands of *bona fide* holder, § 1550; 434.
Discount of, does not constitute usury, n. § 2079; 580.
Usury may be pleaded against *bona fide* holder of, n. § 2080; 582.
Negotiable Instruments.—*Continued.*
Are negotiable by indorsement or delivery, § 2092; 584.
Payable at certain place, are negotiable elsewhere, n. § 2082; 584.
Transfer of, without indorsement, n. § 2082; 584.
Demand of, not necessary to hold guarantor, n. § 2090; 587.
Want or failure of consideration no defense to, § 2114; 597.
Assignee without indorsement may sue on, n. § 2543; 678.
Rule as to action by assignee, not applicable to § 2546; 680.
Transferee of, after maturity, takes subject to what, n. § 2546; 680.
Action against parties jointly or severally bound by, § 2550; 681.
Judgment against garnishee upon, § 2990; 799.
How levied on and sold under execution, n. § 3046; 809.
Made on Sunday, good in hands of *bona fide* holder, n. § 4072; 1027.
See, also, NOTES AND BILLS.
New Matter.
Statement of, in answer, § 2655; 713.
As counter claim, § 2659; 715.
In reply, § 2666; 717.
Newly Discovered Evidence.
As ground of motion for new trial, § 2837; 756.
As ground of petition for new trial, n. § 3155; 852.
New Year's Day.
Holiday, as to paper falling due on, § 2094; 587.
New Trial.
Change of venue upon, § 2590; 691.
Motion for, exceptions to instructions included in, § 2789; 743.
IN CIVIL CASES:
Grounds for, § 2837; 756.
Application for, when to be made, affidavits, § 2838; 761.
Not to be granted for smallness of damages, § 2839; 762.
Costs of, terms and conditions, §§ 2840, 2841; 762.
Motion for, on account of non-averment of material fact, §§ 2842, 2843; 762.
In case of judgment on service by publication, §§ 2877, 2879; 770.
In proceeding to vacate or modify judgment in court where rendered, §§ 3154, 3155; 831.
Appeal from order granting or refusing, § 3164; 835.
Motion for, not necessary in case of appeal, § 3169; 837.
IN ACTIONS TO RECOVER REAL PROPERTY, §§ 3268–3272; 860.

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New Trial.—*Continued.*
IN JUSTICE'S COURT:
After default set aside, § 3544; 905.
After reversal of decision on writ of error, § 3603; 912.
IN CRIMINAL CASES, §§ 4487–4490; 1103.
Ground of, urged as cause against judgment, §§ 4504, 4506; 1106.
May be ordered by supreme court, § 4538; 1110.

Newspaper.
For publication of county notices, how designated, § 306; 74.
For publication of original notice, to be selected by plaintiff, § 2619; 702.
For publication of notice to unknown defendant, selected by court, § 2624; 703.
Publisher of, cannot compel selection of his paper for publishing notices, n. § 3373; 876.
Publications in, not amounting to contempt, n. § 3491; 895.
Maximum charge for publication of notices in; who may select, § 3832; 965.

Next Friend.
May bring action for minor, § 2565; 685.
Liable for costs, n. § 2565; 685.

Next of Kin.
Administration granted to, § 2354; 640.

Nolle Prosequi.
Abolished, § 4618; 1125.

Non age.
Effect of annulling marriage for, § 2234; 621.

Non-acceptance.
Of bills of exchange, notice of, § 2092; 587.
——— damage for, § 2096; 588.

Non-payment.
Notice of, to charge guarantor, § 2090; 587.
Of notes and bills, notice of, required, § 2092; 587.
Of bills of exchange, damage for, § 2096; 588.

Non-residence.
Period of, not included in period of limitation, § 2553; 676.

Non-resident Alien.
Rights of widow in property of, § 2442; 655.

Non-resident Minors.
Guardian for, § 2253; 624.
Foreign guardians of, § 2269; 627.

Non-resident Plaintiff.
Required to give security for costs, §§ 2927, 2929; 781.

Non-residents.
Statute of limitations does not run in favor of, § 2553; 676.

Non-residents.—*Continued.*
Action by attachment against, where brought, § 2580; 683.
Service by publication in actions against, § 2618; 701.
Attachments against, § 2951; 787.
May hold wearing apparel exempt from execution, § 3075; 817.
Notice of action against, to quiet title, n. § 3274; 861.

Non-suit.
Upon the evidence, not allowable, n. § 2844; 763.

Non-user.
Of franchise of corporations, effect of, § 1079; 273.
Of right of way by railway company, forfeiture for, §§ 1260 1261; 340.

Normal Institutes.
To be held by county superintendent, § 1769; 502.
See, also, TEACHERS' INSTITUTES.

Not Guilty.
Plea of, §§ 4360, 4363, 4367; 1081.

Notaries Public.
APPOINTMENT, POWERS, DUTIES, ETC., OF, §§ 258–266; 56.
May administer oaths and take acknowledgments, § 277; 59.
Acknowledgment of instruments before, §§ 1955, 1956; 552.
To make protest of negotiable paper, and give notice, § 2095; 588.
Protest of, as evidence, § 3668; 928.
Affidavit before, receivable in evidence, § 3691; 931.
Fees of, § 3801; 957.
Person improperly acting as, guilty of misdemeanor, § 3975; 1003.

Notes.
Where taxable, n. § 801; 192.
Given for insurance, validity of, § 1146; 292.
Assignment of, carries mortgage as incident, n. § 1941; 547.
Kind of proceedings in action on, when secured by mortgage, § 2509; 666.
Lost, action on; by ordinary proceedings, § 2512; 666.
Secured by mortgage, separate action on, § 3320; 868.

Notes and Bills.
When negotiable, § 2082; 584.
Action on, § 2083; 585.
Non-negotiable, assignment of, §§ 2084, 2086; 585.
——— assignor of, not entitled to notice, § 2088; 586.
Payable in property or labor, negotiable when, § 2085; 585.
Blank endorsement deemed guarantee, § 2089; 586.
Guarantor liable without notice, §§ 2090, 2091; 587.

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Notes and Bills.—*Continued.*
Grace, protest, notice, §§ 2092–2095; 587.
Damages for non-acceptance or non-payment of bills, § 2096; 588.
Notes of Short-hand Reporter.
Receivable in evidence, § 3777; 947.
Notice.
In proceedings to re-locate county seat § 284; 62.
Of special meeting of board of supervisors, § 301; 69.
Of tax sale, § 872; 214.
——— costs of publication of, §§ 873, 874; 214.
Of application for tax deed, § 894; 22[illegible].
Of establishment of highway, § 956; 238.
Of appeal in proceeding for establishment of highway, §§ 959, 960; 242.
Of organization of corporation, §§ 1062, 1063; 270.
Of dissolution of corporation, § 1067; 271.
For appropriation of lands for highway purposes, § 1247; 336.
By recording of instruments affecting personal property, §§ 1922, 1923; 542.
——— affecting real estate, § 1944; 549.
To terminate tenancy at will, §§ 2015, 2016; 569.
Of owner of land to person claiming easement, § 2034; 573.
To assignor of non-negotiable instrument not required, § 2088; 586.
Of non-payment, to charge guarantor, § 2090; 587.
Of non-acceptance or non-payment of negotiable bills or notes, § 2092; 587.
Of protest of notes and bills, §§ 2095, 2096; 588.
By surety to creditor to sue, § 2108; 591.
Of assignment for benefit of creditors, § 2119; 594.
Of objections to claims against the estate of an insolvent, § 2121; 594.
Of sale of property of estate of insolvent, § 2127; 595.
Of filing of mechanic's lien, 16 G. A., ch. 100, §§ 7, 8; 599.
Of formation or renewal of limited partnership, §§ 2155–2157; 604.
Of dissolution of limited partnership, § 2160; 606.
By warehousemen, common carriers, etc., to owners of unclaimed property, § 2178; 607.
As to unclaimed property, publication of, § 2179; 607.
By warehousemen, common carriers, etc., to owners of perishable property, § 2180; 608.
Of proceedings by abandoned husband or wife for control of property, § 2207; 614.
Notice—*Continued.*
Of proceedings to sell real estate of minors, § 2257, 2258; 624.
Of complaint by apprentice against master, § 2289; 629.
Of proceedings against apprentices, § 2294; 629.
Of proceedings to appoint guardian of children of vicious parents, § 2303; 630.
Of hearing of matter in probate, § 2314; 634.
In probate matters, issuance of, in vacation, § 2315; 634.
Of probate of will, § 2341; 637.
By administrator, of appointment, §§ 2368, 2369; 642.
By administrator, of application for sale of real property, § 2389; 645.
Of sale of real property of decedent, § 2393; 646.
Of hearing of claim against estate, § 2408; 643.
To administrator, of special proceedings for non-payment of legacies, § 2435; 652.
Of appointment of referees to set off widow's share, § 2445; 655.
In case of escheats, § 2462; 659.
Of order of court, service of, upon administrator, §§ 2479–2481; 661.
Of petition for removal of administrator, § 2500; 663.
To personal representatives of action against decedent, § 2527; 670.
Of application for change of place of trial, § 2593; 693.
ORIGINAL:
Delivery to sheriff for service, deemed commencement of action, § 2532; 675.
Requisites of, § 2599; 694.
Defective, does not render proceedings void, n. §§ 2599, 2604; 694.
Service of, § 2601, 2625; 696.
May state that no personal claim is made, § 2608; 699.
To unknown defendant, service of, § 2623–2625; 703.
Rendered unnecessary by appearance, § 2626; 704.
Of pendency of action affecting real property, third persons charged with, §§ 2629; 706.
Of amendment to petition made before answer filed, to be served on defendant, § 2647; 710.
Of application for continuance, § 2756; 738.
Must appear of record before entry of default, § 2870; 768.
Of offer to confess judgment, §§ 2898, 2899; 776.
Of offer to compromise, or of acceptance thereof, §§ 2900, 2901; 777.
Of application for receiver, § 2903; 778.
Of motion for judgment in summary proceedings, §§ 2907, 2908; 779.

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Notice.—*Continued*
OF MOTIONS AND ORDERS:
Entrance in appearance docket, sufficient, § 2914; 780.
What to contain, § 2915; 780.
Service of, §§ 2916–2921; 780.
Of attachment on property, § 2967; 792.
Of garnishment, § 2975; 794.
Of sale under execution, §§ 3079, 3080; 817.
——— to defendant in possession, § 3087; 819.
Of proceedings to subject property of decedent to payment of judgment, § 3094; 821.
Constructive, in case of sale under execution, § 3125; 826.
Of proceedings to subject property to payment of judgment; lien effected by, § 3152; 830.
Of petition for new trial, service of, where original service was by publication, n. § 3155; 832.
Of proceedings to vacate or modify judgment, § 3158; 834.
OF APPEAL:
By part of several co-parties, § 3174; 839.
Service of, §§ 3178–3180; 840.
Manner of serving, § 3214; 849.
Of assignment of causes on supreme court docket, § 3203; 847.
Of application for a writ of certiorari, § 3219; 850.
Of action for recovery of real property, § 3249; 858.
Of action to quiet title, § 3274; 861.
Of sale in partition proceedings, § 3299; 866.
Of sale under chattel mortgage, §§ 3307–3311; 867.
——— evidence of service of, perpetuated by affidavit, § 3314; 867.
In *quo warranto* proceedings, § 3349; 873.
Of application for injunction, § 3391; 881.
Of application to vacate injunction, § 3400; 883.
Of hearing upon award, § 3426; 887.
Of action against boat or raft, service of, § 3435; 888.
Of change of name, § 3505; 897.
Of commencement of action before justice, §§ 3518–3522; 901.
Of appeal from justice of the peace in civil causes, § 3588; 910.
Of writ of error from justice of the peace, § 3598; 912.
In attachment or replevin proceedings before justice, §§ 3609, 3610; 913.
To quit, in forcible entry and detainer, § 3614; 914.
Evidence of posting up or service of, §§ 3698, 3700; 932.

Notice.—*Continued.*
OF TAKING DEPOSITIONS, §§ 3722, 3727; 936.
——— service of, §§ 3730–3733; 938.
Of indictment against corporation, § 4326; 1075.
Of appeal in criminal cases, §§ 4523, 4524; 1108.

Notices, Legal.
Fees for publication of, § 3832; 905.
Defacing or tearing down, punished, § 3987; 1006.

Notice Book.
Entry of notice of motion for continuance in, § 2756; 738.

Notice to Quit.
Tenant holding over after, § 2012; 568.
In case of tenancy at will, § 2015; 569.
In proceedings of forcible entry and detainer, § 3614; 914.

Nuisances.
Abatement of, in river forming boundary of state, n. § 3; 1.
Power of township board of health over, §§ 415–417; 94.
City may cause to be abated, § 456; 106.
Intoxicationg liquors deemed, § 1523; 422.
Erecting or using building for illegal sale or keeping of liquors, deemed, § 1543; 429.
Abatement of, by Board of Health, 18 G. A., ch. 151, §§ 16–19; 454.
Actions for abatement of, and damages for, § 3331; 871.
Injunction to restrain, when granted, § 3391; 881
WHAT DEEMED, § 4089; 1033.
Manufacture of gunpowder deemed, § 4090; 1034.
Houses of ill-fame and gambling houses, § 4091; 1034.
PUNISHMENT FOR AND ABATEMENT OF, §§ 4092–4096; 1034.
Judgment for abatement or removal of, how executed, § 4519; 1108.

Numerals.
Taken as part of the language, § 45, ¶ 22; 10.

Nuncupative Wills.
When valid, § 2324; 636.

Oath.
Includes affirmation, § 45, ¶ 12; 10.
Of regents, trustees, etc., of state institutions, § 126; 27.
——— to be filed with auditor before warrant is drawn, § 128; 28.
Those conscientiously opposed to taking, may affirm, § 278; 60.
To be taken by officers of city or town, § 504; 127
Of judges and clerks of elections, § 609; 161.

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Oath.—*Continued.*
Of elector challenged at the polls, § 620; 163.
Of governor and lieutenant-governor, § 671; 170.
Of members of general assembly, § 672; 171; and Const., Art. 3, § 32; 1230.
Of judges, § 673; 171.
Of other officers, § 675; 171; and Const., Art. 11, § 5; 1244.
Of office, form of, § 676; 172.
Of deputies, § 770; 184.
Of trustees of State Reform School, § 1645; 476.
Of sub-directors of school districts, § 1752; 499.
Officer failing to take, punished, § 3976; 1003.

Oaths, Administration of.
By general assembly, § 10; 2.
By commissioners in other states, §§ 267, 271; 58.
By various officers, § 277; 59.
By chairman of board of supervisors, § 700; 69.
By coroner, §§ 355, 357; 84.
By county surveyor, § 377; 87.
By township clerk, § 396; 91.
By school director, § 1799; 507.
By referees, §§ 2820, 2829; 751.
By foreman of grand jury, § 4274; 1063.

Oats.
Weight of, per bushel, § 2049; 575.

Objection.
To competency of juror, when to be interposed, n. § 227; 51.
To tender, deemed waived, § 2107; 590.
To claims filed against estate of insolvent, § 2121; 594.
To misjoinder of action, how corrected, when deemed waived, § 2633; 707.
To application for continuance, §§ 2754, 2755; 738.
To instructions, how taken, §§ 2787–2789; 742.
To decision of court, how taken, § 2831; 753.
To admission of evidence, generally, when to be regarded upon appeal, n. § 2832; 754.
To evidence in justice's court, need not be entered on docket, n. § 3515; 900.
To depositions in justice's court, n. § 3744; 940.

Obligation.
Joint or several, action upon, § 2550; 681.
Of contracts, law impairing, not to be passed, Const., Art. 1, § 21; 1222.

Obscene Books and Pictures.
Selling or distributing, punished, § 4022; 1013.

Obstruction of Highways.
Punishment for, § 3979; 1003.
Declared nuisance, § 4089; 1033.

Obstruction of Highways.—*Continued.*
To be inquired into by grand jury, § 4278; 1064.
By railway company, evidence of, § 4557; 1113.

Obstruction of Railways.
Punishment for, § 3990; 1006.

Obstructions in Highway.
To be removed by supervisor, § 993; 252.

Occupancy.
What sufficient to sustain homestead right, n. §§ 1992, 1994; 562.

Occupying Claimants.
General provisions as to, §§ 1976–1987; 558.
Actions by, prosecuted by ordinary proceedings, § 2512; 666.

Offenses, Public.
Civil action not merged in, § 2526; 670.
Committed on boundary of two counties, action for recovery of fine for, where brought, § 2579; 687.
How divided, § 4103; 1037.
What indictable; what triable on information, Const., Art. 1, § 11; 1218.
When bailable, Const. Art. 1, § 12; 1219.

Offer to Pay or Deliver.
Equivalent to actual tender, § 2105; 590.

Offer to Confess Judgment.
Before or after action brought, §§ 2898, 2899; 776.

Offer to Compromise.
How made; effect of, §§ 2900–2902; 777.

Office.
Vacancies in, occur when, how filled, §§ 781–795; 185.
Public or corporate; actions to test rights to, § 3345; 872.

Office of Corporation or Person.
Place where action growing out of business of, may be brought, § 2585; 689.
Service of notice upon agent in, § 2613; 700.

Offices.
Of state officers, fuel, lights, etc., for, § 120; 25.
Of county officers, to be furnished by board of supervisors, and supplied with fuel, stationery, etc., § 3844; 967.
Of railway corporations, where kept, § 1279; 347.
Of railway, express, and telegraph companies, to be maintained at terminus, 16 G. A., ch. 65; 373.
Of sleeping cars to be maintained at terminus, 18 G. A., ch. 169; 374.

Officer.
Taking bond may require surety to justify, § 250; 55.
Making false certificate of acknowledgment, punished, § 1964; 555.

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Officer.—*Continued.*
Having execution, must cause homestead to be platted, § 1998; 565.
Interpleader by, in action for personal property taken under attachment or execution, § 2573; 686.
Of court, not to be received as surety, § 2931; 782.
Duty of, as to levy of execution, §§ 3055–3060; 812.
Approving stay bond, to require surety to make affidavit as to property, § 3062; 814.
Refusing to deliver copy of process, liable to forfeiture, § 3468; 892.
Person falsely assuming to be, punishable for contempt, § 3492; 895.
Public, not to testify as to privileged communication, § 3644; 920.
Taking deposition or affidavit, presumption as to capacity and signature of, § 3696; 932.
To give copy of public record on demand, § 3706; 933.
Certificate of, as to search for papers, § 3708; 933.
Signature of, to certified copy of record, deemed genuine, § 3711; 934.
May be appointed commissioner for taking depositions, § 3725; 937.
Of corporation, embezzlement by, § 3909; 989.
Removal of goods from custody of, punished, §§ 3915, 3916; 991.
Refusal of, to execute process, punished, § 3949; 998.
Suffering prisoner to escape, punished, §§ 3953–3955; 999.
Resistance to, while serving process, punished, § 3960; 1000.
Refusal to assist in making arrest, punished, § 3961; 1000.
Oppressing, by color of office, or illegally acting as such, punished, §§ 3963, 3969; 1000.
Public, neglect of duty by, deemed misdemeanor, § 3965; 1001.
Public, making false entries or returns, punished, § 3968; 1001.
Failing to pay over, making false entries as to, or appropriating fees, punished, §§ 3970–3972; 1001.
To report fees to supervisors, § 3973; 1002.
Failing to take oath, contracting for illegal expenditures, or failing to report expenditures, punished, § 3976; 1003.
Extra compensation not to be made to, Const., Art. 3, § 31; 1229.

Officers.
Of general assembly, compensation of, § 10; 2.
Entitled to session laws, § 40; 7.
Disposition of session laws by, § 43; 8.
Neglecting to account, action against, §§ 70–73; 16.

Officers.—*Continued.*
Requisition upon, by auditor of state, how made, § 74; 17.
Duties assigned to two or more jointly, §§ 121–132; 26.
Reports of, 16 G. A., ch. 159; 28.
Of State Institutions, not to contract debts beyond appropriation, 17 G. A., ch. 6; 30.
——— not to be interested in contracts, 17 G. A., ch. 144; 31.
Of Cities and Towns, election of, on organization, § 425; 98.
——— compensation of, not to be changed, § 491; 123.
——— election and qualification of, §§ 501–504; 126.
Of Incorporated Towns, §§ 511–516; 129.
Of Cities, election of mayor and councilmen, §§ 517, 521; 130.
Of Cities of the Second Class, elections and terms of, § 532; 135.
Of Cities of First Class, election of, § 535, 16 G. A., ch. 33; 136.
——— may be given salaries instead of fees, 17 G. A., ch. 56; 145.
Of Counties and Cities, not to take warrants below par, § 556; 147.
——— violating provisions as to issuing bonds, discounting warrants, etc., guilty of misdemeanor, § 558; 147.
Elections and Terms of, §§ 573–593; 156.
Qualification of, §§ 670–691; 170.
Which required to give bond, § 674; 171.
Failing to give bond, penalty for, § 684; 173.
Removal or suspension of, from office, §§ 746–765; 180.
May be required to give new bond, §§ 772–780; 184.
Resignations of; vacancies, how filled, §§ 782, 783; 186.
Shall hold over until successors are elected, § 784; 187.
De facto, acts of, as to tax sales, deemed valid, § 903; 231.
Before whom acknowledgments may be taken, §§ 1955–1957; 552.
False certificates of acknowledgment by, how punished, § 1964; 555.
Public, provisions as to suits by sureties, not applicable to bonds of, § 2111; 592.
Public, limitation of actions against, § 2529; 671.
Public, actions against, where to be brought, § 2579; 687.
Of corporation, service upon, by copy, not good, n. § 2603; 697.
Public, presumption in favor of proceedings of, n. § 2604; 697.
Of corporations, service of notice on, § 2611; 699.
Collecting money, summary proceedings against, § 2906; 779.

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Officers.—*Continued.*
Liability of, for unlawful exercise of powers, §§ 3358, 3359; 874.
Actions upon bonds of, §§ 3368, 3369; 875.
Who authorized to punish for contempts, §§ 3491, 3501; 895.
Presumption as to proceedings of, § 3669; 929.
Before whom affidavits may be taken, § 3691; 931.
Compensation of, see COMPENSATION OF OFFICERS, §§ 3755–3844; 945.
To keep table of fees posted, § 3839; 967.
Public, embezzlement by, punished, § 3908; 988.
Public, bribery of, or accepting bribes by, punished, §§ 3939–3941; 996.
Misconduct of, to be inquired into by grand jury, § 4278; 1064.
Of penitentiary, not to receive perquisites or be interested in contracts, §§ 4767–4769; 1149.
Of penitentiary, compensation of, § 4783; 1152.
Of general assembly to be chosen by each house, Const., Art. 3, § 7; 1225.
Liable to impeachment, Const., Art. 3, § 20; 1227.
Of militia, election of, Const., Art. 6, § 3; 1236.
Shall take oath, Const., Art. 11, § 5; 1244.

Official Bond.
Action upon, § 3368; 875.

Official and Corporate Rights.
Action to test, §§ 3345–3367; 872.

Oil.
Inflammable, selling of, for illuminating purposes punished, § 3901; 985.
See INSPECTION OF COAL OIL, 17 G. A., c. 172; 447.

Oleomargarine.
Regulation of sale of, 18 G. A., ch. 39; 1018.

Omnibuses.
Proprietors of, liable for damages to baggage, or delay caused thereby, § 2183; 609.

Onions.
Weight of, per bushel, § 2049; 575.

Open Account.
See ACCOUNT.

Open Court.
Meaning of term, n. § 2741; 732.

Opening of Highway.
Provisions as to, §§ 949, 950; 241.

Opening and Closing of Argument.
Who entitled to, § 2780; 742.
In criminal cases, § 4420; 1089.

Operation of Railways.
General provisions, §§ 1292–1316; 355.

Opinions of Superintendent of Public Instruction.
Given to school officers, § 1577; 459.
Publication of, §§ 1579, 1581; 459.

Opinions of Supreme Court.
To be in writing, § 143; 33.
Custody of, etc., §§ 147–149; 33.
May be taken by reporter, § 154; 34.
Filing of, § 3205; 847.
In criminal cases, must be in writing, § 4537; 1110.

Oppression by Color of Office.
Defined, punishment for, §§ 3963, 3969; 1000.

Orchard.
Trespass upon, punished, § 3984; 1005.

Order of Trial.
In civil cases, § 2779–2783; 741.
In criminal cases, § 4420; 1089.

Order of Payment.
Of claims against estates of decedents, §§ 2418–2428; 650.
Of specific legacies, § 2422; 651.

Orders.
Entitled to grace, 16 G. A., ch. 81; 587.
Actions against parties to, § 2550; 681.

Orders of Court.
As to administrator, notice of, how served, §§ 2479–2481; 661.
For change of place of trial in vacation, § 2593, 693.
Entry of, by clerk, § 2864; 766.
In summary proceedings, § 2906; 779.
Motions for, notice of, definition of, when granted, §§ 2911–2926; 780.
How enforced, § 3026; 806.
For appearance and examination of debtor, §§ 3135–3137; 828.
——— service of, § 3146; 829.
Vacation or modification of, in court where rendered, §§ 3154–3157; 831.
Appeals from, when allowable, § 3161; 835.
In replevin, for delivery of property, issuance and execution of, §§ 3229–3237; 854.
In mandamus proceedings, when to issue, §§ 3374–3377; 877.
——— form of, to whom issued, return, § 3382; 879.

Ordinances.
Power of cities and towns to make, § 482; 120.
Fines and imprisonment for violation of, §§ 483–486; 121.
Information for violation of, not triable by jury, 18 G. A., ch. 77; 121.
Method of adoption and form of, § 489; 122.
Recording and publishing of, § 492; 123.
Yeas and nays on passage of, § 493; 124.
Judicial notice of, § 546; 140.
How receivable in evidence, § 3720; 936.

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Organic **Laws.**—See pp. 1188-1213.

Organization.
Of general assembly, §§ 6–10; 2.
Of city under special charter in accordance with general incorporation act, §§ 434–449; 102.
Of railway companies, §§ 1273–1282; 345.

Original Entries.
Book of, to be procured and kept by recorder, §§ 3703–3705; 933.

Original Notice.
Delivery of, to sheriff, or service of, deemed commencement of action, § 2532; 675.
Requisites of, § 2599; 694.
Service of, §§ 2601–2625; 696.
See, NOTICE.

Orphans.
Admission of, to Orphans' Homes, 16 G. A., ch. 94, §§ 1–4; 472.

Orphans' Homes.
Government of, §§ 1623–1629; 471.
Appropriation for expenses of, §§ 1630–1632; 471.
Enumeration, adoption and discharge of children, §§ 1633–1637; 471.
Fund, tax, §§ 1638–1642; 472.
Admission to, 16 G. A., ch. 94, §§ 1–4; 472.
Support of, 16 G. A., ch. 94, §§ 5, 6, 473.
Employment and education of children in, 16 G. A., ch. 94, § 7; 473.
Levy of tax for, in delinquent counties, 16 G. A., ch. 94, § 8; 473.

Orphans of Soldiers.
Enumeration of, §§ 1635–1637; 471.

Osage Orange Seed.
Weight of, per bushel, § 2049; 575.

Ounce.
Standard, § 2043; 574.

Overplus.
In sales under execution, to be paid to defendant, § 3084; 819.
In sales on foreclosure, to be paid to the mortgagor, § 3324; 869.

Overseers of Poor.
Township trustees to be, § 393; 90.
May be appointed by board of supervisors, § 1361; 381.

Overseers in Penitentiary.
Employment of, § 4793; 1154.

Oversight.
Testimony to correct, may be admitted, § 2799; 747.

Owner.
Unknown, assessment of real estate to, § 826; 200.
Of property not assessed, to have assessment made by treasurer, § 852; 203.
Of stock, who deemed, § 1453; 404.

Owner.—*Continued.*
Of land, duties of, as to fences, §§ 1489–1500; 414.
Of liquors kept with intent to sell in violation of law, punished, § 1542; 428.
Of premises leased for sale of liquors, liability of, n. § 1543; 429.
Who deemed, under mechanic's lien law; 16 G. A., ch. 100, § 10; 602.
Of lost property, entitled to proceeds thereof paid into county treasury § 1519; 421.
Of property sold as unclaimed, recovery of proceeds by, from county treasury, § 2182; 609.

Panel.
OF TRIAL JURY:
Challenge to, in civil cases, §§ 2762–2767; 738.
—— in criminal cases, §§ 4401–4403; 1086.
OF GRAND JURY:
Challenge to, §§ 4258–4263; 1060.
How filled up, § 4256; 1066.

Paper and Stationery.
Executive council to advertise for proposals for, § 121; 26.

Papers.
What to be taken by jury on retiring, § 2797; 747.
Used as evidence, not deemed part of record; how sent up on appeal, § 3184; 841.
Originals of, may be sent to supreme court, § 3209; 848.
Of justice of the peace, deposited with successor, § 3625; 915.
Filed in one court, may be used as evidence in another, § 3670; 929.
Production of, in evidence, how compelled, §§ 3685–3688; 931.

Paragraphs.
Equitable petition to be separated into, § 2646; 708.
Equitable division of answer to be separated into, § 2660; 716.
Equitable division of reply to be separated into, § 2667; 717.
Setting up irrelevant matter, may be stricken out, n. § 2719; 728.

Pardon and Remission of Fines and Forfeitures.
May be granted by governor, §§ 4712–4714; 1138; and Const., Art. 4, § 16; 1232.

Parents.
Of minor, consent to marriage of, § 2191; 611.
Of illegitimate children, marriage between, § 2200; 612.
Recovery by, for services of minor, § 2240; 622.

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Parents.—*Continued.*
As guardians of minors, §§ 2241–2243; 623.
To be notified of proceedings against apprentices, § 2294; 629.
Vicious or intemperate, guardianship of children of, § 2301; 630.
Consent of, to adoption of child, § 2308; 631.
Inheritance by, §§ 2453–2457; 657.

Parks.
City may purchase or condemn land for, § 470; 114.

Parliamentary Practice.
Cushing's Manual as standard of, § 27; 5.

Particulars.
Bill of, when necessary, § 2713; 727.

Parties.
In actions against executors for specific performance, § 2488; 662.
To Actions, §§ 2543–2575; 678.
In whose name prosecuted, §§ 2543, 2544; 678.
Joinder of, §§ 2545, 2547, 2548; 680.
In case of assignment, § 2546; 680.
When numerous, one may sue or defend for all, § 2549; 681.
Upon joint and several obligations, § 2550; 681.
Court may order brought in, § 2551; 682.
Upon bond given for public security, § 2552; 682.
Against partnership, § 2553; 683.
By foreign corporations, § 2554; 683.
For seduction, § 2555; 683.
For injury or death of minor child, § 2556; 683.
Against unknown defendant, § 2557; 684.
By name used in written instruments, § 2558; 684.
Against prisoner, § 2559; 684.
Married Women as, §§ 2562, 2564; 684.
Minors as, §§ 2565–2568; 685.
Insane Persons as, §§ 2569–2571; 686.
Interpleader by, §§ 2572–2575; 686.
Not to serve original notice, § 2601; 696.
Defect of, as ground of demurrer, §§ 2643; 710.
Necessary to final decision upon counter claim, may be brought in, § 2662; 716.
United in interest, verification of pleading by, § 2671; 718.
By intervention, who may become, § 2683; 720.
Claiming under conveyance, may plead the same according to legal effect or name, § 2723; 729.
Appeals by a portion of, §§ 3174–3176; 839.
Who proper, in actions to recover personal property, § 3223; 853.

Parties.—*Continued.*
In actions for partition, § 3280; 864.
In actions before justices, § 3516; 910.
Admissible as witnesses, §§ 3638, 3639; 918; and Cons., Art. 1, § 4; 1215.

Partition Fences.
See Fences, §§ 1489–1505; 414.

Partition of Real Property.
Place of bringing action for, § 2576; 687.
Service by publication in actions for, § 2618; 701.
Proceedings in, § 3277; 863.
Pleading; parties; trial, §§ 3278–3283; 863.
Incumbrances, §§ 3284–3289; 864.
Making partition, §§ 3290–3297; 865.
Sale, §§ 3298–3306; 866.

Partners.
Liability of, for taxes of firm, § 806; 194.
Surviving, may sue as real parties in interest, n. § 2543; 678.
May be joined in proper cases by amended pleading, n. § 2689; 721.
Not competent as jurors in action against co-partner, n. § 2772; 739.
Confession of judgment by, n. § 2896; 775.
Garnishment of; attachment of property, n. § 2974; 794.
Interest of, in partnership property, levy upon, n. § 3054; 811.
In Limited Partnership:
General, powers §§ 2148, 2149; 604.
Special, §§ 2148, 2161–2170; 604.
Liability of, §§ 2148, 2149, 2154; 604.
Fraud of, punished, § 2165; 605.

Partnership.
Mortgage of property of, by individual member, n. § 1923; 542.
Action on obligation of, against one partner, n. § 2550; 681.
Suit by or against, how brought, § 2553; 683.
Claim against, set off against individual debt due one member, n. § 2659; 715.
Facts showing capacity of, need not be pleaded; how denied, §§ 2716, 2717; 728.
Lien of judgment against, upon individual property, n. § 2882; 772.
Appointment of receiver in action to settle accounts of, n. § 2903; 778.
Signing attachment bond in name of, n. § 2959; 790.
Attachment of property of, §§ 2973, 2974; 793.
Levy of execution upon property of, §§ 3053, 3054; 811.
Accounts and rights of, not to be settled in action of replevin, n. § 3226; 853.
See, also, Limited Partnerships, §§ 2147–2170; 603.

Part Performance.
Of parol contract as to land, what sufficient to take case out of the statute of frauds, n. § 3665; 927.

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Party Walls.
See WALLS IN COMMON, §§ 2019-2030; 570.
Passengers.
Maximum rates for transportation of, § 1305; 357; and 15 G. A., ch. 68; 363.
Liability of carrier of, for damages to baggage, § 2183; 609.
Carrier of, cannot limit liability by contract or regulation, § 2184; 609.
Passing Counterfeit Money.
Punished, § 3922; 993.
Patents.
From state land office, §§ 87, 88; 19.
For school lands, § 1850; 525.
For lands held by the state, § 1916; 541.
From United States to be recorded in case of property held under land grant, 18 G. A., ch. 186; 550.
For lands to issue to heirs of deceased patentees, 17 G. A., ch. 33; 658.
For lands, certified copies of, receivable in evidence, 16 G. A., ch. 10; 925.
Paupers.
Under age, may be bound as apprentices, § 2283; 629.
Bringing of, within the state, punished, § 4045; 1020.
Payee.
Action of, against guarantor, § 2091; 587.
Payment.
Of mileage and salary to members of general assembly, 15 G. A., ch. 3; 3.
To minors for services, § 2240; 622.
Of specific legacies, §§ 2429-2435; 651.
Of distributive share of estate, § 2437; 653.
Payments.
For liquors sold in violation of law, may be recovered, § 1550; 434.
On note will not prevent bar of statute, n. § 2539; 677.
Peace.
Offenses against, see OFFENSES AGAINST PUBLIC PEACE, §§ 4065-4072; 1026.
Peace Officers.
To make information upon violation of liquor law, § 1551; 436.
Who constitute, §§ 4109, 4110; 1038.
Peaches.
Weight of, per bushel, § 2049; 575.
Peck.
Contents of, § 2047; 575.
Peddlers.
Cities and towns may regulate and license, § 463; 108.
Tax upon; penalty for failure to take out license, §§ 906, 907; 231.
Penalty.
Upon tax not brought forward by treasurer, remission of, 15 G. A., ch. 29; 206.
Penalty.—*Continued.*
On delinquent tax, § 866; 211.
In relation to life insurance companies, suits to recover, how and where brought; disposal of, § 1178; 307.
For non-payment of money does not constitute usury; how far enforcible, n. § 2079; 580.
In favor of school fund on usurious contract, § 2080; 582.
Limitation of actions for, §§ 2529, 2535; 671.
Action for recovery of, where to be brought, § 2579; 687.
When recovered, how disposed of, § 3370; 876.
Actions for, by whom prosecuted, § 3371; 876.
Judgment for, rendered by collusion, does not bar another prosecution, § 3372; 876.
Pendency of Actions.
Affecting real property, third persons affected with notice of, §§ 2628, 2629; 705.
Penitentiary.
Defense for prisoner in, § 2559; 684.
Service of original notice upon prisoner in, § 2617; 700.
AT FORT MADISON:
Established, § 4744; 1144.
Warden, election, qualification and duties, §§ 4745-4751; 1145.
Clerk, appointment, qualification and duties, §§ 4752, 4753; 1146.
Deputy warden, appointment, qualification, and duties, § 4754; 1147.
Guards, §§ 4755, 4756; 1148.
Chaplain, § 4757; 1148.
Physician, §§ 4758-4766; 1148.
Officers not to receive perquisites; penalty, §§ 4767-4769; 1149.
Imprisonment at hard labor; solitary imprisonment, § 4770; 1150.
Convicts sentenced in U. S. courts to be received in, § 4771; 1150.
Warden to serve process, § 4772; 1150.
Supplies to be furnished on contract, §§ 4773-4775; 1150.
Escape or discharge of convicts, §§ 4776-4779; 1151.
Economy, receipts, § 4782; 1152.
Salaries of officers; appropriation; support of convicts, §§ 4783-4787; 1152.
Miscellaneous provisions, §§ 4788-4806; 1153.
Leasing convict labor, 18 G. A., ch. 149; 1156.
Diminution of sentence for good behavior, 18 G. A., ch. 154; 1156.
AT ANAMOSA.
Acts applicable only to, pp. 1157-1159.
Pensions.
Not taxable, § 802; 193.

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Pensions.—*Continued.*
Clerk of district court to certify papers for, § 3782; 950.
People.
Political power inheres in, Const., Art. 1, § 2; 1215.
Rights of, retained, Const., Art. 1, § 25; 1223.
Perch.
Standard length of, § 2040; 574.
Of mason work or stone, contents of, § 2050; 576.
Peremptory Challenge to Jurors.
In civil cases, § 2771; 739.
In criminal cases, §§ 4404, 4411–4413; 1086.
Performance.
Of contract payable in property, §§ 2097–2102; 588.
Of condition precedent, how compelled, § 2715; 727.
Period of Limitation.
See LIMITATION OF ACTIONS, §§ 2529–2542; 671.
Perishable property.
In hands of warehousemen or common carrier, unclaimed, disposal of, § 2180; 608.
Taken under attachment, sale of, § 2999; 801.
——— proceeds of, how applied, § 3011; 803.
Perjury.
False swearing before commissioner of another state, deemed, § 275; 59.
Person taking affirmation instead of oath, subject to penalty for, § 278; 60.
False swearing as to service of notice of application for tax deed, deemed, § 894; 222.
DEFINED, PUNISHMENT FOR, § 3936; 996.
Subornation of, § 3937; 996.
Attempt to suborn, § 3938; 996.
Requisites of indictment for, § 4312; 1072.
Giving of false note and schedule by poor convict, deemed, § 4612; 1124.
False swearing upon application for reprieve or pardon, deemed, § 4713; 1138.
Permanent Survey of Lands.
Proceedings for, 15 G. A., ch. 8; 862.
Permit to Sell Intoxicating Liquors.
How obtained; accounts to be kept; vacation of; penalty for violating, §§ 1526–1538; 423.
Perpetuating Testimony.
By affidavit, § 3700; 932.
By deposition, §§ 3745–3750; 940
In criminal cases, § 4572; 1115.
Perpetuity.
Disposal of property amounting to, void, § 1920; 541.
Personal Property.
See PROPERTY, PERSONAL.
Personal Service.
Outside of state, only equivalent to publication, n. § 2621; 703.
Personal Services.
Earnings of debtor for, exempt from execution, § 3074; 817.
Petition.
For re-location of county seat, §§ 281–285; 61.
For establishment of highway, § 922; 236.
Of occupying claimant, §§ 1976–1978; 558.
By husband or wife abandoned by the other, for leave to sell property for support of family, § 2207; 614.
——— to set aside order allowing sale in such cases, § 2209; 614.
For authority to execute conveyance from an insane husband or wife, § 2216–2218; 616.
In action for divorce, must state what, §§ 2221, 2222; 617.
For annulling marriage, §§ 2232, 2233; 621.
For leave to sell property of minor, § 2258; 625.
For appointment of guardian of drunkard, spendthrift, or lunatic, § 2273; 627.
For removal of administrator, §§ 2497, 2498; 663.
For discovery, what to contain; verification of, § 2523; 669.
Notice of filing, § 2599; 694.
Failure to file by day fixed in notice, deemed discontinuance of action, § 2600; 696.
Against unknown defendant, to be verified; what to state, § 2622; 703.
Striking cause of action from, §§ 2631, 2632; 706.
Filing of, for each cause of action in case of misjoinder of causes, § 2634; 707.
Time of demurring or answering to, § 2635; 707.
REQUISITES OF, § 2646; 708.
Amendment of, before answer, § 2647; 710.
Causes of demurrer to, §§ 2648, 2649; 710.
Objections not appearing on face of, how to be taken; when deemed waived, § 2650; 712.
Cross.—against co-defendant or third persons, proceedings upon, § 2663; 716.
In action for slander or libel, what necessary to be stated in, § 2681; 719.
OF INTERVENTION, provisions as to, § 2685; 721.
Interrogatories may be attached to, § 2693; 724.

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Petition—*Continued.*
Dismissal of, for failure to answer interrogatories attached to answer, § 2700; 726.
Counts of, how numbered, § 2705; 726.
Duly verified, taken as true upon default in actions on account, 16 G. A., ch. 36; 727.
In action for injuries to real property, requisites of, § 2726; 729.
Supplemental, when allowed, § 2731; 730.
For appointment of receiver, § 2903; 778.
For attachment, §§ 2950–2955; 787.
——— on debts not due, § 2956; 789.
Of intervention in attachment proceedings, § 3016; 804.
In attachment, amendment of, § 3021; 805.
In proceedings to subject property to payment of judgment, deemed true, when, § 3151; 830.
For new trial, after term when judgment is rendered, § 3155; 832.
To vacate or modify judgment, proceeding under, §§ 3157–3162; 833.
For re-hearing in supreme court, §§ 3201, 3202; 847.
For writ of certiorari, § 3219; 850.
In action for recovery of personal property, § 3225; 852.
In action for recovery of real property, § 3250; 858.
In action to quiet title, § 3274; 861.
In action for partition, § 3278; 863.
In *quo warranto* proceedings, § 3349; 873.
For order of mandamus, §§ 3377–3379; 878.
For injunction, § 3388; 880.
In actions against boats and rafts, § 3433; 888.
For writ of *habeas corpus*, §§ 3449, 3450; 890.
In proceedings for change of name, § 3503; 897.
Not necessary in actions before justices, § 3518; 901.
In forcible entry and detainer, § 3615; 914.
To procure affidavit, § 3692; 931.
In proceedings to perpetuate testimony, § 3746; 940.
For redress of grievances, right of, Const., Art. 1, § 20; 1222.

Petroleum Oil.
Regulation of sale of, 17 G. A., ch. 172; 447.
Penalty for sale of, when of low fire test, § 3901; 985.

Pharmacist.
See PRACTICE OF PHARMACY, 18 G. A., ch. 75; 448.

Pharmacy.
Regulation of practice of, pharmacists to be registered, 18 G. A., ch. 75, §§ 1, 2; 448.
Commissioners appointed; duties and fees of, 18 G. A., ch. 75, §§ 3–6; 449.
Penalty for adulterating drugs, 18 G. A., ch. 75, § 7; 450.
Sales by, 18 G. A., ch. 75, §§ 8, 9; 450.
Itinerant venders, 18 G. A., ch. 75, § 10; 451.
Penalties, 18 G. A. ch. 75, § 11; 451.

Physician.
Not liable to act as juror, § 228; 51.
Summoned by coroner on inquest, compensation of, § 368; 86.
Of Hospital for the Insane, appointment of, qualifications, §§ 1386, 1394; 386.
Not prohibited from putting up prescriptions, 18 G. A., ch. 75, § 9; 450.
Registry of, 18 G. A. ch. 151, § 3; 452.
To local board of health, 18 G. A., ch. 151, §§ 14, 15; 454.
Not to testify as to privileged communications, § 3643; 920.
Fees of, as commissioner of insanity, § 3825; 964.
Of the penitentiary, appointment, powers and duties of, §§ 4758–4766; 1148.
Of city, see CITY PHYSICIAN.

Pint.
Contents of, § 2041; 575.

Place.
Of holding court, § 192; 43.
Of contract, effect of law of, as to usury, n. § 2079; 580.
Denial concerning, how made, § 2701; 726.
Need be alleged, when, § 2703; 726.
OF BRINGING ACTION:
In civil cases, §§ 2576–2589; 687.
Before justices, §§ 3509, 3514; 899.
OF TRIAL, CHANGE OF:
In civil actions, §§ 2590–2598; 691.
In actions before justices, § 3533; 903.
In criminal cases, §§ 4368–4388; 1082.
Upon preliminary examinations before justice, § 4228; 1056.
Upon trial on information before justice, §§ 4670, 4671; 1133.
See, also, CHANGE OF VENUE.

Plaintiff.
Term defined, § 2505; 665.
Error of, as to kind of proceedings, effect of, how corrected, §§ 2514–2516; 667.
Party interested, to be, §§ 2543, 2544; 678.
Joinder of, §§ 2545–2548; 680.
May sue by name used in written instrument, § 2558; 684.
May have guardian *ad litem* of insane person joined as defendant, § 2571; 686.

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Plaintiff.—*Continued.*
May notify defendant that no personal claim is made, § 2603; 699.
May determine newspaper in which publication of notices shall be made § 2619; 702; and § 3832; 965.
May file notice of pendency of action in county where property is situated, § 2629; 706.
May strike cause of action from petition, § 2631; 706.
Petition of, §§ 2645, 2646; 708.
May amend petition without leave before answer filed, § 2647; 710.
Suing in corporate or representative capacity, need only aver capacity or relation, § 2716; 728.
Dismissal of action by, § 2834; 763.
Relief granted to, on failure of defendant to answer, not to exceed relief demanded, § 2855; 765.
May serve copy of judgment on defendant served by publication, § 2879; 771.
Rendered liable for costs by offer of defendant to confess, when, § 2899; 776.
May be required to give security for costs when, §§ 2927–2929; 781.
Apportionment of costs to, § 2934; 783.
In attachment, may secure lien upon interest of defendant in partnership property, § 2974; 794.
May controvert answers of garnishee, § 2987; 798.
Lien of, upon partnership property, under execution against partner, how secured, § 3054; 811.
May be required to give indemnifying bond, § 3056; 812.
May abandon levy, § 3086; 819.
May sue purchaser at sheriff's sale for amount of bid, § 3089; 820.
May enforce judgment against property of decedent, how, § 3092; 821.
Meaning of term, in relation to executions, § 3128; 827.
Death of, does not prevent execution from issuing; substitution of representatives of, § 3130–3134; 827.
Bond of, in action to recover personal property, § 3229; 854.
In action for recovery of real property, must recover upon the strength of his own title, § 3247; 857.
Against co-tenant, must show denial of his right, § 3248; 858.

Plat.
Of surveyor, what to show, § 876; 87.
Of highway, to be recorded, § 949; 241.
——— to be furnished township clerk and highway supervisor, § 968; 245.
Of homestead, §§ 1991, 1998; 562.
——— how recorded, § 1999; 565.
Of permanent survey of lands, 15 G. A., ch. 8; 862.

Plat.—*Continued.*
Of property in partition proceedings, § 3292; 865.
Of surveyor as evidence, § 3701; 933.
Fee for copy of, § 3890; 957.

Plat Book.
Of highways, § 937; 245.
To be kept by auditor, §§1948–1950; 551.

Plats.
Of Lands Laid out in City or Town:
Descriptions in; duty to record, § 559; 147.
Statements of; acknowledgment and recording, §§ 560, 561; 148.
Vacation of streets and alleys in, § 562; 149.
Vacation of, by proprietor, §§ 563–567; 149.
To be made by auditor upon failure of owner to make, § 568; 150.
Not to be recorded until property is free from encumbrance, 18 G. A., ch. 53; 152.
Re-survey of, 15 G. A., ch. 54; 153.
Vacation of 15 G. A., ch. 61; 154.
Special laws for vacation of, not allowed, Const., Art. 3, § 30; 1228.
Of Tracts Owned in Severalty:
Auditor may require, for purposes of taxation, § 569; 150.
May be executed by auditor, § 570; 151.
Legalized, § 571; 151.
Penalty for selling lots in, until executed and recorded, § 572; 151.

Pleas to Indictment.
Number and form of, §§ 4359, 4360; 1081.
Of guilty, how put in; may be withdrawn, §§ 4361, 4362; 1081.
Trial and judgment upon, §§ 4363–4366; 1081.
Of not guilty, entered for defendant refusing to plead, § 4367; 1082.

Pleas to Information before Justice.
What allowable, § 4668; 1132.

Pleading Over.
After decision on demurrer, effect of, § 2654; 713.

Pleadings in Civil Actions.
In case of claims against estate of decedent, § 2410; 649.
In case of misjoinder of causes of action, § 2634; 707.
General Provisions, §§ 2635–2645; 707
Petition, §§ 2645–2647; 708.
Demurrer, §§ 2648–2654; 710.
Answer, §§ 2655–2658; 713.
Counter claim, §§ 2659–2664; 715.
Reply, §§ 2665–2668; 717.
Verification, §§ 2669–2680; 717.
In slander and libel, §§ 2681, 2682; 719.

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Pleadings in Civil Actions.—*Continued.*
In intervention, §§ 2683–2685; 720.
Amendments, §§ 2686–2692; 721.
Interrogatories attached to, § 2693–2700; 724.
General principles, §§ 2701–2736; 726.
Supplementary, when allowed, § 2731; 730.
Lost, substitution of, § 2735; 731.
When other than a general execution is required, must state facts entitling to, § 2852; 764.
Default for failure to file, § 2869; 767.
Written, not required in summary proceedings, § 2910; 779.
Containing matter arising after commencement of action, confession of, § 2938; 784.
In proceedings to vacate or modify judgment, § 3158; 834.
In supreme court as to right to take or maintain appeal, § 3213; 849.
In actions to recover real property, §§ 3250–3252; 858.
In actions to quiet title, §§ 3274–3276; 861.
In actions for partition, §§ 3278–3283; 863.
In *quo warranto* proceedings, §§ 3349–3352; 873.
In mandamus, §§ 3377–3380; 878.
In *habeas corpus* proceedings, §§ 3449–3452; 890.
In actions before justices, §§ 3530–3532; 902.
In circuit court upon appeals from justices, § 3596; 911.
Taken as true upon failure of opposite party to obey subpœna, § 3684; 930.

Pleadings in Criminal Actions.
By defendant, how put in, §§ 4345, 4346; 1079.
Demurrer to indictment, how put in and tried; judgment upon, §§ 4352–4358; 1079.
Pleas to the indictment, number and form of, how put in, judgment upon; §§ 4359–4367; 1081.

Poison.
Mingling of, with food, etc., punished, § 3877; 980.

Poisons.
Method of retailing, by pharmacists, 18 G. A., ch. 75, § 9; 450.
To be labeled when sold, and record kept, § 4038; 1017.

Pole.
Standard length of, § 2040; 574.

Police.
City council may establish and organize, § 525; 133.
To be elected by council in cities of second class, § 532; 135.
Appointment of, in cities of first class, § 534; 136.

Police.—*Continued.*
Number of, to be regulated by city council, duties of, § 537; 138.

Police Clerk.
Election or appointment of, § 542; 139.

Police Courts.
Establishment of, election or appointment of clerk, § 542; 139.
Deemed courts of record, and to have seal, § 543; 139.
Always open, juries in, appeals, etc., §§ 545, 546; 140.
Witness' fees in, § 3814; 961.
Proceedings before, in criminal cases, § 4707; 1137.

Police Judge.
Election of, in cities of first class, 16 G. A., ch. 33, § 535; 137.
Powers and jurisdiction of, § 543; 139.
Compensation of, § 544; 140.
Mayor may act as, § 547; 140.
Included in term magistrate, § 4103; 1037.

Policeman.
As peace officer, § 4109; 1038.

Policies of Insurance.
To state whether company is mutual or stock, § 1140; 289.
To provide for equitable cancellation thereof, 17 G. A., ch. 39; 297.
Forfeiture of, 18 G. A., ch. 210; 299.
Amount of, *prima facie* evidence of value, 18 G. A., ch. 211, § 3; 300.
Valuation of, by auditor, § 1169; 305.
Assignment of, n. § 2043; 585.
Assignee of, may sue thereon, n. § 2543; 678.

Policies of Life Insurance.
Exempt from execution, § 1182; 308.
Defenses to actions on, 16 G. A., ch. 55; 309.
Avails of, not subject to debts; how disposed of, § 2372; 643.

Political Corporations.
General regulations as to appropriation of money, issuance of bonds, etc., §§ 552–555; 146.
Bonds for indebtedness in excess of limit, made liens upon property of, 15 G. A., ch. 23; 63.
Not to become stockholders in banking corporations, Const. Art. 8, § 4; 1237.
Limit of indebtedness of, Const. Art. 11, § 3; 1242.

Poll Books.
To be furnished by county auditor, § 615; 162.
How kept, § 621; 163.
Returns in, §§ 623, 629; 164.
Messenger failing to deliver, punished, § 4006; 1009.

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Poll Tax.
Paid by labor upon highway, §§ 984, 985; 249.
When not paid in labor, how collected, § 988; 251.
Members of militia exempt from, 18 G. A., ch. 74, § 19; 264.
Firemen exempt from, § 1560; 441.

Polls.
Where to be opened, § 603; 160.
Time of opening and closing, § 611; 161.

Polling of Juries.
In civil cases, §§ 2804, 2805; 749.
In criminal cases, § 4470; 1100.

Pools.
Railway companies not allowed to form, §§ 1297, 1298; 356.

Poor.
Board of supervisors to exercise powers as to, § 303, ¶ 21; 71.
Relief of, by city council, § 538; 138.
Liability of relatives for support of, §§ 1330–1351; 377.
Legal settlements of, §§ 1352–1360; 379.
Relief of, outside of poorhouse, §§ 1361–1363; 381.
——— where there is no poorhouse, §§ 1364–1368; 382.
Supervisors may contract for support of, §§ 1369–1371; 383.
Establishment and management of poor house, §§ 1372–1382; 384.

Poor Convicts.
Liberation of, §§ 4611, 4612; 1123.

Poor-house.
Purchase of real estate for, by board of supervisors, § 303, ¶ 20; 71.
Relief of poor in absence of, §§ 1364–1368; 382.
Establishment and management of, by board of supervisors, §§ 1372–1382; 384.

Poor Tax.
Levy of, § 1381; 385.

Port Warden.
Appointment or election of, § 528; 134.

Posse Comitatus.
Sheriff may call out, § 340; 82; and § 4145; 1043.

Possession.
Mortgagee of personal property entitled to, § 1927; 544.
Of lands, deemed to be in owner, § 1928; 544.
Mortgagor of real property entitled to, § 1938; 546.
Of property owned by husband or wife, action for, by one against the other, § 2204; 613.
Of property belonging to estate, proceedings to compel delivery of, §§ 2379–2381; 644.
Of real property of decedent, §§ 2402–2461; 647.

Possession.—*Continued.*
What sufficient to bar action to recover real property, n. § 2529; 671.
Of property during the period of redemption, § 3102; 822.
Of real property, action for recovery of, § 3245–3272; 857.
What sufficient to take parol contract as to land out of the statute of frauds, n. § 3666; 927.
Of recently stolen property, presumption from, n. §§ 3902, 3904; 986.

Postage for Sending Papers, etc.
Taxed as costs, § 2937; 784.

Posthumous Children.
May inherit, notwithstanding will, § 2334; 637.
Share of, from whom taken, § 2335; 637.

Posting of Notices.
How proved, § 3698; 932.

Potatoes.
Weight of, per bushel, § 2049; 575.

Pound.
Standard, divisions of, etc., § 2043; 574.

Power of the County.
Sheriff may call out, § 340; 82; and § 4145; 1043.

Power of Attorney.
Recorded, how revoked, § 1969; 556.

Power, Political.
Inheres in the people, Const., Art. 1, § 2; 1215.

Powers.
Of corporations for pecuniary profit, § 1059; 269.
Of the state, how divided, Const., Art. 3, § 1; 1224.

Practice.
In courts, general assembly to provide system of, Const., Art. 5, § 14; 1235.

Prairie.
Setting fire to, and burning, punished §§ 3889, 3890; 982.

Prayer for Judgment.
May be based upon several counts § 2646; 708.
Not necessary in answer, § 2658; 715.
Not to be attacked by motion for more specific statement, n. § 2720; 729.

Præcipe.
For jury, service and return of, § 242; 53.
For new jury, § 244; 54.
In habeas corpus proceedings, §§ 3460, 3470; 892.

Precincts.
At city elections, § 501; 126.
What to constitute, §§ 603, 604; 160
For elections in independent school districts 18 G. A., ch. 8; 212.

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Preferred Stock.
May be issued by railways, §§ 1286, 1287; 348.
Pregnancy.
Of wife at time of marriage, cause for divorce, § 2224; 618.
Of person sentenced to death, inquiry as to, 17 G. A., ch. 165; 972.
Prejudice.
Of judge or inhabitants of county, ground for change of place of trial, §§ 2590–2592; 691.
Error without, not to be regarded in subsequent proceedings, § 2690; 724.
——not to be regarded in supreme court, § 2836; 756.
Presumed from improperly granting change of venue, n. § 2596; 691.
Preliminary Examination.
General provisions, §§ 4226–4238; 1056.
Trial, §§ 4239–4244; 1057.
Bail, §§ 4245, 4246; 1058.
Warrant of commitment, § 4247; 1058.
Witnesses bound over to appear, §§ 4248–4251; 1059.
Findings and return of magistrate, §§ 4252, 4253; 1059.
Minutes of evidence to be laid before grand jury, § 4289; 1065.
Preliminary Information.
Defined, § 4111; 1038.
Arrest of defendant upon warrant, §§ 4185–4188; 1049.
Bail, §§ 4189, 4192–4194; 1050.
Execution of warrant, §§ 4190, 4191; 1050.
Defendant to be taken before magistrate, § 4195, 4196; 1051.
Proceedings upon, see PRELIMINARY EXAMINATION, §§ 4226–4244; 1056.
See, also, INFORMATIONS.
Premium Notes.
Taken as capital stock, § 1124; 233.
Failure to pay, not to work forfeiture of policy, 18 G. A., ch. 210; 299.
Preparatory Department.
Of State University, discontinued, 17 G. A., ch. 115; 465.
Preponderance of Evidence.
What sufficient against verdict, to warrant setting aside, n. § 2857; 756.
Prescription.
Right of foot-way not acquired by, § 2033; 703.
Physician not prohibited from putting up, 18 G. A., ch. 75, § 12; 491.
Presence of Defendant.
When necessary on arraignment, § 4328; 1075.
——— in criminal trials, § 4351; 1079.
At rendition of verdict, § 4461; 1098.
Not necessary at ruling on motion for new trial, n. § 4490; 1103.
When necessary at judgment on conviction, § 4497; 1105.
Presence of Plaintiff.
In habeas corpus proceedings, § 3488; 894.
President of School Board.
Powers and duties of, § 1739, 1740; 496.
President of Senate.
Who to be, Const., Art. 4, § 18; 1232
To act as governor upon death or disqualification of lieutenant-governor, Const., Art. 4, § 19; 1232.
President of State University.
Appointment; powers; duties, §§ 1595, 1596, 1600; 461.
President of Agricultural College,
Not eligible as trustee, § 1605; 466.
Election of, § 1606; 466.
Powers and duties of, §§ 1611, 1613; 467.
Oath of, § 1615; 468.
Presidential Electors.
Election of, §§ 659–669; 169.
Press.
Liberty of, Const., Art. 1, § 7; 1216.
Presumption.
In favor of proceedings of court of general jurisdiction or public officer, n. § 2601; 697.
Of jurisdiction upon service by publication, n. § 2618; 701.
In favor of judgment by default upon publication, n. § 2870; 768.
In favor of proceedings of officers and courts of limited jurisdiction, § 3669; 929.
Priest.
Not to testify as to privileged communications, § 3643; 920.
Principal and Surety.
Executions against, how levied, §§ 3039–3042; 808.
Printer, Public.
Compensation for publication of estray notices by, §§ 3822, 3823; 963.
See, also, STATE PRINTER.
Printing.
To be done by state printer, § 96; 22.
Of acts of general assembly, § 35–57; 6.
Priority.
Of mechanic's lien, 16 G. A., ch. 100, § 9; 600.
Prisoners.
Sheriff to have charge of, § 339; 82.
IN PENITENTIARY.
Defense for, how made, § 2559; 684.
Service of original notice on, § 2617; 700.
Not required to verify pleading, § 2675; 718.
Testimony of, how procured, §§ 3678, 3679; 930.
Officer suffering to escape, punished, § 3953–3955; 999.

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Prisoners.—*Continued.*
Assisting to escape, punishment for, §§ 3956–3958; 999.
Breaking jail, punished, § 3959; 1000.
May be confined at hard labor, §§ 4736, 4737; 1143.
Credited for labor, § 4741; 1144.
Cruel treatment of, punished, § 4742; 1144.
To be protected, § 4743; 1144.

Prisons.
Condition and management of, to be inquired into by grand jury, § 4278; 1064
DISCIPLINE OF:
Jails used as; duty of keeper, §§ 4723–4728; 1141.
Inspectors of jails, §§ 4729–4733; 1142.
Solitary imprisonment, § 4734; 1142.
Expenses of safe keeping and maintaining, § 4735; 1143.
Confinement at hard labor, §§ 4736–4743; 1143.

Private Property.
Cannot be taken to pay debts of public corporation, § 3748; 810.
Not to be taken for public use without compensation, Const., Art. 1, § 18; 1220.
See, also, TAKING OF PRIVATE PROPERTY.

Private Seals.
Use of, abolished, § 2112; 592.

Privileged Communications.
Not to be received in evidence, §§ 3642–3644; 910.

Probate Business.
Compensation to clerk for, § 3783; 950.

Probate Jurisdiction.
Of circuit court, §§ 2312–2321; 634.

Probate Records.
To be kept separate, § 202; 45.
How kept, §§ 2490–2493; 662.

Probate of Wills.
Not conclusive on adverse parties, n. § 2312; 634.
Proceedings for, how tried, §§ 2340, 2341; 637.
Effect of, n. § 2342; 638.
Conclusive as to due execution, § 2353; 640.
Proceedings for, how tried, n. § 2737; 731.
——— how tried upon appeal, n. § 2741; 732.

Procedendo from Supreme Court.
Not essential to further proceedings after decision on appeal, n. § 3194; 845.
Effect of, § 3206; 847.
In criminal cases, § 4542; 1111.

Procedure.
Uniformity of, § 2520; 668.
Before referee, § 2830; 783.

Proceedings.
Not affected by repeal of statute, § 45, ¶ 1; 8.
Effect of Code upon, §§ 51, 52; 12.
Judicial, to be public, § 189; 43.
Removing or suspending attorney, §§ 219–223; 50.
Of board of supervisors, publication of, §§ 304–307; 74.
On trial of contested county elections, §§ 702–717; 176.
On trial of contested state elections, §§ 721–729; 178.
On trial of contested election of member of the general assembly, §§ 731–736; 179.
On trial of contested election for governor, §§ 742–745; 180.
For removal of officer, §§ 748–755; 181.
To condemn right of way for railway, §§ 1244–1259; 334.
To compel relatives to support poor person, §§ 1330–1351; 377.
To determine extent of homestead, §§ 2002–2006; 566.
In courts, in relation to money, denomination used in, § 2075; 579.
By abandoned husband or wife, for control of property, § 2207; 614.
To authorize conveyance for insane husband or wife, §§ 2216–2218; 616.
To annul marriage, §§ 2232, 2233; 621.
To authorize sale of property by guardian, §§ 2257–2265; 624.
Against master of apprentice, §§ 2288–2293; 629.
Against apprentices, §§ 2294–2299; 629.
To appoint guardian of children of vicious parents, §§ 2302–2306; 630.
As to custody of adopted child, § 2311; 632.
In probate, jurisdiction, etc., of, in, §§ 2312–2321; 634.
By administrator for leave to sell real estate, §§ 2386–2401; 645.
Upon claims against estate of decedent, §§ 2408–2417; 648.
Summary, against administrators for non-payment of legacies, § 2435; 652.
Special, defined, § 2506; 665.
In civil actions, how divided, § 2507; 666.
Equitable, what actions prosecuted by, §§ 2508–2511; 666.
Ordinary, what actions prosecuted by, §§ 2512–2513; 666.
Error of plaintiff as to kind of, effect of, correction, etc., §§ 2514–2516; 667.
Ordinary, trial of equitable issues in, § 2517; 667.
Change in kind of, by court, § 2518; 668.
Error in kind of, how waived, § 2519; 668.
Special, provisions as to other proceedings applicable to, § 2520; 668.

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Proceedings.—*Continued.*
By or against decedent, continued in name of personal representative, § 2527; 670.
Against a defendant not served, § 2627; 705.
In case of misjoinder of causes of action, § 2634; 707.
May be amended, § 2689; 721.
Ordinary and equitable, trial of issues in, §§ 2740–2743; 732.
SUMMARY, §§ 2906–2910; 779.
Summary, on bond for costs, § 2932; 782.
In attachment, to be independent of ordinary proceedings, § 2950; 787.
In attachment, amendments in, § 3021; 805.
Summary, against debtor, auxiliary to execution, § 3135–3149; 828.
In equity, to subject property to payment of judgment, § 3150–3153; 830.
To vacate or modify judgment in court where rendered, §§ 3154–3162; 831.
Special, appellate jurisdiction in, § 3163; 835.
Stay of, on appeal, §§ 3186–3193; 843.
Upon writ of certiorari, §§ 3216–3224; 849.
Kind of, in action to recover personal property, § 3226; 853.
In action for recovery of real property, §§ 3245–3272; 857.
In action to quiet title, §§ 3273–3276; 861.
In action for partition, § 3277; 863.
To foreclose mortgage of personal property, §§ 3307–3318; 867.
To foreclose mortgage of real property, § 3319; 868.
In actions to test official and corporate rights, § 3345; 872.
By mandamus, §§ 3373–3385; 876.
For injunction, §§ 3386–3402; 879.
Ordinary, granting of injunctions in, § 3386; 879.
In civil action, or on judgment, how enjoined, §§ 3396; 882.
Upon submission of controversies, §§ 3408–3415; 884.
In habeas corpus, §§ 3473–3490; 893.
In forcible entry and detainer, §§ 3616–3618; 914.
Of officers and inferior courts, presumption as to, § 3669; 929.
In district court, in case of security to keep the peace, §§ 4121–4129; 1040.
Before justices, see JUSTICES OF THE PEACE.

Proceeds.
Of sale of unclaimed property, § 2181; 608.
Of escheated property, disposition of, §§ 2463, 2464; 659.

Process.
Service of, upon lands owned by U. S., § 4; 1.

Process.—*Continued.*
How attested, § 188; 43.
Sheriff may call out posse to execute, § 340; 82; and § 4145; 1043.
Execution of, by sheriff after expiration of office, § 344; 82.
Service of, by coroner, § 350; 83.
Service of, by person specially appointed, § 351; 84.
Service of, upon foreign insurance companies, § 1144; 291.
Service of, on agents of life insurance companies, § 1165; 302.
In probate matters, may be revoked, § 2320; 635.
How served on persons in lunatic asylum, § 2616; 700.
Of supreme court, § 3172; 838.
——— upon judgment, § 3197; 846.
Under which prisoner is held, penalty for refusal to deliver copy of, § 3468; 892.
Not to be issued from justice's court into another county, § 3631; 916.
Refusal of officer to execute, punished, § 3949; 998.
Resisting execution of, punished, § 3960; 1000.
Officer may call out power of the county to aid in executing, § 4145; 1043.
Person resisting service of, punishable for contempt, § 4146; 1043.
Person refusing to assist officer to execute, guilty of misdemeanor, § 4147; 1043.
Governor may call out force to assist in executing, § 4148; 1044.
Upon an indictment, §§ 4318–4326; 1074.
To be served by warden of penitentiary, § 4772; 1150.
For witnesses, accused entitled to, Const., Art. 1, § 10; 1218.
Authority of supreme court to issue, Const., Art. 5, § 4; 1233.
Style of, Const., Art. 5, § 8; 1234.

Proclamation of Governor.
Of general or special election, §§ 577, 579; 156.
Of proposition to amend the constitution, 16 G. A., ch 114; 1247.

Production of Books and Papers.
How compelled, §§ 3685–3688; 931.

Professors.
Not liable to jury service, § 228; 51.

Profits.
Of real property of decedent to be collected, applied and accounted for, by administrator, §§ 2402–2404; 647.
Not to be derived by administrator from estate, § 2473; 660.

Prohibition, Statutory.
Against commencement of an action prevents the bar of the statute of limitation from running, § 2541; 673.

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Promise.
New, revives cause of action on contract, § 2539; 677.

Promissory Note.
Taking of, does not affect mechanic's lien, n. 16 G. A., ch. 100, § 2; 506.
Not kept alive by indorsement, n. § 2539; 677.
Action to recover possession of, n. § 3225; 852.
See NEGOTIABLE INSTRUMENTS.

Proof.
Burden of, see BURDEN OF PROOF.
Of loss to be given before action brought on insurance of policy, 18 G. A., ch. 211, § 3; 300.
Of execution and delivery of deeds, etc., § 1959; 554.
Of publication of original notice, how made, § 2620; 702.
Greater amount of, not rendered necessary by verification, § 2679; 719.
Mere insufficiency of, does not constitute a variance, § 2688; 721.
Extent of, required, § 2729; 729.
Correspondence of, with petition in justice's court, n. § 3530; 902.
Of service of subpœnas, § 3671; 929.

Property.
Term includes what, § 45 ¶ 10; 10.
Of state, executive council to have charge of, § 120; 25.
What exempt from taxation, § 797; 189.
How taxed, § 801; 192.
Classification of, for taxation, § 821; 198.
Of stockholders in corporations, liability of, for corporate debts, § 1068; 271; and §§ 1082–1085; 274.
Of railways, taxation of, §§ 1317–1323; 360.
Rights of aliens in, § 1908; 539.
Contracts payable in, §§ 2097–2102; 588.
——usurious, interest upon, n. § 2079; 580.
In hands of warehouseman or wharfinger, §§ 2172, 2173, 2175; 606.
Lien of warehousemen, carriers, etc., on; sale of, etc., §§ 2177–2180; 607.
Perishable, sale of, by warehouseman, common carrier, etc., § 2180; 608.
Rights of married women in, § 2202–2214; 613.
Control of, in case of abandonment of husband or wife by the other, §§ 2207, 2208; 614.
Conveyance of, in case of insanity of husband or wife, §§ 2216–2219, 616.
OF MINORS:
Guardian appointed to manage, § 2243; 623.
Authority of guardian or court over, § 2245; 623.
Sale of, by guardian, § 2257–2265; 624.

Property.—*Continued.*
Of drunkards, spendthrifts, lunatics or idiots, sale of by guardian, § 2276; 628.
Disposition of, by will, §§ 2322–2325; 635.
OF DECEDENT:
Inventory, appraisement, discovery of, etc., §§ 2379–2381; 642.
Set apart to wife, § 2371; 643.
Sale of, §§ 2386–2401; 645.
Limitation of actions for injuries to, § 2529; 671.
Actions for trespass to, accrue when, § 2531; 674.
ATTACHMENT OF:
How effected, § 2949; 787.
Removed from county may be taken under, § 2965; 792.
When held by third persons, § 2967, 792.
When bound, § 2969; 793.
Perishable, sale of, § 2999; 801.
Control and sale of, § 3012; 804.
Returned to defendant, § 3015; 804.
EXECUTIONS UPON:
Of state or public corporation exempt from, § 3048; 810.
Of partnership, levy upon, §§ 3053, 3054; 811.
Recovery for injuries to, by purchaser at execution sale, § 3127; 827.
Of judgment debtor, disposal of, in summary proceeding, §§ 3140, 3141; 828.
Equitable proceeding to subject to payment of judgment, §§ 3150–3153; 830.
To be released from levy on filing of appeal bond, § 3193; 844.
Offenses against, §§ 3880–3901; 981.
Stolen or embezzled, disposal of, § 4648; 1129.
Stolen, seizure of, on search warrant, § 4650; 1127.
Right of acquiring, possessing and protecting, Const., Art. 1, § 1; 1214.
Private, not to be taken for public use, without compensation, Const., Art. 1, § 18; 1220.
Rights of aliens as to, Const., Art. 1, § 22; 1223.
Of corporations, taxation of, Const., Art. 8, § 2; 1227.

Property, Personal.
Term includes what, § 45, ¶ 9; 9.
Cities and towns may acquire and hold, § 454; 106.
To be assessed in name of owner or his agent, § 812; 195.
Place of taxation of, n. § 823; 199.
Acknowledgment and recording of instruments of conditional sale of, § 1922; 542.
——of bill of sale or mortgage of, §§ 1923–1926; 542.

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Property, Personal.—*Continued.*
Mortgagee entitled to possession of, § 1927; 544.
Of non-resident minor, delivery of, to foreign guardian, § 2271; 627.
Of decedent, title to, upon failure to take out administration, n. § 2367; 641.
Of intestate, distribution of, §§ 2436–2439; 652.
Damages for injuries resulting in death, disposition of as, § 2526; 670.
Specific attachment on, § 3000; 802.
Execution not a lien upon, until levy, § 3045; 809.
Appraisement of, on sale under execution, § 3100; 821.
ACTION FOR RECOVERY OF:
Interpleader in, § 2572; 686.
When seized under landlord's attachment, § 2575; 687.
Proceedings in, §§ 3225–3244; 852.
Before justice of the peace, where to be brought, § 3511; 899.
——— proceedings in, § 3605; 913.
FORECLOSURE OF MORTGAGE ON, §§ 3307–3318; 867.
Statute of frauds affecting contracts as to, §§ 3664, 3665; 926.
Destruction or sale of, by mortgagor, punished, § 3895; 984.
May be taken on search warrant, when, § 4630; 1127.

Property, Real.
Term includes what, § 45, ¶ 8; 9.
Upon which to erect county buildings, purchase of, § 303, ¶ 9; 70.
Cities and towns may acquire and hold, § 454; 106.
——— may purchase or condemn for squares, streets, etc., § 470; 114.
——— may acquire at execution sale, 18 G. A., ch. 89; 114.
——— may condemn for water works, § 474; 115.
——— method of condemnation by, § 476; 116.
Listing and taxation of, § 812; 195.
Insurance companies may own, for what purposes, § 1137; 288.
Life insurance companies may acquire and own, for what purposes, §§ 1180, 1181; 308.
CONDEMNATION OF:
For sewerage, 16 G. A., ch. 107; 118.
For toll-bridges, § 1005; 255.
For mill-dams and races, §§ 1188–1206; 321.
For drains, ditches and watercourses, §§ 1207–1214; 324.
For water power improvements, §§ 1236–1249; 332.
For works of internal improvement, §§ 1241–1253; 333.
For channels and ditches, 18 G. A., ch. 191; 339.
By state, §§ 1271, 1272; 343.

Property, Real.
CONDEMNATION OF.—*Continued.*
For public ways to mines and quarries, 15 G. A., ch. 34; 344.
For telegraphs, § 1326; 375.
For school house sites, §§ 1825–1828; 520.
GENERAL PROVISIONS:
Rights of aliens in, § 1908; 539; and Const., Art. 1, § 22; 1223.
Disposition of in perpetuity, not allowed, § 1920; 541.
Who deemed seized, § 1928; 544
Term heir, not necessary in conveyance of, § 1929; 545.
Conveyance passes interest of grantor, § 1930; 545.
Subsequently acquired interest enures to grantor, § 1931; 545.
Adverse possession does not prevent sale of interest, § 1932; 545.
Estates may commence *in futuro*, § 1933; 545.
Declarations or creations of trust in, § 1934; 545.
Married women may convey or encumber, § 1935; 545.
Conveyance by husband and wife, §§ 1936, 1937; 546.
Mortgagor retains legal title and right of possession, § 1938; 546.
Conveyances to two or more, create tenancy in common, § 1939; 546.
Vendor's lien for unpaid purchase money, § 1940; 546.
CONVEYANCE OF:
Recording, §§ 1941–1947; 547.
Recording land-grant titles, 18 G. A., ch. 186; 550.
Entry of, upon transfer and index books, §§ 1948–1954; 551.
Acknowledgment of, §§ 1955–1965; 552.
——— legalized, §§ 1966–1968; 555.
Forms for, § 1970; 556.
Records of, transcribed, §§ 1971–1975; 557.
EASEMENTS IN, §§ 2031–2036; 572.
SALE OF, BY GUARDIAN, §§ 2257–2265; 624.
SALE OF, BY EXECUTOR, §§ 2387–2400; 645.
Limitation of action for recovery of, in such cases, § 2401; 647.
Complete record of sale of, to be kept, § 2492; 662.
Of estate, jurisdiction as to sale of, § 2312 634.
Of heir or devisee, administrator to take possession of, §§ 2402–2404; 647.
Share of husband or wife of decedent in, § 2440; 653.
Descent of, §§ 2453–2459; 657.
Escheat of, §§ 2460–2464; 658.
Place of bringing action in relation to, §§ 2576–2578; 687.

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Property, Real.—*Continued.*
Service by publication in action for recovery or partition of, § 2618; 701.
Third persons to take notice of actions affecing, § 2628; 705.
Requisites of petition for injuries to, § 2726; 729.
Conveyance of, by commissioner, §§ 2886–2893; 774.
Return of attachment on, § 3010; 803.
Redemption of, from sale under execution, §§ 3102–3123; 822.
Conveyances of, by sheriff, §§ 3101, 3124; 822.
Sale of interest of judgment debtor in, § 3142; 829.
Appeal in cases affecting, not limited by amount, § 3173; 838.
Action for recovery of, §§ 3246–3272; 857.
Action to quiet title to, §§ 3273–3276; 861.
Foreclosure of mortgages on, §§ 3319–3330; 868.
Actions affecting, before justice, transfer of, §§ 3535, 3536; 903.
Introduction in evidence of instruments affecting, §§ 3659–3662; 924.
Lien of bail bonds upon, §§ 4606–4608; 1123.
Liens of judgments for fines in criminal actions upon, § 4609; 1123.

Prosecuting Witness.
Costs of preliminary examination may be taxed to, § 4254; 1060.
Name of, to be endorsed on indictment; costs may be taxed to, § 4292; 1066.
Costs of proceedings before justice may be taxed against; appeal, § 4691; 1134.

Prosecution.
Verification of pleading not necessary when it would subject to, § 2676; 718.
Witness not required to testify as to matters which would subject him to, § 3647; 921.

Prosecutions.
For violation of game laws, where to be brought, attorneys' fees, etc., 17 G. A., ch. 156, §§ 10, 11; 1022
In criminal cases, limitation of, §§ 4165–4170; 1046.
To be conducted in the name and by authority of the state, Const., Art. 5, § 8; 1234.

Prostitutes.
Deemed vagrants, § 4130; 1041.

Prostitution.
Enticing away female for purpose of, punished, § 3865; 977.
Houses kept for, deemed nuisances, § 4091; 1034.

Protest.
Of notes and bills, §§ 2094–2096; 587.
Of notary public, as evidence, § 3668; 928.

Provisions.
Diseased or unwholesome, punishment for sale of, § 4035; 1017.

Public Buildings.
Officers having management of, to take oath, § 126; 27.
——— not to contract beyond appropriation, § 127; 27.
Submission to vote of question as to erection of, § 309; 75.
Mechanics' liens do not attach to, n. 16 G. A., ch. 100, § 3; 596.
Lien upon, of bonds issued for their erection, 15 G. A., ch. 23; 603.
Judgments not a lien upon, n. § 2882; 772.
Are exempt from execution, § 3048; 810.

Public Health, Offenses Against.
Selling unwholesome provisions, § 4035; 1017.
Adulterating food, liquors, or drugs, §§ 4036, 4037; 1017.
Failure to label poisons and keep record of sales, § 4038; 1017.
Inoculating with small pox to spread disease, § 4039; 1017.
Selling drugged liquors, § 4040; 1018.
Throwing dead animals into streams, wells, etc., § 4041; 1018.
Diluting or adulterating milk, § 4042; 1018.
Regulation of sale of oleomargarine, 18 G. A., ch. 39; 10 8.
Regulation of sale of lard from diseased hogs, 18 G. A., ch. 137; 1019.

Public Lands.
Conflicting entries of, not affected by record, n. § 1941; 547.
Use of timber from, by settlers, § 3342; 872.
Location of, by general assembly, Const., Art. 11, § 7; 1244.

Public Library.
To receive public documents, § 131, 16 G. A., ch. 159, § 3; 28.
Cities may establish and maintain, § 461; 107.

Public Money.
Officer empowered to expend, prohibited from contracting in excess of appropriation, § 127; 27.
Not to be appropriated to sectarian institution, § 552; 146.
Statement of receipts and expenditures of, to be published with session laws, Const., Art. 3, § 18; 1227.
Not to be appropriated for local or private purposes, Const, Art. 3, § 31; 1229.

Public Offenses.
Civil remedy not merged in, § 2526; 670.
Divided into felonies and misdemeanors, §§ 4103–4105; 1037.

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Public Offenses.—*Continued.*
Can only be punished upon conviction in court having jurisdiction, § 4106; 1037.
Resistance to the commission of, §§ 4112–4114; 1038.
Local jurisdiction of, §§ 4155–4164; 1044.
Compromising of, when allowable, §§ 4708–4711; 1137.

Public Officers.
Bonds of, how construed, § 3368; 875.
Cannot be examined as to privileged communications, § 3644; 920.
Making false entries or returns, punished, § 3768; 1001.

Public Peace, Offenses Against.
Affrays, unlawful assemblages, riots, §§ 4065–4069; 1026.
Injuring or destroying houses or boats, § 4070; 1027.
Horse racing, § 4071; 1027.
Breach of Sabbath, § 4072; 1027.

Public Policy, Offenses Against.
Lotteries, § 4043; 1019.
Selling liquors to Indians or intoxicated persons, § 4044; 1019.
Minors not to be allowed in saloons, 15 G. A., ch. 59; 1019.
Bringing pauper within the state, § 4045; 1020.
Carrying on business without license, § 4046; 1020.
Putting in circulation foreign bank notes, § 4047; 1020.
Game laws, 17 G. A. ch. 156; 1020.
Obstructing passage of fish with net, 15 G. A., ch. 50; 1023.
Fishing on premises of another, § 4054; 1023.
Bringing diseased sheep, horses, etc., within the state, punished, §§ 4055, 4056; 1023.
Diseased horses, etc., taken up and killed, § 4057; 1024.
Bringing within the state or having in possession Texas cattle, §§ 4058, 4059; 1024.
Introducing or cultivating diseased hop roots, punished, §§ 4060, 4061; 1024.
Permitting Canada thistles to mature, punished, § 4062; 1025.
Killing birds, punished, § 4063; 1025.
Running threshing machines without boxing, § 4064; 1025.
Failure to properly equip steam boilers, punished, 15 G. A., ch. 14; 1026.

Public Shows.
License for; penalty for failure to obtain, 16 G. A., ch. 131; 232.

Public Squares.
Special laws for vacation of, not allowed, Const., Art. 3, § 30; 1228.

Public Ways.
To mines and quarries, establishment of, 15 G. A., ch. 34; 344.

Publication.
Acts taking effect by, § 3; 6.
Of acts, compensation for, § 44; 8.
Of public documents, 16 G. A., ch. 159, § 3; 28.
Of supreme court reports, 18 G. A., ch, 60; 35.
Of proceedings of board of supervisors, §§ 304–307; 74.
Of school laws, § 1579; 459.
Of notice of assignment, § 2119; 594.
Of certificate of limited partnership, §§ 2155, 2156; 604.
Of notice of dissolution of limited partnership, § 2170; 606.
Of notice as to unclaimed property, § 2179; 607.
Of notice of probate of will, § 2341; 637.
Of notice of order of court as to administrator, §§ 2479, 2480; 661.
Service of notice on corporations by, § 2612; 699.
SERVICE OF ORIGINAL NOTICE BY, §§ 2618–2621; 701.
———upon unknown defendant, §§ 2622–2625; 703.
Service by, before filing petition not good, n. § 2618; 701.
———legalized, 18 G. A., ch. 124; 703.
Defendant served by, may appear after default and defend, § 2875; 770.
JUDGMENT in case of service by; new trial, etc., §§ 2876–2881; 770.
Defendant served by, may have new trial, § 3154; 831.
Of notice of sale under chattel mortgage, §§ 3310, 3311; 867.
Of change of name, §§ 3501–3506; 897.
Affidavits as to fact of, § 3697; 942
Of estray notices, §§ 3822, 3823; 963.
Of legal notice, where to be made, fees for, § 3832; 965.
Of original notice or notices of sales, plaintiff to select paper for, § 3834; 965.
Of delinquent tax list, compensation for, § 3835; 966.
Laws of general assembly may take effect by, Const., Art. 3, § 26; 1227.

Publisher.
Cannot by mandamus compel publication of proceedings in his own paper, n. § 307; 74.
Of newspaper, to make proof by affidavit of publication of notices, § 2620; 702.

Punishment.
Of partner in limited partnership, for fraud, § 2165; 605.
For unlawfully issuing license to solemnize marriage, § 2192; 611.
For eluding writ of habeas corpus, § 3467; 892.

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Punishment.—*Continued.*
For contempt, §§ 3493, 3494; 896.
On conviction of murder in first degree, to be fixed by jury, 17 G. A., ch 165; 972.
May be reduced by supreme court, on appeal in criminal cases, § 4558; 1110.
In penitentiary, what to consist of, § 4770; 1150.
Cruel and unusual, not to be inflicted, Const., Art. 1, § 17; 1220.
Of members of general assembly, for disorderly behavior, Const., Art. 3, § 9; 1226.

Pupils.
Dismissal or suspension of, by board, in independent districts, § 1735; 495.
Dismissal of, by sub-director, § 1756; 500.
Where to attend school, §§ 1793–1795; 507.
Not to be excluded on account of color, Const., Art. 1, § 1; 1214.

Purchase Money.
Homestead right subject to, n. § 1988; 560.
Mortgage for, on homestead, valid without husband and wife joining, n. § 1990; 561.

Purchaser.
At judicial sale, officer selling not to become, § 342; 82.
At tax-sale, who becomes, § 876; 215.
——— interest acquired by, n. § 897; 226.
In good faith, of tax-title, protected, n. § 897; 225.
At void tax-sale, recovery by, of taxes paid, n. § 897; 225.
Of property wrongfully sold at tax-sale, money refunded to, § 901; 230.
At judicial or tax-sale has color of title; rights of, assignable, § 1982; 559.
Protected against mechanics' liens, when, 16 G. A., ch. 100, § 6; 598.
From decedent, protected against claims of non-resident widow, § 2442; 655.
In good faith, not affected by re-trial in case of judgment on service by publication, § 2878; 771.
At judicial sale of equitable interest in real property, interest acquired by, n. § 2882; 772.
At sheriff's sale, title vests in, when, n. § 3102; 822.
At execution sale, recovery by for injuries to property, § 3127; 827.
In good faith, not affected by, judgment on appeal, § 3199; 846.
At sale under chattel mortgage, §§ 3312–3316; 867.
At tax-sale, may recover for waste or trespass, §§ 3343, 3344; 872.
Under execution, may recover for waste or trespass, §§ 3339–3341; 872.

Qualification.
Of sureties on bonds, §§ 249, 250; 55.
——— for stay of execution, § 3062; 814.

Qualification for Office.
By officers, §§ 670–691; 170.
——— appointed to fill vacancies, § 786; 187.
Religious test not to be required as, Const., Art. 1, § 4; 1215.
Of representatives and senators in general assembly, Const., Art. 3, § 4; 1225.

Quantity.
Denial concerning, how made, § 2701; 726.

Quarries.
Establishment of public ways to, 15 G. A., ch. 34; 344.

Quart.
As measure of contents, § 2047; 575.

Quartermaster General.
Adjutant-general to act as, 18 G. A., ch. 74, § 11; 261.

Questions.
Submitted to vote by board of supervisors, § 309; 75.
Submitted to jury for findings of fact, § 2808; 749.
To be propounded to garnishee, §§ 2980–2982; 796.

Quieting Title.
Action for, §§ 3273–3276; 861.

Quinces.
Weight of, per bushel, § 2049; 575.

Quit-claim Deed.
Purchaser by, protected, n. § 1941; 547.
Form for, § 1970; 556.

Quorum.
Of supreme court, § 139; 32.
Of board of supervisors, § 297; 68.
Of council of incorporated town, § 511; 129.
Of houses of general assembly, a majority constitutes, Const., Art. 3, § 8; 1225.

Quo Warranto.
Action of, §§ 3345–3367; 872.

Rafts.
Taking up of, when lost, §§ 1509–1513; 418.
Actions against, §§ 3445–3448; 889.
Maliciously injuring or cutting loose, punished, § 3980; 1004.
Jurisdiction of offenses upon, § 4161; 1045.

Railways.
Speed of trains of, within city limits, § 456; 106.
City may authorize or forbid laying of tracks of, over streets, § 464; 108.

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Railways.—*Continued.*
Location of, over streets, n. § 464; 108.
County, city, or town not to be interested in, § 553; 146.
Bonds in aid of, void, §§ 554, 555; 147.
Rights of, over streets dedicated to city, n. § 561; 148.
Compensation to riparian owner for right of way of, 15 G. A., ch. 35; 345.
Speed of trains of, at depot grounds, § 1289; 350.
Mechanics' liens upon, 16 G. A., ch. 100, § 5; 598.
——— in favor of laborer, n. 16 G. A., ch. 100, § 3; 596.
Injunctions to stop operation of, § 3391; 881.
Throwing stones or discharging firearms at trains of, punished, 16 G. A., ch. 148, § 1; 985.
Getting on or off trains of, while in motion, punished, 16 G. A., ch. 148, § 2; 985.
Malicious injuries to, punished, § 3979; 1003.
Obstruction of, or injury to, punished, § 3990; 1006.
See RAILWAY COMPANIES, *infra.*

Railway Bridges.
Use of, for highways, 15 G. A., ch. 5; 259.

Railway and Toll Bridges.
Across certain rivers, §§ 1031–1037; 258.

Railway Companies.
Taxation of property of, used in operation of road, n. § 801; 192; and §§ 1317–1323; 360.
——— not used in operation of road, §§ 808–810; 194.
Property of stockholders in, not liable for corporate debts, § 1068; 271.
Proceedings by, to condemn property for right of way, §§ 1241–1259; 333.
May condemn right of way for channels and ditches, 18 G. A., ch. 191; 339.
Forfeiture of right of way of, for non-user, § 1260; 340.
Condemnation of abandoned right of way by, § 1261; 341.
The crossing of highways, railways, canals, etc., by, §§ 1262–1267; 341.
Shall construct private crossings and cattle guards, § 1268; 342.
GENERAL PROVISIONS:
Organization, powers and liabilities, §§ 1273–1282; 345.
Stock and debts, §§ 1283–1287; 348.
To construct cattle-guards, crossings and signs, § 1288; 349.
Liability for failure to fence; double damages; rate of speed at depot grounds, § 1289; 350.
Liability for fires, § 1289; 350.

Railway Companies.
GENERAL PROVISIONS.—*Continued.*
Crossings with other railways near Mississippi river, § 1290; 352.
Terms of aid tax, changed, § 1291; 352.
Foreign corporations, 18 G. A., ch. 128; 353.
Re-location, 16 G. A., ch. 118; 353.
Crossings or connections with other railways; method and terms of; rates of transportation; commissioners to determine, §§ 1292–1296; 355.
Shall not pool earnings, § 1297; 356.
May allow drawbacks, § 1298, 1299; 356.
Sale or lease of property and franchises, § 1300; 356.
Mortgages of leases, contracts, etc., § 1301; 356.
Change of ownership or name, § 1302; 356.
To report cost of construction, etc., to general assembly, § 1303; 356.
Maximum rates to be fixed and posted, § 1304; 357.
Maximum passenger tariff, § 1305; 357.
Conditions in land grants preserved, § 1306; 357.
Liability for injuries to employes and others, § 1307; 357.
Cannot limit liability by contract or regulation, §§ 1307, 1308; 357.
Judgment for injuries a lien upon property, § 1309; 358.
Regulations as to railways terminating at Council Bluffs, § 1310; 359.
Regulations as to transfers at Missouri river, § 1311; 359.
Must fulfill contracts with municipal corporations; penalties, §§ 1312–1316; 359.
ASSESSMENT AND TAXATION OF, §§ 1317–1323; 360.
Taxation of sleeping and dining cars, 17 G. A., ch. 114; 362.
RATES OF FARE for freight and passengers, 15 G. A., ch. 68; 363.
BOARD OF COMMISSIONERS, 17 G. A., ch. 77; 364.
TAXES IN AID OF, 17 G. A., ch. 173; 372.
——— forfeiture of, 18 G. A., ch. 192; 373.
OFFICES, general regulations as to, 16 G. A., ch. 68; 373.
——— of sleeping cars, 18 G. A., ch. 169; 374.
Penalty against employes of, for bringing liquors within the state, § 1553; 436.
Holding lands by grant, to place title on record, 18 G. A., ch. 186; 550.
Place of bringing action against, § 2582; 689.

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Railway Companies.—*Continued.*
Service of notice upon, §§ 2611, 2613; 699.
Regulations as to transportation of animals by, § 4032; 1016.
Illegal transportation of same by, punished, 17 G. A., ch. 156, § 8; 1022.
Evidence of obstruction of highway by, § 4557; 1113.
See, also, RAILWAYS, *supra*, and STREET RAILWAYS.

Rape.
Defined and punished, § 3861; 975.
Assault with intent to commit, punished, § 3873; 979.
Limitation of prosecution for, § 4166; 1046.
What evidence sufficient in prosecution for, §§ 4558, 4560; 1113.

Raspberries.
Weight of, per bushel, § 2049; 575.

Rate of Interest.
What legal, § 2077; 580.
Upon judgments or decrees, § 2078; 580.
Taking greater rate than allowed, prohibited, § 2079; 580.
Penalty for contracting for illegal rate, § 2080; 582.

Rates.
Of toll, §§ 1006, 1010; 255.
Of ferriage, § 1012; 256.
Of toll or ferriage to be kept posted, §§ 1020, 1021; 257.
For transportation, by connecting railways, establishment of, §§ 1292–1296; 355.
OF CHARGES OF RAILWAYS:
For passengers and freight, to be fixed and posted, § 1304; 357.
For passengers, § 1305; 357.
Limitation of, 15 G. A., ch. 68; 363.
To be uniform and not unreasonable, 17 G. A., ch. 77, §§ 11, 12; 367.
Railway commissioners to examine into, 17 G. A., ch. 77, § 15; 368.

Real Estate.
See PROPERTY, REAL.

Real Property.
See PROPERTY, REAL.

Reasonable Doubt.
Of guilt of defendant, entitles to acquittal, § 4428; 1092.
Of degree of offense, effect of, § 4429; 1093.

Rebate of Taxes.
By board of supervisors, § 800; 191.

Recalling Witnesses.
After close of testimony, in criminal cases, n. § 2779; 747.

Receipts.
For taxes, § 867; 211.
——— paid by purchaser, § 889; 220.

Receipts.—*Continued.*
May be demanded on making tender, § 2106; 590.
Of warehousemen, or wharfingers; when to issue; effect of, §§ 2171, 2172, 2174; 606.
For money paid, as evidence, n. § 3658; 923.
For fees, § 3836; 966.

Receiver.
To be appointed for insolvent bank, § 1572; 457.
IN CIVIL ACTION, oath and bond, powers of, §§ 2903–2905; 778.
Of attached property, § 2970; 793.
Of partnership property:
Seized under attachment, § 2974; 794.
Levied on under execution, § 3054; 811.
Of property of debtor in summary proceedings, § 3141; 828.
——— compensation of, § 3147; 829.

Receiver of Land Office.
Receipt or certificate of, as evidence, §§ 3709, 3710; 933.

Receiving Stolen Goods.
Punishment for, §§ 3911–3914; 990.

Recognition of Illigitimate Child.
Effect of, § 2466; 659.
What sufficient, n. § 2466; 659.

Recognizances.
See BONDS.

Re-commitment of Defendant.
After appearance, § 4451; 1097.
After giving bail, §§ 4603–4605; 1122.

Record.
Of will, as evidence, § 2342; 638.
Upon appeal, what must contain, n. §§ 2741, 2742; 732.
Instructions deemed part of, § 2787; 742.
Complete, to be kept by clerk in case of sale of real property by order of court, § 2492, 662.
——— where title to land is involved and decided, § 2866; 767.
What deemed part of, for purposes of appeal, § 3184; 841.
Notes of short-hand reporter to be part of, § 3777; 947.
What deemed part of, in criminal cases, § 4482; 1102.
Of instruments affecting real property admissible in evidence, § 3660; 924.

Records.
OF COURT:
Reading and approval of, § 176; 40.
Approval of, at subsequent term, § 177; 40.
Amendment of, §§ 178, 179; 40.
What constitute, § 196; 44.
Record book to be kept by clerk, § 197; 44.
District, and circuit, kept together, § 202; 45.

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Records.
OF COURT.—*Continued.*
Not to be amended or impaired without authority, § 2736; 731
Of one court admissible in the other, § 3670; 929.
Of marriage licenses, to be separately kept, § 202; 45.
Of notaries public, where to be deposited, § 264; 57.
Of board of supervisors, § 308; 75.
Of tax sales, how kept, § 882; 217.
———as evidence, § 905; 231.
Public, board of supervisors may have transcribed, §§ 1971–1975; 557.
———may be transcribed for new county, § 1972; 557.
Of mechanics' liens, 16 G. A., ch. 100, § 14; 602.
Of proceeding as to property of minors, § 2245; 623.
Of proceedings in probate, §§ 2490–2492; 662.
Of bonds of administrators and guardians, § 2493; 662.
Copies of, as evidence, §§ 3702–3706; 933.
Judicial, as evidence, §§ 3712–3715; 934.
Executive and legislative, as evidence, §§ 3716–3720; 935.

Recorder of Incorporated Town.
Election and duties of, §§ 511–513; 129.

Recorder of County.
See COUNTY RECORDER.

Recovery of Personal Property
Interpleader and substitution of parties in actions for, §§ 2572–2575; 686.
From officer holding under levy, n. §§ 3055, 3058; 812.
ACTION FOR:
Petition, requisites of, § 3225; 852.
Proceedings; joinder; counter claim, § 3226; 853.
Service of order upon Sunday, § 3227; 853.
New parties; intervention, § 3228; 853.
Bond and order for seizure of property, §§ 3229–3231; 854.
Seizure of property; discovery, §§ 3232–3234; 854.
Delivery bond; appraisement of property; return of officer, §§ 3235–3237; 855.
Verdict, judgment, and execution, §§ 3238–3244; 855.
In justice's court, § 3605; 913.
——— notice of, to non-resident defendant, §§ 3609, 3610; 913.

Recovery of Real Property.
Place of bringing action for, § 2576; 687.
Publication of original notice in action for, § 2618; 701.

Recovery of Real Property.—*Continued*
ACTION FOR:
Proceedings, parties, §§ 3245, 3246; 857.
Plaintiff to recover only on his own title, § 3247; 857.
By tenant in common or co-tenant, § 3248; 858.
Service upon agent of non-resident, § 3249; 858.
Pleadings, §§ 3250–3252; 858.
Substitution of landlord, § 3253; 858.
Trial; verdict; judgment, §§ 3254–3260; 859.
Limitation of recovery for use and occupation, § 3261; 859.
Improvements set off, § 3262; 859.
Exemplary damages, § 3263; 859.
Liability of tenant, § 3264; 859.
Proceeding in case of crop sown, § 3265; 860.
Judgment and writ of possession, § 3266; 860.
Recovery for rent accruing after judgment, § 3267; 860.
New trial, §§ 3268–3272; 860.

Redemption.
From tax sale, §§ 890–893; 220.
From chattel mortgage, n. § 1927; 544.
From sale under execution, §§ 310.–3123; 822.
Recovery by purchaser of damages for injuries to property during period of, § 3127; 827.
Meaning of terms "defendant" and "plaintiff" as to, § 3128; 827.
Provisions as to, applicable to proceedings in justices' courts, § 3129; 827.
From sales under judgment in foreclosure, § 3321; 868.
Law giving right of, impairs obligation of existing contract, n. Const., Art. 1, § 21; 1222.

Redundant Matter.
May be stricken from pleading on motion, § 2719; 728.

Referees.
To settle disagreement as to homestead, §§ 2002–2004; 566.
In matter of accounts of executors, § 2412; 649.
In matter of claims against estates of decedents, § 2415; 649.
For setting off share of widow, §§ 2443–2448; 655.
IN CIVIL ACTIONS, §§ 2815–2830; 751.
Hearing and decision of cause by, § 2817; 751.
Vacancies in, how filled, § 2818; 751.
To stand in place of court, 2819; 751.
Trial by, powers of, § 2820; 751.
Report, exceptions, §§ 2821–2823; 751.
Number and appointment of, § 2824; 752.
Appointment of, in vacation, § 2825; 753.

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Referees.
In Civil Action.—*Continued.*
Affidavit of, § 2826; 753.
Hearing by, when to be had, § 2827; 753.
Acceptance of, to be entered of record, § 2828; 753.
May issue process and administer oaths, § 2829; 753.
Form of procedure before, § 2830; 753.
May be appointed on default, to determine amount due, § 2872; 769.
Compensation of, taxed as costs, § 2942; 784.
In matter of retaxing costs, § 2944; 785.
In summary proceedings against debtor, § 3137; 828.
—— compensation of, § 3147; 829.
In Partition Proceedings:
To report encumbrances, § 3284; 864.
To make division, §§ 3290–3297; 865.
Sale and conveyance by, §§ 3298–3302; 866.
Compensation of, § 3834; 966.
Bribery of, or acceptance of bribes by, punished, §§ 3944, 3945; 997.
Attempt to improperly influence, punished, § 3946; 998.

Reference.
In proceedings by guardian for leave to sell property, § 2260; 625.
In Civil Actions, §§ 2817–2830; 750.
To compute damage in case of judgment by default, § 2872; 769.
In case of intervention in attachment proceedings, § 3016; 804.
Without consent in ordinary actions, not constitutional, n. Const., Art. 1, § 9; 1216.

Reform School.
See State Reform School, §§ 1643–1663; 475.

Refunding Indebtedness.
Of counties, cities, and towns, § 17 G. A., ch. 58; 65.
Of school districts, 18 G. A., ch's. 51, 132; 518.

Regents.
Must take oath, § 126; 27.
Of State University:
Who constitute; how elected, §§ 1587, 1588; 461.
Meetings, officers, powers and duties of, §§ 1590–1603; 462.
Compensation of, § 1602; 464; and 17 G. A., ch. 92; 965.

Regiment in Militia.
Officers, etc., of, 18 G. A., ch. 74, § 13; 262.

Register of Elections.
How kept, §§ 595–601; 159.

Register of Marriages.
How kept; as evidence, § 2197; 612.

Register of Land Office.
Certificate of, as evidence, § 3710; 934.

Register of State Land Office.
Office, duties, etc., of, §§ 83–93; 19.
Office of, abolished, 18 G. A., ch. 206; 21.
Report of, 16 G. A., ch 179, § 1; 28.
When to be elected, § 581; 157.
Bond of, § 678; 172.
May appoint deputy, §§ 766–768; 183.
Receipt or certificate of, as evidence, §§ 3709, 3710; 933.
Salary and fees of, § 3759; 943.
To account for fees, § 3778; 948.

Registration.
Of pharmacists and druggists, 18 G. A., ch. 75; 448.
Of physicians, midwives, births, marriages, and deaths, 18 G. A., ch. 151, §§ 3–8; 452.

Registry of Voters.
Lists to be made by assessors, § 594; 159.
Board of registry for township, who constitute, powers and duties of, §§ 595–598; 159.
In cities or towns, § 599; 160.
At special elections, § 600; 160.
In new townships, § 601; 160.
Provisions apply when, § 602; 160.
At elections in independent school districts, 18 G. A., ch. 8, § 3; 512.
Illegal, punished, § 4007; 1009.
Laws requiring, not unconstitutional, n. Const., Art. 2, § 1; 1223.

Regulation of Sale of Coal Oil.
Appointment and duties of inspector, 17 G. A., ch. 172, §§ 1–3; 447.
Sale without inspection, punished, 17 G. A., ch. 172, § 4; 448.

Regulation of the Practice of Pharmacy.
Commissioners of pharmacy; registration, 18 G. A., ch. 75, §§ 1–5; 448.
Provisions as to sale of drugs, medicines, poisons and liquors, 18 G. A., ch. 75, §§ 7–9; 450.
Itinerant venders, 18 G. A., ch. 75, § 10; 451.
Fraudulent registration, 18 G. A., ch. 75 § 11; 451.

Re-hearing.
In supreme court, §§ 3201, 3202; 847.

Relatives.
Liability of, for support of poor persons, §§ 1330–1351; 377.

Relator in Mandamus.
Who may be, n. § 3373; 876.

Release.
Of distrained animals on bond, § 1426; 409.
Of dower, n. § 2440; 653.

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Release.—*Continued.*
Defense of, must be specially pleaded, § 2718; 728.
Of property in attachment, §§ 2994–2998; 800.
Relief.
On ground of fraud, limitation of action for, § 2529; 671.
On ground of fraud or mistake, when action for, accrues, § 2530; 674.
In civil actions, what may be granted, § 2855; 765.
Religion.
Opinions upon, not to render witness incompetent, Const., Art. 1, § 4; 1215.
Laws for the establishment of, or prohibiting the free exercise of, not to be made, Const., Art. 1, § 3; 1215.
Religious Associations.
Incorporation of, §§ 1095–1102; 276.
Religious Belief.
Effect of, upon credibility of witnesses, n. § 3636; 917.
Religious Instruction.
In Home for the Friendless, 17 G. A., ch. 176, § 6; 633.
By chaplain, to convicts in penitentiary, § 4757; 1148.
Religious Test.
Not to be required as qualification for office, Const., Art., 1, § 4; 1215.
Religious Worship.
Disturbance of, punished, § 4023; 1013.
Re-location of County Seat.
Proceedings for, §§ 281–288; 61.
Board of supervisors may authorize vote for, § 303, ¶ 15; 71.
Re-location of Railways.
Proceedings for, 16 G. A., ch. 118; 353.
Remainder.
Owner of estate in, may recover for waste or trespass, § 3532; 871.
Remains of Deceased Persons.
See DEAD BODIES.
Remedies.
How divided, § 2504; 665.
Civil, not merged in public offense, § 2526; 670.
Remission.
Of fines and forfeitures by governor, §§ 4712–4714; 1138; and Const., Art. 4, § 16; 1232.
Remonstrances.
Against re-location of county seat, § 283; 61.
Removal.
Of guardian, § 2247; 624.
Of executor from state, produces vacancy, § 2347; 638.
Removal.—*Continued.*
Of administrators; §§ 2496–2503; 663.
Of defendant from county after commencement of action, effect of, § 2588; 690.
Of defendant, under judgment in forcible entry and detainer, §§ 3619–3623; 914.
Removal from Office.
Of officer of city or town by council, § 516; 130.
Of officer of city or member of council, § 530; 135.
Of county and township officers, §§ 746–755; 180.
Of officer appointed to fill vacancy, § 787; 187.
Removal of Cause to Federal Court.
Not allowable in proceedings by occupying claimants, n. § 1976; 558.
Right of, after being remanded for new trial, n. § 3201; 847.
Renewal.
Of corporation, § 1069; 271.
Of usurious loan, does not purge usury, n. § 2079; 580.
Of limited partnership, § 2257; 624.
Of execution, in justice's court, § 3572; 907.
Rent.
Proportion of, may be recovered by executor of tenant for life, from lessee, § 2011; 568.
Lien of landlord for; how enforced, §§ 2017, 2018; 569.
Of real property of heir or devisee, administrator to receive and account for, §§ 2402–2404; 647.
Accruing after judgment in real action, recovery of, § 3267; 860.
Non-payment of, not ground for action of forcible entry and detainer, § 3612; 914.
Reservation of, on agricultural lands, not valid for longer period than twenty years, Const., Art. 1, § 24; 1223.
Rents and Profits.
May be set off in proceedings by occupying claimant, n. § 1976; 558.
Of homestead, to be retained by survivor in occupancy, n. § 2007; 567.
Limitation of, recovery for, § 3261; 859.
Repair.
Of bridges, by board of supervisors, § 303, ¶ 18; 71.
——— by highway supervisors, § 991; 252.
Of walls in common, § 2022; 571.
Repeal of Statutes.
Effect of, § 45, ¶ 1; 8.
By code, effect of, §§ 50–52; 11.
Re-petition.
In proceedings to re-locate county seat, not authorized, n. § 283; 61.

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Replevin.
Action of, see, RECOVERY OF SPECIFIC PERSONAL PROPERTY, §§ 3225-3244; 852; and, before justices, § 3605; 913.

Reply.
When to be filed, § 2636; 707.
May be filed on overruling of demurrer to answer, § 2653; 713.
When necessary; what to contain; when demurrable, §§ 2665-2668; 717.
Interrogatories may be attached to, § 2693; 724.
Denial in, concerning time, sum, quantity or place, how made, § 2701; 726
Divisions of, to be numbered, § 2705; 726.
Inconsistent defenses may be stated in, § 2710; 726.
Allegations of, deemed controverted, § 2712; 726.
Supplemental, when allowed, § 2731; 730.
Matter in abatement stated in, § 2732; 731.
In habeas corpus proceeding, need not be verified; issue raised by, §§ 3481, 3482; 893.

Reports.
Of auditor of state, § 63; 14.
Of treasurer of state, § 81; 18.
Of state officers, printing of, § 105; 23.
Of public officers, 16 G. A., ch. 159; 28.
Of supreme court, copyright and distribution of, §§ 158, 159; 34.
——— publication of, 18 G. A., ch. 60; 35.
Of criminal returns, by secretary of state, § 63; 14.
——— by clerk of courts, § 203; 46; and 18 G. A., ch. 22; 87.
——— by county auditor, § 18 G. A., ch. 22, § 2; 87.
Of State Agricultural Society, §§ 1107, 1108; 279.
Of State Horticultural Society, §§ 1119, 1120; 282.
Of railway companies:
To secretary of state, §§ 1280-1282; 347.
As to construction and equipment of roads, § 1303; 356
For purposes of taxation, § 1318; 361.
Of railway commissioners to governor, 17 G. A., ch. 77, § 4; 365.
Of trustees of Hospital for the Insane, § 1385; 386.
Of State Board of Health, 18 G. A., ch. 151, § 11; 453.
Of superintendent of Public Instruction, §§ 1582, 1583; 460.
Of board of regents of University, § 1601; 464.
Of trustees of Agricultural College, § 1610; 467.
Of assignee of estate of insolvent, § 2123; 594.
Of referees, §§ 2821, 2822; 751.

Reports.—*Continued.*
Of referees in partition proceedings, §§ 3292, 3296, 3300; 865.
Of courts, as evidence of the unwritten law, § 3719; 935.
Of clerks, mayors and justices, as to fines, bonds, etc., § 3974; 1002.
Of the warden of the penitentiary, §§ 4749, 4750; 1146.

Reporter of the Supreme Court.
Duties, etc., of, §§ 154-160; 34.
Preparation of reports for publication by, 18 G. A., ch. 60, § 1; 35.
Compensation of, 18 G. A., ch. 60, § 9; 37.
Election of, § 583; 157.

Reporter, Short-hand.
Appointment and duties of, §§ 181, 182; 42.
Compensation of; notes of, as evidence, § 3777; 947.

Representation.
Heirs to take by, § 2458; 658.

Representative Districts.
Formation of, Const., Art. 3, §§ 35-37; 1230.

Representatives in Congress.
Certificates of election of, § 658; 169.
Resignation of, to be made to governor, § 782; 186.
Special election to fill vacancy in, § 789; 187.

Representatives in General Assembly.
Election of, § 587; 157.
Certificates of election of, §§ 642, 648; 167.
Abstracts and canvass of votes for, §§ 646, 647; 167.
Special election to fill vacancy in, § 789; 187.
When to be chosen, eligibility of, Const., Art. 3, §§ 3, 4; 1225.
Privileged from arrest, Const., Art. 3, § 11; 1226.
Not to be appointed to civil office, Const., Art. 3, § 21; 1227.
Maximum number, apportionment of, Const., Art. 3, § 35; 1230.
See, also, MEMBERS OF GENERAL ASSEMBLY.

Representatives, Personal.
Actions brought or contined, by or against, § 2527; 670.
Action against, on joint liability, § 2550; 681.
Revivor of judgment in favor of, § 3130-3134; 827.
May bring action of forcible entry and detainer, § 3613; 914.
See, also, ADMINISTRATORS, EXECUTORS, and ESTATES OF DECEDENTS.

Reprieve.
In case of sentence of death, 17 G. A., ch. 165, § 6; 972.

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Reprieve.—*Continued.*
Application for, § 4713; 1133.
May be granted by governor, Const., Art. 4, § 16; 1232.

Reputation.
Limitation of action for injury to, § 2529; 671.

Requisition.
For arrest of fugitive from justice, §§ 4174, 4175; 1047.

Reserve Fund.
Of insurance companies, § 1136; 287.

Residence.
What sufficient to give jurisdiction in action for divorce, n. § 2220; 617.
Of railway corporations, what deemed to be, n. § 2582; 689.
Of defendant, as determining place of bringing action, §§ 2586, 2587; 689.
Effect of change of, by defendant after suit brought, § 2588; 690.
Service by leaving copy of notice at place of, §§ 2603, 2604; 697.

Resignation.
Of notary public, removal from county deemed, § 265; 57.
Of member of board of supervisors, absence from county deemed, § 298; 68.
Of officers, to whom made, § 782; 186.
Of executor, effect of, n. § 2347; 638.

Resistance.
To order or process, punishable as contempt, § 3491; 895.
To service or execution of process, punishment for, § 3960; 1000.
To the commission of public offense, who may make, §§ 4112–4114; 1038.
To process, how overcome and punished, §§ 4145–4148; 1043.

Restoration.
Of money or property, on appeal, § 3198; 846.

Restraint.
Of insane person without authority, § 1416; 395.

Resulting Trust.
May be established by parol, n. § 3664; 926.

Re-survey.
Of town plats, 15 G. A., ch. 54; 153.
Of highways, §§ 964, 965; 244.

Re-taxation.
Of costs, § 2944; 785.

Re-trial.
Of actions where service is had by publication only, § 2877; 770.

Retrospective Laws.
Not unconstitutional, n. Const., Art. 1, § 21; 1222.

Return of Depositions.
By officer taking § 3737; 939.
By judge or justice, when taken merely by name of office, § 3742; 940.

Return of Execution.
To be entered by clerk, § 3029; 807.
When issued to another county, how made, §§ 3031, 3032; 807.
When to be made, § 3037; 808.
In case of garnishment, § 3052; 811.
On judgment before justice, § 3571; 907.

Return of Justice of the Peace.
To circuit court, on appeal, §§ 3585–3587; 909.
——on writ of error, §§ 3598–3600, 3602; 912.

Return of Property.
Judgment for, in replevin, n. §§ 3239, 3241; 856.

Return of Service.
Of Notice:
What to state, § 2604; 697.
By sheriff, how made, § 2605; 698.
Liability of sheriff for defect in; amendment of, § 2606; 698.
How proven, § 2609; 699.
In case of motion, § 2920; 781.
Of appeal, § 3214; 849.
Of sale under chattel mortgage, § 3310; 867.
In justices' courts, § 3522; 901.
Of Writ of Attachment:
On partnership property, § 2973; 793.
By sheriff, § 3010, 803.
Defects in, not vital, n. § 3010; 803.
Of writ of certiorari, §§ 3220, 3221; 851.
Of writ of habeas corpus, § 3471; 893.

Returns, False.
Making of, by public officer, punished, § 3968; 1001.

Returns of Elections.
From precincts, auditor to send for, § 634; 165.
From counties, secretary of state may send for, §§ 649, 662; 168.
Compensation of messengers sent for, § 3827; 965.
For governor and lieutenant-governor, Const., Art. 4, § 3; 1231.

Returns of Railway Companies.
For purposes of taxation, § 1318; 361.
To railway commissioners, 17 G. A., ch. 77, § 5; 366.

Revenue Laws
Publication of, § 828; 201.

Revenue License.
No defense for illegal sale of liquors, n. § 1543; 429.

Revenues, Security of.
County responsible to state for state tax, § 908; 232.

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Revenues, Security of.—*Continued.*
County liable in case county treasurer is defaulter, § 909; 232.
Interest on warrants only allowable when receipted for by holder, § 910; 232.
Discounting warrants by officers, punished, § 911; 233.
County or state treasurers loaning public funds, punished; depository established, § 912; 233.
Board of supervisors to settle with county treasurer and forward report to auditor of state, § 913; 233.
County treasurer to report monthly to auditor of state, § 914; 234.
Auditor of state to send county auditor statement of account, § 916; 234.
Settlement of county treasurer going out of office, § 917; 234.
Examination of funds of treasurer of state and county treasurers, § 918; 234.
Failure of officers to account, etc., as required, punished, § 919; 235.
Payments to counties of excess of funds due them, 16 G. A., ch. 113; 235.

Reversal of Judgment.
Not to affect purchaser, § 3199; 846.

Reversioner.
May recover for waste or trespass, §§ 3333, 3337; 871.

Revival.
Of cause of action on contract, § 2539; 677.
Of garnishment, by or against representatives of garnishee, § 2978; 796.

Revivor of Judgments.
In case of death of plaintiff or defendant, §§ 3130–3134; 827.

Revocation.
Of license of attorney, §§ 217–223; 50.
Of permit to sell liquors, § 1535; 425.
Of will, §§ 2329, 2330; 656.

Reward.
For arrest of criminal, § 58; 13.
For recovery of funds stolen from county, n. § 303, ¶ 11; 72.
For taking up stray vessels, logs or lumber, or lost goods, §§ 1511, 1518; 419.
For procuring place of trust, punishment for offering or accepting, §§ 3942, 3943; 997.
For arrest of escaped convict from penitentiary, § 4776; 1151.

Right of Suffrage.
OFFENSES AGAINST:
Bribery and illegal voting at elections, §§ 3993–3997; 1007.
Influencing votes by fraud or force, §§ 3998–4002; 1008.
Bribery of clerks, judges, etc., § 4001; 1008.

Right of Suffrage.
OFFENSES AGAINST.—*Continued.*
False entries, or illegal acts or omissions by judges, clerks, etc., §§ 4003–4007; 1008.
GENERAL PROVISIONS, Const., Art. 2, §§ 1–6; 1223.

Right of Trial by Jury.
May be waived in civil cases, § 2814; 750.
Shall remain inviolate, Const., Art. 1, § 9; 1216.
In criminal cases, Const., Art. 1, § 10; 1218.
——— may be waived, n. Const., Art. 1, § 10; 1218.

Right of Way.
FOR RAILWAYS:
Taking of private property for, § 1241; 333.
For channels and ditches, 18 G. A., ch. 191; 339.
Forfeiture of, for non-user, §§ 1260, 1261; 340.
For canals, turnpikes, or bridges, § 1269; 342.
For public ways to mines and quarries, 15 G. A., ch. 34; 344.
For foot-way, not acquired by adverse use, § 2033; 573.
Notice to prevent the acquisition of, § 2035; 573.

Rights.
Of married women in property, §§ 2202–2214; 613.
Acquired by marriage, forfeited by divorce, § 2230; 620.
Of persons, Const., Art. 1, § 1; 1214.
Not enumerated in Constitution, retained by people, Const., Art. 1, § 25; 1223.

Riots.
Defined and punished, §§ 4067, 4068; 1026.
Suppression of, §§ 4149–4154; 1044.

Riparian Owners.
Rights of, 15 G. A., ch. 35; 345.

Risks of Insurance Companies.
Limit of, § 1132; 256.

Road.
Includes bridges, § 45, ¶ 5; 9.
See HIGHWAY.

Road Supervisor.
See HIGHWAY SUPERVISOR.

Road-bed.
Of abandoned railway, condemnation of, § 1261; 341.

Robbery.
Defined and punished, §§ 3858–3860; 979.
Assault with intent to commit, punished, § 3874; 979.

Rod.
Standard length of, § 2040; 574.

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Rolling Stock of Railway.
Taxation of, § 801; 192.
Mechanic's lien upon, 16 G. A., ch. 100, § 5; 598; and n. *Ibid.*, § 3; 596.

Rule.
For production of books and papers, §§ 3685–3688; 931.

Rules.
Of court, how made and published, § 189; 41.
——— judicial notice to be taken of, § 2709; 726.
Regarding juries, §§ 2790–2802; 746.
For allowing appeals on intermediate orders, § 3166; 836.
Of proceedings of houses of general assembly, Const., Art. 3, § 9; 1226.

Rye.
Weight of, per bushel, § 2049; 575.

Sabbath.
Breach of, punished, § 4072; 1027.
See, also, SUNDAY.

Salaries.
Of members of general assembly, § 12; 2.
——— payment of, 15 G. A., ch. 3; 3.
Officers of cities may receive, in place of fees, 17 G. A., ch. 56; 145.
Not taxable, § 802; 193.
Of public officers, mandamus to compel payment of, n. § 3373; 876.
Of state, district, county and township officers, §§ 3755–3810; 943.
Of state and district officers, how paid, § 3780; 948.
Of officers of penitentiary, § 4783; 1152.
Of judges of supreme and district courts, Const., Art. 5, § 9; 1235.
See, also, COMPENSATION OF OFFICERS.

Sale.
Officer may not become purchaser at, § 343; 82.
Of coal oil without inspection, penalty for, 17 G. A., ch. 172, § 4; 448.
Of university lands, how ordered by board of regents, § 1599; 463
Of school lands, §§ 1845–1859; 524.
Conditional, of personal property, recording of instrument of, §§ 1922, 1923; 542.
Of property of estate of insolvent, § 2127; 595.
Of unclaimed property by warehouseman or carrier, §§ 2177–2180; 607.
By guardian, of minor's property, §§ 2257–2265; 624.
Of property of decedent by administrator, §§ 2386–2401; 645.
Of property of intestate to make distribution, § 2438; 653.
Of property for purpose of setting off widow's share, § 2451; 656.
Of escheated property, § 2463; 659.
Of real property by order of court, entry of, in probate record, § 2490; 662.

Sale.—*Continued.*
Of perishable property under attachment, § 2992; 801.
——— application of proceeds of, § 3011; 803.
Of property in partition proceedings, §§ 3298–3306; 866.
Of boat or raft under judgment, § 3449; 89.
Of mortgaged property, by mortgagor, punished, § 3895; 984.
Of unwholesome provisions, or adulterated food, liquors or drugs, punished, §§ 4035–4037; 1017.
Of poisons, regulation of, 18 G. A., ch. 75, § 9; 450; and § 4038; 1017.
Of adulterated or drugged spirituous liquors, punished, § 4040; 1018.
Of adulterated or diluted milk, § 4042; 1018.

Sale Book.
To be kept by clerk of court, § 197; 44.
Entry in, by redemption creditor, of amount credited on claim, §§ 3115, 3117; 825.

Sale for Taxes.
By township collector, § 405; 92.
Of city property, § 495; 124.
Of personal property, § 857–864; 209.
Of real property, §§ 871–886; 213.
In gross, effect of, n. § 897; 225.

Sale of Intoxicating Liquors.
Prohibited, § 1523; 422.
Under permits, §§ 1533, 1537; 425.
To minors or insane persons, prohibited, § 1539; 426.
Without permit, deemed misdemeanor, § 1540; 427.
Mixed, prohibited, § 1541; 428.
In violation of law, void; payment for, recovered, § 1559; 434.
Within two miles of city limits or place of election, 17 G. A., ch. 119; 439.
To voters at elections, 18 G. A., ch. 82; 441.

Sale on Foreclosure.
Under chattel mortgage, notice of; validity; how contested, §§ 3307–3317 867.
Under mortgage of real property, § 3321; 868.

Sale under Execution.
After expiration of execution valid, n. § 3037; 808.
Notice, how given, §§ 3079, 3080; 817.
——— penalty, for failure to give; sale not affected, § 3081; 818.
Time and manner, § 3082; 818.
Sale in mass, effect of, n. § 3082; 818.
Adjournments, § 3083; 818.
Disposition of proceeds, § 3084; 819.
Additional execution and sale, § 3085; 819.
Failure of sale, levy continues, how abandoned, § 3086; 819.

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Sale Under Execution.—*Continued.*
Notice to defendant in possession, § 3087; 819.
Plan of division of property, § 3088; 820.
Failure of purchaser to pay, § 3089; 820.
Sale vacated when judgment was not a lien on the property, § 3090; 820.
Money and notes appropriated without sale, § 3091; 820.
In case of judgment against a decedent, §§ 3092–3096; 821.
Setting off mutual judgments, § 3097; 821.
Appraisement, § 3100; 821.
Certificate of purchase, § 3101; 822.
REDEMPTION:
When allowable, §§ 3098, 3099; 821.
By defendant, §§ 3102, 3103, 3112, 3117; 822.
By creditors, §§ 3112–3117; 824.
Mode of, §§ 3118–3123; 825.
DEED:
When and to whom made, §§ 3101, 3124; 822.
When to be recorded, § 3125; 826.
Presumptive evidence of regularity, § 3126; 826.
Holder of, may recover for damages to property during period of redemption, § 3127; 827.
Injunction against sale of property of third party, n. § 3386; 879.
In justice's court, § 3574; 907.
——— provisions applicable, § 3129; 827.
Purchaser may recover possession by action, § 3611; 913.

Saloons.
Minors not to be allowed in, 15 G. A., ch. 59; 1019.

Salt.
Weight of, per bushel, § 2049; 575.

Sand.
Weight of, per bushel, § 2049; 575.

Sanity.
Presumption of, in criminal cases, n. § 4423; 1092.
Of defendant, proceeding to determine, before trial or after conviction, §§ 4620–4624; 1125.

Satisfaction.
Of mechanic's lien, how acknowledged, 16 G. A., ch. 100, § 15; 603.
Of mortgage by executor of mortgagee, § 2383; 645.
Of judgment, § 2865; 766.
Of judgment in federal court, entry of in county where lien, 17 G. A., ch. 129; 774.
Of mortgage, by mortgagee, penalty for failure, § 3327; 870.
——— by clerk in case of foreclosure, § 3328; 870.

Savings Banks.
Organization, powers, etc., of, 15 G. A., ch. 60; 311.

Scales, Public.
Weighmasters of, §§ 2065–2068; 578.

Scalps of Wild Animals.
Bounty on, may be offered by board of supervisors § 303, ¶ 19; 71.
——— amount of, how obtained §§ 1487, 1488; 409.

Schools.
Under sectarian management, public money not to be given to, § 552; 146.
Districts, organization, meetings, etc., §§ 1713–1717½; 489.
Sub-districts, election of directors in, §§ 1718–1720; 491.
Board of directors, meetings, powers, etc., §§ 1721–1738; 492.
President, powers and duties, §§ 1739, 1740; 496.
Secretary, powers and duties, §§ 1741–1746; 497.
Treasurer, powers and duties, §§ 1747–1751; 498.
Sub-director, powers and duties of, §§ 1752–1756; 499.
Teachers, employment and duties of, §§ 1757–1760; 500.
General provisions, §§ 1761–1764; 501.
County superintendent, §§ 1765–1776; 501.
Taxes, §§ 1777–1780; 503.
County auditor, §§ 1781–1783; 505.
County treasurer, §§ 1784, 1785; 506.
Miscellaneous, §§ 1786–1799; 506.
Independent districts, §§ 1800–1823; 509.
Funding indebtedness, 18 G. A. ch's 51 and 132; 518.
Industrial expositions in, 15 G. A., ch. 64; 519.
Disturbances of, punished, § 4023; 1013.
Colored children not to be excluded from, n. Const., Art. 1, § 1; 1214.

School Books.
Change in, how made, § 1728; 494.

School District.
Presumption of regularity of organization of, n. 2716; 728.
Levy of tax by, to pay judgment, n. § 3049; 810.
See, also, DISTRICT TOWNSHIPS, and INDEPENDENT DISTRICTS.

School Fund.
Apportionment of, § 66, ¶ 12; 16.
To be controlled by board of supervisors, § 303, ¶ 12; 70.
Notice of apportionment of, § 322; 79.
Penalties recovered from life insurance companies to go to, § 1178; 307.
CONSISTS OF WHAT, to whom payable, etc., §§ 1837–1844; 522.

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School Fund.—*Continued.*
Sale and management of lands, §§ 1845–1859; 524.
Control of, securities, §§ 1860–1863; 527.
Loans of, § 1864–1868; 528.
General provisions, §§ 1869–1880; 530.
Counties responsible for, §§ 1881–1884; 532.
Penalty for usury in favor of, § 2080; 582.
Proceeds of unclaimed property to go to, § 2182; 609.
Proceeds of escheated property to go to, § 2463; 659.
Action on contracts for, not barred by statute of limitations, § 2542; 678.
Fines and forfeitures to go to, § 3370; 876.
Fines, etc., going to, to be reported by officers, etc., § 3974; 1002.
Liability of state for losses to, Const., Art. 7, § 3; 1236.
To be under control of general assembly, Const., Art. 9, ch. 2, § 1; 1240.
What to constitute, Const., Art. 9, ch. 2, §§ 3, 4; 1240.
Agents for management of, Const., Art. 9, ch. 2, § 6; 1241.
Distribution of, Const., Art. 9, ch. 2, § 7; 1241.

School House Funds.
Apportionment of tax for, § 1778; 504.
Limit of levy for, § 1780; 504.
Tax for, in independent districts, voting of, § 1807; 511.

School Houses.
Sale or disposition of, by district township, § 1717; 490.
Erection and repair of, § 1723; 493.
Sites, selection of, § 1724; 493.
——— condemnation of property for, §§ 1825–1828; 520.
Sub-director to have control and management of, § 1753; 499.
May be used for religious worship, etc., n. § 1753; 499.

School House Sites.
Selection of, § 1724; 493.
Condemnation of property for, §§ 1825–1828; 520.

School Lands.
Sale of, for taxes, 17 G. A., ch. 101; 229.
Sale and management of, §§ 1845–1859; 524; and Const., Art. 9, ch. 2, § 1; 1240.
Prevention of waste upon; survey, §§ 1858, 1859; 527.
Appropriation of proceeds of, Const., Art. 9, ch. 2, § 3; 1240.

School Laws.
Publication of, § 1579; 459.

School Officers.
To deliver books, etc., to successors, § 1791; 507.
Women eligible as, 16 G. A., ch. 136; 492.

School Tax.
Payable only in money, § 854; 208.
Voting of, by district township, § 1717; 490.
Not to be levied after third Monday in May, § 1738; 496.
Apportionment of, by county auditor, § 1781; 505.
In independent districts, levy of, § 1804, 510.

Science and Art.
Books of, as presumptive evidence, § 3653; 922.

Scientific Associations.
Incorporation of, §§ 1095–1102; 276.

Seal.
Not implied in terms, deed, bond, etc., § 45, ¶ 20; 10.
Includes impression upon paper, § 45, ¶ 14; 10.
Of notary public, § 259; 56.
Of commissioners in other states, § 263; 58.
County to keep, § 279; 61.
City or town shall have, § 454; 106.
For office of city clerk, § 523; 132.
Of Hospital for the Insane, § 1395; 388.
Of officer to be affixed to certificate of acknowledgment, § 1961; 554.
Acknowledgments not authenticated by, legalized, § 1968; 556.
Private, use of, abolished, § 2112; 592.
Defect in writ of attachment as to, n. § 2962; 791.
Of office, how indicated in recorded acknowledgment, § 3660; 924.
Of officer taking deposition or affidavit, presumption as to, § 3696; 932.
Official, fee for affixing, § 3819; 962.
Counterfeiting of, punished, § 3933; 995.
Of State, Const., Art. 4, § 20; 1233.

Sealed Verdict.
Effect of, § 2805; 749.

Sealer of Weights and Measures.
For county, appointment, duties, resignation etc., of, §§ 2057–2061; 577.
In cities and towns, §§ 2059, 2060; 577.
Fees of, § 3802; 957.

Search.
Right to security against, Const., Art. 1, § 8; 1216.

Search Warrant.
For liquors illegally kept, §§ 1544–1546; 430.
Money seized under may be attached, n. § 2977; 796.
Against gambling house, § 4027; 1014.

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Search Warrant.—*Continued.*
PROCEEDINGS UPON, §§ 4629-4653; 1126.
May issue when, Const., Art. 1, § 8; 1216.
Seat of State Government.
Location of, Const., Art. 11, § 8; 1244.
Secretary of Board of Health.
Duties, salary, etc., of, 18 G. A., ch. 151, § 10; 453.
Secretary of Governor.
To be kept at office, § 55; 13.
Salary of, § 3755; 943.
Secretary of School District.
To give bond, § 1731; 495.
Compensation of, § 1733; 495.
Powers and duties of, §§ 1741-1746; 497.
Secretary of Senate.
To superintend printing and distribution of journal, 16 G. A., ch. 159, §§ 4-8; 29.
Secretary of State.
Certificate of, to bill becoming a law without approval, § 30; 6.
To have custody of original acts, § 31; 6.
Printing and distribution of laws by, §§ 35-43; 6.
OFFICE, DUTIES, ETC., OF, §§ 61-65; 14.
To perform duties of register of State Land Office, 18 G. A., ch. 206, § 2; 21.
To receipt for state printing, § 98; 22.
To take receipts from state printer for paper, § 103; 23.
To receipt for state binding, § 109; 24.
To preserve and record abstracts of census, § 116; 25.
To keep journal of executive council, § 119; 25.
To be furnished fuel, stationery, etc., § 120; 25.
To take charge of paper and stationery, § 122; 26.
To send documents to public libraries, § 131; 28.
Distribution of public documents by, 16 G. A., ch. 159, § 3; 29.
Distribution of supreme court reports by, § 159; 35.
To publish statement of times of holding court, § 165; 38.
Duty of, as to commissions of notaries public, §§ 258-261; 56.
Duties of, as to commissions of commissioners in other states, §§ 273, 274, 276; 59.
May administer oaths, § 277; 59.
To record names, etc., of county officers, § 324; 80.
Publication by, of statement as to change in class of cities, § 509; 128.
When to be elected, § 581; 157.
May send for returns of elections, §§ 649, 662; 168.
Secretary of State.—*Continued.*
To record result of elections; § 654; 168.
Bond of, § 678; 172.
——— to be filed with auditor, § 682; 173.
To be clerk of court for trial of contested state elections, § 720; 178.
May issue subpœnas in trial of contested elections, § 723; 178.
Depositions in cases of contested elections, to be returned to, §§ 735, 736; 179.
May appoint deputy, §§ 766-768; 183.
Distribution of report of State Agricultural Society by, § 1108; 280.
To make distribution of report of Horticultural Society, § 1120; 282.
To record change of name of railway, § 1274; 346.
To contract for printing of estray notices, § 1469; 407.
Salary and fees of, § 3756; 943.
To account for fees, § 3778; 948.
To countersign grants and commissions, Const., Art. 4, § 21; 1233.
Election, term of office and duties of, Const., Art. 4, § 22; 1233.
To publish proposition to amend constitution, 16 G. A., ch. 114, § 1; 1247.
Sectarian Institution.
Public money not to be given to, § 552; 146.
Security.
To be by bond; to whom given, §§ 246, 247; 54.
Defective, may be rectified, § 248; 55.
By sureties, qualifications, affidavit, §§ 249, 250; 55.
Collateral, person taking not entitled to mechanic's lien, 16 G. A., ch. 100, § 2; 596.
To creditors prejudiced by a will, § 2384; 645.
To be given by legatee for the restoration of property, etc., § 2429; 651.
To prevent sale of property to set off widow's share, § 2451; 656.
Not to be required in actions by the State, § 2560; 684.
May be required in case of judgment on service by publication, § 2876; 770.
May be required in partition proceedings, § 3305; 866.
FOR COSTS:
May be required when, §§ 2927-2932; 781.
In supreme court, § 3210; 848.
Against seizures and searches, Const., Art. 1, § 8; 1216.
Securities.
Given for illegal sales of liquors, void, § 1550; 434.
Of life insurance companies, change of, § 1174; 307.
Official, actions on, §§ 3368, 3369; 875.

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Securities and Investments.
By bond, to whom given, sureties, §§ 246–250; 54.
Investments, how made, §§ 251–257; 55.

Security of the Revenue.
Counties responsible for state taxes, §§ 908, 909; 232.
Interest on warrants to be receipted, § 910; 232.
Discounting warrants by officers, penalty for, § 911; 233.
County or state treasurer not to loan funds; deposits by, § 912; 233.
Reports and settlements of county and state treasurer, §§ 913–919; 233.
Settlement of balances due county, 16 G. A., ch. 113; 235.

Security to keep the Peace.
Proceedings before magistrate, §§ 4115–4123; 1039.
Proceedings in district court, §§ 4124–4129; 1040.

Seduction.
Civil action for; by whom brought, §§ 2555, 2556; 683.
Action for, will survive, n. § 2525; 669.
Punishment for, § 3867; 977.
Marriage a bar to prosecution for, § 3868; 978.
Jurisdiction of offenses of, § 4162; 1045.
Limitation of prosecution for, § 4166; 1046.
Corroborating evidence in prosecution for, § 4560; 1113.

Seed.
Weight of, per bushel, § 2049; 575.

Seizin.
Of lands, who deemed to have, § 1928; 544.

Seizure.
Of liquors illegally kept, § 1546; 431.
Right to security against, Const, Art. 1, § 8; 1216.

Selection of Jury.
For district and circuit courts, §§ 240–242; 53.
In justices' courts in civil cases, § 3547; 975.
——— in criminal cases, §§ 4672–4682; 1132.
See, also, JURY.

Seminaries of Learning.
Associations for incorporation of, §1091; 276.

Senate of General Assembly.
Organization of, §§ 6–10; 2.
Trial of impeachments by, §§ 4550–4555; 1112; and Const., Art. 3, § 19; 1227.
Maximum number of members of, Const., Art. 3, § 35; 1230.
President of, Const., Art. 4, § 18; 1232.

Senators in Congress.
Election of, by joint convention of General Assembly, § 26; 5.

Senators in General Assembly.
When to be elected, § 588; 157.
Certificates of election of, §§ 642, 648; 167.
Abstract and canvass of votes for, §§ 646, 647; 167.
Oath of, § 672; 171.
Contesting elections of, §§ 730–736; 179.
Resignations of, to be made to governor, § 782; 186.
Special election to fill vacancies of, § 789; 187.
Election and qualifications of, number, etc., Const., Art. 3, §§ 5, 6; 1225.
Privileged from arrest, Const., Art. 3, § 11; 1226.
Not to be appointed to civil office, Const., Art. 3, § 21; 1227.
Apportionment; maximum number of, Const., Art. 3, §§ 34, 35; 1230.
See, also, MEMBERS OF GENERAL ASSEMBLY.

Senatorial Districts.
Formation of, Const., Art. 3, §§ 35–37; 1230.

Sentence.
For an offense already punished as contempt, § 3500; 897.
Of death, how executed, 17 G. A., ch. 165; 972.
Time for pronouncing, fixed, § 4496; 1104.
Commitment under, §§ 4509–4511; 1106.
Reduction of, by supreme court on appeal, § 4538; 1110.

Separate Trials.
Of defendants jointly indicted, § 4424; 1092.

Separation.
Of husband and wife, not to deprive survivor of right of administration, n. § 2354; 640.
OF JURY:
In trial of civil actions, § 2792; 746.
In trial of criminal actions, §§ 4434, 4435; 1094.

Sepulchre.
Desecration of, punished, § 4017; 1011.

Service.
OF PROCESS;
On lands owned by U. S., § 4; 1.
By sheriff after expiration of office, § 344; 82.
By successor of sheriff, § 346; 83.
By coroner, § 350; 83.
By person specially appointed, § 351; 84.
OF NOTICE:
Of application for tax deed, § 894; 222.

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Service.
OF NOTICE.—*Continued.*
To quit, § 2016; 569.
To person claiming easement, § 2034; 573.
Of mechanic's lien, 16 G. A., ch. 100, §§ 6–8; 598.
Of petition by guardian for leave to sell property, § 2258; 625.
Of application by administrator for leave to sell real estate, § 2389; 645.
Of order of court upon administrator, §§ 2479–2481; 661.
Of action before justice, §§ 3521, 3522; 901.
Of taking depositions, §§ 3730–3733; 938.
OF ORIGINAL NOTICE:
Deemed commencement of action, § 2532; 675.
By whom and how to be made; return of, §§ 2601–2609; 696.
Upon Sunday, when allowable, § 2607; 698.
Upon county, how made, § 2610; 699.
On corporations, §§ 2611–2613; 699.
On persons under disability, §§ 2614–2617; 700.
In action to recover real property, § 3249; 858.
In action against boat or raft, § 3435; 888.
BY PUBLICATION.
When and how made, §§ 2618–2620; 701.
Before filing of petition, not good, n. § 2618; 701.
——— legalized, 18 G. A., ch. 124; 703.
Rendered unnecessary by personal service, § 2621; 703.
On unknown defendants, §§ 2622–2625; 703.
Judgment upon; security and new trial in case of, §§ 2876–2881; 770.
Defective, judgment by default upon, n. § 2870; 768.
Of copy of judgment on defendant served by publication, §§ 2879, 2880; 771.
Of notice in summary proceedings, § 2907; 779.
Of notice of motion for an order, §§ 2915–2921; 780.
Of order for appearance of debtor, in summary proceedings, § 3146; 829.
OF NOTICE OF APPEAL:
Upon whom and when to be served, §§ 3178–3180; 840.
Method of, § 3214; 849.
In proceedings before justice, § 3589; 910.
Of writ of certiorari, § 3220; 851.
Of notice of sale under chattel mortgage, §§ 3309–3311; 867.

Service.—*Continued.*
Of writ of habeas corpus, §§ 3460–3468; 892.
OF SUBPŒNA:
In civil cases, §§ 3671, 3677; 929.
In criminal cases, §§ 4563–4565; 1114.
Of notice or paper, how proved, § 3698; 932.

Service as Apprentice.
Minor may be bound to, § 2280; 628.

Services.
Of minors, payment for, § 2240; 622.
Of executors, compensation for, §§ 2494, 2495; 662.
Of child, who may sue for, in case of loss from injury or death, § 2556; 683.

Sessions of General Assembly.
Where to be held, § 5; 2.
To be biennial, Const., Art. 3, § 2; 1225.

Set-off.
Of mutual judgments, § 3097; 821.
——— before justices, §§ 3555–3565; 906.
See COUNTER CLAIM.

Setting Aside.
Of judgment by default in district or circuit court, § 2871; 768.
——— in justice's court, § 3543; 904.
Of sheriff's sale, n. § 3082; 818.
Of indictments, §§ 4337–4344; 1077.

Setting Fire.
To building, boat or property, punished, §§ 3885, 3886; 981.
To prairie, punished, §§ 3889, 3890; 982.

Settlement.
Of losses of mutual insurance companies, § 1139; 289.
Of estate of insolvent debtor, §§ 2117–2128; 593.
OF ESTATE OF DECEDENT:
Jurisdiction of court in, § 2319; 635.
By executors or administrators, §§ 2370–2385; 642.
Final, when to be made, § 2469; 660.

Settlements.
Legal, how acquired and lost, §§ 1352–1360; 379.
Of insane persons, county of, § 1402; 391.
Of patients in Hospital for the Insane, §§ 1417–1419; 395.

Settlers on Public Land.
Use of timber by, § 3342; 872.

Seventh Day.
Persons keeping, not compelled to act as jurors on that day, § 2776; 740.

Severance of Territory.
Of city or town, §§ 440–446; 103.

Severance of Trials.
When to be granted in civil cases, § 2746; 735.
In trial of defendants jointly indicted, § 4424; 1092.

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Sewerage.
General system of, 16 G. A., ch. 107; 17 G. A., ch. 162; 118.
Sewers.
City given power to construct, § 465; 110.
For state buildings, construction of through city, 18 G. A., ch. 55; 120.
Sexton of Cemetery.
Powers of, 17 G. A., ch. 106, § 3; 96.
Sham Defenses.
May be stricken out on motion, § 2707; 726.
Share.
Of surviving husband or wife of decedent, extent of, § 2440; 653.
——— how set off, §§ 2443–2451; 655.
——— not to be affected by will, § 2452; 656.
Of widow of non-resident alien in property of intestate husband, § 2442; 655.
Sheep.
To be restrained from running at large, § 1446; 401.
Having disease, bringing within state punished, § 4055; 1023.
Sheriff.
Term includes what, § 45, ¶ 19; 10.
May serve requisition of auditor of state, § 74; 17.
To attend upon supreme court, § 137; 32.
To notify judges of election, of number of jurors required, § 237; 52.
Duty of, as to drawing jury, § 240; 53.
To serve precept for jury, § 242; 53.
May be ordered to take possession of property in hands of trustee, §§ 256, 257; 56.
May administer oaths, § 277; 59.
May control publications pertaining to his office, § 306; 74.
POWERS AND DUTIES OF, §§ 337–348; 82.
Duties of, to be performed by coroner, §§ 349–351; 83.
To serve warrant of coroner, § 362; 85.
To give notice of election, § 578; 156.
When to be elected, § 589; 157.
Bond of, § 678; 172.
Suspension of, from office, §§ 756–758; 182.
May appoint deputies, §§ 766–769; 183.
May call upon military force for aid, 18 G. A., ch. 74, § 5; 261.
May appoint jury and assess damages for taking private property, § 1244; 334.
To take insane persons to hospital, § 1401; 390.
To summon referees to settle disagreement as to homestead, §§ 2002, 2003; 566.
May serve notice of mechanic's lien, 16 G. A., ch. 100, § 7; 599.
Sheriff.—*Continued.*
Limitation of action against, § 2529; 671.
Delivery of notice to, deemed commencement of action, § 2532; 675.
May have person claiming personal property substituted in action of replevin against him, § 2573; 686.
Service of original notice by, § 2605; 698.
Liability of, for defective return of service, § 2606; 698.
Shall serve notice on Sunday, when, § 2607; 698.
Signature of, proof of truth of return, § 2609; 699.
To select talesmen to fill jury, § 2775; 746.
To provide food and lodging for jury, § 2802; 748.
Summary proceedings against, § 2906; 779.
Levy of attachment by, § 2954; 789.
Execution of attachment by, §§ 2964–2966; 792.
To take possession of attached property, § 2967; 792.
Disposition of money or property taken under attachment, §§ 2971, 2972; 793.
To summon garnishees, § 2975; 794.
May be garnisheed for money in his hands, § 2976; 795.
May take answers of garnishees, § 2980; 796.
May release attached property on bond, §§ 2996, 2997; 800.
May sell perishable property held under attachment, § 2999; 801.
Cannot require indemnifying bond in case of attachment by the state, § 3007; 803.
To be indemnified for levy of attachment by the state, § 3009; 803.
Return of writ of attachment by, § 3010; 803.
To be allowed expense of keeping attached property, § 3013; 804.
To make entry of attachment in incumbrance book, § 3022; 806.
Provision as to, in chapter on attachments, applicable to constables, § 3023; 806.
Method of return on execution issued from another county, § 3031; 807.
To receipt for, and endorse execution, §§ 3037, 3038; 808.
To exhaust property of principal before that of surety, §§ 3039–3042; 808.
Mode of levying execution by, §§ 3043–3050; 809.
To receipt for money paid by person indebted to defendant, § 3047; 810.
To return execution, when stayed, and release property, § 3065, 3066; 814.
SALE BY, under execution, §§ 3082–3089; 818.

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Sheriff.—*Continued.*
To give notice of sale under execution, § 3079; 817.
May adjourn sale, § 3983; 818.
To execute deed for property not subject to redemption, § 3101; 822.
To give certificate of redemption of judgment, § 3110; 824.
To execute deed for property sold under execution, § 3124; 826.
Deed of, presumptive as to regularity, § 3126; 826.
May be appointed receiver in summary proceedings against debtor, § 3141; 828.
Liability of, in such cases, § 3143; 829.
Compensation of, in summary proceedings against debtor, § 3147; 829.
To release property on filing of appeal bond. § 3193; 844.
To execute order in action to recover personal property, § 3232; 854.
Disposition of property and return of writ in replevin, §§ 3234–3237; 855.
To execute bill of sale on foreclosure of chattel mortgage, § 3313; 857.
May be directed to attach defendant for violation of injunction, § 3493; 883.
Service of writ of *habeas corpus* by, §§ 3460–3468; 892.
To serve attachment for contempt in *habeas corpus* proceedings, § 3477; 893.
May perform duty of constable, § 3632; 916.
Service of subpœna by, §§ 3671, 3677; 929.
May serve subpœna for person taking deposition, § 3682; 930.
Compensation of, §§ 3788–3790; 951.
Annual salary of, § 3789; 953.
Fees of, in proceedings as to estray, § 3822; 963.
Fees of, in conveying patient to hospital for the insane, § 3825; 964.
To be furnished with office, fuel, stationery, etc., § 3844; 967.
To summon jury to inquire as to sanity or pregnancy of person sentenced to death, 17 G. A., ch. 165, § 7; 972.
Method of execution of sentence of death by, 17 G. A., ch. 165, §§ 13–15; 973.
Bribery of, punished, § 3948; 998.
Person falsely assuming to be, punished, § 3962; 1000.
Stirring up controversies by, punished, § 3964; 1001.
Is a peace officer, § 4109; 1038.
To transfer defendant on change of venue, § 4379; 1083.
Fees of, for transferring prisoner on change of venue, § 4382; 1084.
Not to act in summoning talesmen in criminal cases, when interested, §4396; 1085.

Sheriff.—*Continued.*
Execution of sentence of imprisonment by, §§ 4512–4517; 1107.
Fees of, for conveying insane prisoner to asylum, § 4628; 1126.
To keep calendar of prisoners, and return copy thereof to district court, §§ 4725, 4726; 1141.
May punish refractory prisoners, § 4734; 1142.
To superintend and prevent escape of prisoners at hard labor, §§ 4738, 4740; 1143.

Shingles.
Inspection, size, etc., of, §§ 2069–2074; 578.

Shop.
May be included in homestead, § 1997; 565.

Short-hand Reporters.
Appointment and duties of, §§ 181, 182; 42.
Compensation, etc., of, § 3777; 947.

Shows.
Licenses for, penalty for failure to obtain, 16 G. A., ch. 131; 232.

Sidewalks.
Construction and repair of, at expense of adjacent property, §§ 466–468; 111.

Signs.
To be erected at railway crossings, § 1258; 349.

Signature.
Of officer taking acknowledgment, genuineness of, how shown, §§ 1956, 1957; 552.
Certificate of acknowledgment does not prove genuineness of, n. § 1958; 553.
Of written instrument deemed genuine unless denied under oath, § 2730; 730.
Evidence as to genuineness of, § 3655, 922.
Of officers taking depositions or affidavits, presumed genuine, § 3696; 932.
Of officer to certified copy of record deemed genuine, § 3711; 934.
Of fictitious officer or corporation, affixing of, punished, § 3928; 994.

Sinking Fund.
Of city or town, taxes for, § 497; 125.
May be established by corporation, § 1081; 273.

Slander.
Pleading in action for, §§ 2681, 2682; 719.
Words charging person with cheating do not constitute, n. § 4081; 1030.
In charging a crime, evidence to support justification of, n. § 4428; 1092.

Slavery.
Not to be permitted, Const., Art. 1, § 23; 1223.

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Sleeping Cars.
Taxation of, 17 G. A., ch. 114; 362.
Offices of, to be maintained at termini of route, 18 G. A., ch. 169; 374.
Small Pox.
Care of person infected with, by board of health, 18 G. A., ch. 151, §§ 21–23; 455.
Innoculating with, to spread disease, punished, § 4039; 1017.
Soldiers.
Not to be sent to poor-house, § 1362; 382.
May make verbal wills, § 2225; 618.
Not to be quartered in house without consent, Const., Art. 1, § 15; 1220.
Of U. S. garrisoned in state, not entitled to vote, Const., Art. 2, § 4; 1224.
Soldiers' Orphans.
Enumeration, §§ 1635–1637; 471.
Fund; control of; tax for, §§ 1638–1642; 472.
Soldiers' Orphans' Homes.
Government of, §§ 1623–1629; 470.
Appropriation; expenses; reports, §§ 1630–1632; 471.
Enumeration, adoption and discharge of children, §§ 1633–1637; 471.
Taxes for fund, §§ 1638–1642; 472.
Admission to, 16 G. A., ch. 94, §§ 1–4; 472.
Support of, 16 G. A., ch. 94, §§ 5, 6; 473.
Employment and education of, 16 G. A., ch. 94, § 7; 473.
Levy of tax for, in delinquent county, 16 G. A., ch. 94, § 8; 473.
Solemnizing Marriage.
Without license deemed misdemeanor, § 2192; 611.
——— penalty for, § 2195; 612.
Method of, § 2193; 612.
Solicitation of Place of Trust.
By corrupt influences, punished, §§ 3942, 3943; 997.
Solicitor.
See CITY SOLICITOR.
Solitary Confinement.
In county jail, § 4734; 1142.
Sorghum Seed.
Weight of, per bushel, § 2049; 575.
Sovereignty of the State.
General provisions, §§ 1–4; 1.
Speaker of House of Representatives.
Term of office of, § 13; 3.
To open and publish returns of election for governor and lieutenant governor, Const., Art. 4, § 3; 1231.
To act as governor when, Const., Art. 4, § 19; 1232.
Special Administrator.
Appointment and duties of, §§ 2357–2361; 641.
Special Appearance.
Effect of, § 2626; 704.
Special Constable.
Appointment of, § 3630; 916.
Special Charters.
Abandonment of, §§ 434–439; 102.
Provisions made applicable to cities under, § 479; 117.
Amendment of, §§ 548–550; 144.
Acts applicable to cities under, § 551; 146.
Judicial notice taken of, n. § 2716; 728.
Act applicable to all cities under, not unconstitutional, n. Const., Art. 3, § 30; 1228.
Inconsistent with constitution, repealed, n. Const., Art. 12, § 2; 1244.
See also, CITIES UNDER SPECIAL CHARTER.
Special Elections.
When to be held, § 574; 156.
Registry of voters for, § 600; 160.
For representative in congress, or senator or representative in general assembly, § 789; 187.
Provisions as to general elections, applicable to, § 791; 188.
Canvass of votes at, §§ 792, 793; 188.
Special Execution.
Under attachment not to issue after death of debtor, n. § 3011; 802.
On foreclosure cannot be stayed by order of court, n. § 3321; 868.
On judgment against boat or raft, § 3459; 889.
Special Findings.
By juries, §§ 2808, 2809; 749.
Judgment upon, § 2858; 765.
Special Laws.
When not allowable, Const., Art. 3, § 30; 1228.
Corporations not to be created by, Const., Art. 8, § 1; 1237.
Special Proceedings.
Issues in, how tried, n. § 2737; 731.
How tried upon appeal, n. § 2741; 732.
Special Session of General Assembly.
Compensation of members at, § 12; 2; and Const., Art. 3, § 25; 1227.
Laws of, to take effect when, Const., Art. 3, § 26; 1227.
Governor may call, Const., Art. 4, § 11; 1231.
Special Term of Court.
How ordered, § 166; 39.
Special Verdict.
Jury may render, §§ 2806–2808, 749.
Controls general verdict, § 2809; 750.
Judgment upon, § 2858; 765.
Judgment in supreme court upon, n. § 3194; 845.
In criminal cases, §§ 4474–4478; 1101.

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Specie Payments.
Not to be suspended by banking associations, Const., Art. 8, § 11; 1238.
Specific Attachments.
When, and how issued, §§ 3000–3004; 802.
Specific Performance.
Of contract by husband to convey homestead cannot be enforced, n. § 1990; 561.
Enforcement of, against executor, §§ 2487, 2488; 661.
Actions for, when brought, n. § 2529; 671.
Service by publication in action for, § 2618; 701.
Speech.
Liberty of, Const., Art. 1, § 7; 1216.
Speed of Railway Trains.
May be regulated by cities and towns, § 456; 106.
At depot grounds, limited, § 1289; 350.
Spendthrifts.
Guardianship of, §§ 2272–2279; 627.
Squares, Public.
City may purchase or condemn property for, § 470; 114.
Special laws for vacation of, not allowed, Const., Art. 3, § 30; 1228.
Staff.
Of commander-in-chief of the militia, 18 G. A., ch. 174, § 11; 261.
Stage Companies.
Place of bringing action against, § 2582; 689.
Stake.
May be recovered from stakeholder, n. § 4029; 1015.
Stamps.
Counterfeiting of, punished, § 3935; 995.
Alteration or counterfeiting of, punished, §§ 4078–4080; 1029.
Standards of Weights and Measures.
Units and subdivisions of, §§ 2037–2047; 574.
To control contracts, § 2048; 575.
Custody of, § 2053; 576.
For counties, §§ 2053, 2057; 576.
Standard Weights.
For testing public scales, § 2067; 578.
State.
Sovereignty and jurisdiction of, §§ 1–4; 1.
Boundaries of, defined, § 1; 1; and Const., preamble; 1214.
——— how enlarged, Const., Art. 11, § 4; 1244.
Term includes what, § 45, ¶ 15; 10.
May condemn property for improvements to public buildings, §§ 1271, 1272; 343.
May take or bid in, manage and sell real property, §§ 1910–1919; 540.
State.—*Continued.*
Statute of limitations does not run against, n. § 2529; 671.
Actions by, how prosecuted; no security required, § 2560; 684.
Attachment for indebtedness due, §§ 3005–3009; 802.
Public property of, exempt from execution, § 3048; 810.
Appeal by, in mandamus proceedings, § 3385; 879.
Appeal by, in criminal cases, §§ 4521, 4527, 4539; 1108.
Not to become stockholder in corporation, Const., Art. 8, § 3; 1237.
State Agricultural College and Farm.
Printing and distribution of reports of, 16 G. A., ch. 159, § 3; 28.
Board of trustees of, powers, duties and salary, §§ 1604–1610; 465.
Officers, duties of, §§ 1611–1615; 467.
Lease of lands of, 15 G. A., ch. 71; 468.
Investment and control of funds of, §§ 1617, 1618, 1622; 469.
Tuition in, § 1619; 469.
Sale of liquors within three miles of, prohibited, § 1620; 469.
Course of study in, § 1621; 470.
Money not to be diverted from proper fund, § 1622; 470.
State Agricultural Society.
General provisions as to, §§ 1103–1108; 279.
Regulations as to fairs of, § 1114; 281.
State Auditor.
See AUDITOR OF STATE.
State Bank.
May be established, Const., Art. 8, § 6; 1238.
Must be founded on specie basis, Const., Art. 8, § 7; 1238.
State Binder.
Office, duties, etc., of, §§ 106–110; 23.
Compensation of, §§ 3767, 3768; 945.
State Board of Equalization.
How composed, duties of, §§ 834–836; 204
State Board of Health.
Appointment, powers, and duties of, 18 G. A., ch. 151, §§ 1, 2; 451.
Register of physicians, midwives, births, marriages and deaths, 18 G. A., ch. 151, §§ 3–8; 452.
Meetings of board, 18 G. A., ch. 151; § 9; 453.
Secretary of board, 18 G. A., ch. 151; § 10; 453.
Report, 18 G. A., ch. 151, § 11; 453.
Appropriation, rooms, etc., 18 G. A., ch. 151, § 12; 453.
Powers, duties, etc., of local boards, 18 G. A., ch. 151, §§ 13–24; 453.

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State Boundaries.
Defined, § 1; 1; and Const., preamble; 1214.
May be enlarged, Const., Art. 11, § 4; 1244.
State Buildings.
Construction of sewers for, 18 G. A., ch. 55; 120.
State Canvass.
Of votes, §§ 649–658; 168.
——— at special elections, § 793; 188.
State Historical Society.
To receive twenty copies of supreme court reports, § 159; 35.
General provisions as to, §§ 1900–1907; 536.
State Horticultural Society.
General provisoins as to, §§ 1117–1121; 281.
State Indebtedness.
Limitation of, Const., Art. 7, § 1; 1236.
For what purpose may be contracted, Const., Art. 7, § 2; 1236.
Liability to school fund constitutes, Const., Art. 7, § 3; 1236.
For defense, Const., Art. 7, § 4; 1236.
To be authorized by special law and tax voted, Const., Art. 7, § 5; 1236.
Repeal of special laws authorizing, Const., Art. 7, § 6; 1237.
Laws in relation to, Const., Art. 7, § 7; 1237.
State Institutions.
Oath of officers of, § 126; 27.
Officers of, not to contract debts beyond appropriations, 17 G. A., ch. 67; 30.
Officers of, not to be interested in contracts, 17 G. A., ch. 144; 31.
State Land Office.
General provisions as to, §§ 83–93; 19.
Transfer of, to office of Secretary of State, 18 G. A., ch. 206; 21.
To be furnished with fuel, stationery, etc., §§ 120, 122; 25.
Reports of, 16 G. A., ch. 159; 28.
State Librarian.
To be furnished with fuel, stationery, etc., §§ 120, 122; 25.
Appointment and duties of, §§ 1890–1897; 534.
Salary of, § 3762; 944.
State Library.
To receive copies of reports of supreme court, § 159; 35.
Provisions relating to, §§ 1885–1899; 534.
State Normal School.
Establishment and government of, 16 G. A., ch. 129; 485.
State Officers.
Contesting elections of, §§ 718–729; 178.
Resignations of, to be made to governor, § 782; 186.
State Officers.—*Continued.*
Vacancies to be filled by governor, § 783; 186.
Compensation of, §§ 3755–3773; 943.
To keep account of fees, §§ 3778–3780; 948.
State Printer.
Election, office, duties, etc., of, §§ 94–105; 22.
Bond of, §§ 678, 679; 172.
Compensation of, §§ 3764–3766; 944.
State Reform School.
Location and government of, §§ 1643–1652; 475.
Commitment to, §§ 1653–1659; 477.
Discharge or binding out of children, §§ 1660–1662; 479.
Aiding child to escape from, punished, § 1663; 479.
Appropriation for, 15 G. A., ch. 21; 480.
State Roads.
Not to be distinct from other roads, § 956; 242.
State Treasurer.
See TREASURER OF STATE.
State University.
Law department of, to receive supreme court reports, § 159; 35.
——— graduates of, entitled to practice, § 209; 47.
Objects, course of study, § 1585; 461.
Government of; regents, §§ 1586–1588; 461.
Departments, courses of study, § 1589; 462.
Meetings of regents; executive committee, §§ 1590, 1591; 462.
Secretary of regents, § 1592; 462.
Treasurer of regents, §§ 1593–1595; 462.
Laws for government of, § 1596; 463.
Apparatus, library, cabinet, §§ 1597, 1598; 463.
Sales of lands, how ordered, § 1599; 463.
Reports of president and regents, §§ 1600, 1601; 464.
Compensation of regents, § 1602; 464; and 17 G. A., ch. 92; 965.
Members of general assembly not eligible to office of regent, § 1603; 464.
Permanent endowment, 17 G. A., ch. 76; 464.
Preparatory department discontinued, 17 G. A., ch. 115; 465.
Establishment of, Const., Art. 9, ch. 1, § 11; 1239.
Location of, Const., Art. 11, § 8; 1244.
LANDS OF:
Effect of sale for taxes, 17 G. A., ch. 101; 229.
Contract for, to become due on default; suit on, § 1855; 526.
How appropriated, controlled and managed, Const., Art. 9, ch. 2, §§ 1–5; 1240.

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State University.
LANDS OF.—*continued.*
Proceeds to be permanent fund, Const., Art. 9, ch. 2, § 2; 1240.
Protection, improvement and disposition of, Const., Art. 9, ch. 2, § 5; 1241.
FUNDS OF:
Loans of, to become due on default; suit for, § 1855; 526.
Liability of state for losses to, Const., Art. 7, § 3; 1236.
How appropriated and managed, Const., Art. 9, ch. 2, §§ 1–5; 1240.

State Warrants.
To be drawn by auditor, § 66; 14.
Payment of, by treasurer, §§ 76–80; 17.
To draw interest, when, § 78; 17.
Interest on, to be receipted by holder, § 910; 232.
Officer not to discount, § 911; 233.

Statement.
For mechanic's lien, 16 G. A., ch. 100, § 6; 598.
Of fact omitted in pleading may be filed; trial of, §§ 2842, 2843; 762.
For judgment by confession, § 2896; 775.
Of facts in submission of controversy without action, § 3408; 884.
Of receipts and expenditures of public moneys to be published with session laws, Const., Art., 3, § 18; 1227.

Statements.
Of insurance companies, §§ 1141–1143; 289.
——— to be published, §§ 1157, 1158; 296.
Of life insurance companies, §§ 1167, 1168; 303.
Of railway companies for purpose of taxation, § 1318; 361.

Stationery.
Allowance of, to general assembly, § 12; 2.
To be furnished state officers, §§ 120, 122; 25.
Estimates and proposals for, § 121; 26.
For committees of general assembly, 15 G. A., ch. 1; 26.
To be furnished county officers, § 3844; 967.

Statutes.
General provisions as to, §§ 28–45; 5.
Repeal of, by code, §§ 47, 48; 11.
How pleaded; court to take judicial notice of, § 2708; 726.
How evidenced, §§ 3718, 3719; 935.
Words used in, need not be strictly pursued in indictment, § 4304; 1071.
Private, how pleaded in an indictment, § 4309; 1072.

Statute of Frauds.
When contracts must be evidenced in writing, §§ 3663–3667; 925.

Statute of Limitations.
In civil actions, §§ 2529–2542; 671.
May be taken advantage of by demurrer, § 2648; 710.
In criminal cases, §§ 4165–4170; 1046.
See LIMITATION OF ACTIONS.

Stay of Execution.
How effected, for what time, § 3061; 813.
Affidavit of surety on bond, § 3062; 814.
When not allowable, § 3063; 814.
BOND FOR:
To be taken and recorded, effect of, § 3064; 814.
Execution returned and property released upon filing of, §§ 3065, 3066; 814.
Execution upon, § 3067; 815.
Surety may object to, § 3068; 815.
New surety for, when required, effect of, §§ 3069, 3070; 815.
Does not release judgment lien, § 3071; 815.
Waives right of redemption, § 3102; 822.
Of sentence of death, 17 G. A., ch. 165, § 16; 974.
On judgments for fines in criminal actions, § 4610; 1123.

Stay of Proceedings.
On appeal, §§ 3186–3193; 843.
Upon certiorari, § 3218; 850.
Upon writ of error from justice, § 3601; 912.

Stealing.
Of fruit, punished, §§ 3897–3899; 984.
See LARCENY, §§ 3902–3904; 986.
At fire or from person, § 3905; 988.

Steam Boilers.
Equipment of; penalty for neglect, 15 G. A., ch. 14; 1026.

Stenographer.
Appointment and duties of, §§ 181, 182; 42.
Compensation of, §§ 3777; 947.

Step-mother.
Right of inheritance of, n. § 2457; 657.

Steward.
Of the poor-house, appointment and duties of, §§ 1374–1376; 384.
Of Hospital for the Insane, appointment and duties of, §§ 1386, 1392; 386.
Of the penitentiary, appointment and duties of, § 4766; 1149.

Stirring up Quarrels.
Punished, § 3964; 1001.

Stock.
Question as to permitting to run at large submitted to vote, § 309; 75.
Power of city to regulate running at large of, § 459; 107.
Railways to be fenced against, § 1289; 350.

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Stock.—*Continued.*
What to be restrained from running at large, § 1446; 401.
Liability of owner for damage by, §§ 1448, 1449; 402.
Meaning of term, § 1450; 403.
Submission of question as to running at large, §§ 1450, 1451; 403.
Liability of owner, where prohibited from running at large, § 1452; 404.
Distraint of, §§ 1454, 1455; 404.
Taken up as estrays, §§ 1464–1478; 405.
Marks and brands of, §§ 1479–1481; 408.
Care and relief of, §§ 1482, 1483; 408.
Release of, from distraint, § 1486; 409.
Driving off, punished, § 3896; 984.

Stock, Corporate.
Of corporations, taxation of, § 813; 195.
In manufacturing companies, exempt from taxation, 18 G. A., ch. 57; 197.
In insurance companies, transfer of, § 1134; 287.
———, amount of to be truly stated, 17 G. A., ch. 111; 298.
Of railway corporations, §§ 1283–1287; 348.
How attached, § 2967; 792.
How levied on under execution, § 3050; 811.

Stock-feeders and Keepers.
Lien of, for charges, 18 G. A., ch. 25; 609.

Stockholders.
Property of, liable for corporate debts, when, § 1068; 271.
Individual liability of, for corporate debts, §§ 1082–1085; 274.
In banks, double liability of, 18 G. A., ch. 208; 275.
The State or municipal corporations not to be, Const., Art. 8, §§ 3, 4; 1237.
In banking associations, liability of, Const., Art. 8, § 9; 1238.

Stolen Goods or Property.
Presumption of guilt from possession of, n. §§ 3902, 3904; 986.
Receiving, punished, §§ 3911–3914; 990.
Seizure of, on search warrant, § 4630; 1127.
When taken on search warrant, to be restored to the owner, §§ 4648, 4653; 1129.
Disposal of, after seizure, §§ 4654–4659; 1130.

Stone.
Contents of perch of, § 2050; 576.

Stone Coal.
Weight of, per bushel, § 2049; 575.

Storekeeper.
To have weights and measures compared with standard, § 2064; 578.

Strawberries.
Weight of, per bushel, § 2049; 575.

Strays
See ESTRAYS, §§ 1456–1478; 405.

Streets.
Laying out and regulation of, by cities, § 464; 108.
Vacation of, n. § 464; 109.
Grading and repairing of, § 465; 110.
Improvement of, at expense of adjacent property, § 466; 111.
Compensation to property owners for damage from change of grade of, § 469; 112.
City may purchase or condemn land for, § 470; 114.
Labor upon, § 487; 121.
City council to have supervision of, § 527; 134.
Dedication of, to city, § 561; 148.
May be altered or vacated as highways, § 562; 149.
Of unincorporated towns, part of highway, § 952; 42.
Not to be established across lands of State institutions, § 954; 242.
City may take private property for, § 1270; 342.
Obstruction of, deemed nuisance, § 4089; 1033.
Special laws for vacation of, not allowed, Const., Art. 3, § 30; 1228.

Street Commissioner.
In cities of first class, 16 G. A., ch. 33; 136.

Street Railways.
City may authorize or forbid to lay track over street, § 464; 108.
Right of way for, over highways, 18 G. A., ch. 32; 343.

Struck Jury.
How formed, § 2778; 740.

Sub-contractor.
Mechanic's lien, how secured by, 16 G. A., ch. 100, §§ 6–8; 598.
Who deemed, under mechanic's lien law, 16 G. A., ch. 100, § 11; 602.

Sub-directors of District Township.
Election of, §§ 1718–1720; 491.
Qualification, powers and duties of, §§ 1752–1756; 499.

Sub-districts.
Election of directors in, §§ 1718–1720; 491.
District township may be divided into, § 1725; 493.
Organization and adjournment of meetings of, § 1789; 507.
Division of district townships into, § 1796; 508.

Subject.
Act of general assembly to contain but one, expressed in title, Const., Art. 3, § 29; 1228.

Submission of Controversies.
Without action or in action, §§ 3408–3415; 884.

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Submission of Motions and Demurrers.
When to be made, § 2641; 708.
Submission to Arbitration.
When and how made, §§ 3416–3431; 885.
Submission to Vote.
Of questions by board of supervisors, § 309; 75.
Of proposition to authorize state debt, Const., Art. 7, § 5; 1236.
Of act creating banking association, Const., Art. 8, § 5; 1237.
Of amendments to Constitution, Const., Art. 10, §§ 1. 2; 1241.
Of question as to calling constitutional convention, Const., Art. 10, § 3; 1242.
Of amendments to Constitution, method of, 16 G. A., ch. 114; 1247.
Subornation of Perjury.
Defined, punishment for, §§ 3937, 3938; 996.
Subpœnas.
For appearance of witnesses before committee of general assembly, § 17; 4.
May be issued by coroner, § 356; 84.
May be issued by county surveyor, § 378; 87.
In trial of contested elections, §§ 704, 723; 176.
For witnesses to prove acknowledgments, § 1965; 555.
May be signed and issued by referee, § 2829; 753.
Not deemed part of record, § 3184; 841.
Disobedience to, punishable as contempt, § 3491; 895.
Issuance and service of, §§ 3671–3677; 929.
To bring books and papers, § 3672; 929.
May be issued by person authorized to take depositions, §§ 3680–3683; 930.
Effect of failure to obey, §§ 3683, 3684; 930.
For witnesses before the grand jury, § 4279; 1064.
In criminal cases, how issued and served; disobedience to, §§ 4061–4069; 1114.
In cases of impeachment, § 4570; 1114.
Subscribing Witness.
Testimony of, not conclusive, § 3654; 922;
Substitute.
When amendment to pleading deemed, § 2692; 724.
Substitution.
Of third party in action to recover real property, § 2572; 686.
Of new parties in action to recover personal property, § 3228; 853.
Successor.
Of sheriff, books and papers, property, etc., to be delivered to, § 345; 83.
Successor.—*Continued.*
Of sheriff to serve process, execute deeds, etc., of predecessor, §§ 346, 348; 83.
Of justice of the peace, may issue or renew execution, §§ 3627, 3634; 915.
——— how to be determined, § 3628; 916.
Suffrage.
Offenses against the right of, §§ 3993–4007; 1007.
Right of, Const., Art. 2; 1223.
Suit.
See ACTION.
Sum.
Denial concerning, how made, § 2701; 726.
Summary Proceedings.
When allowable, proceedings in, §§ 2906–2910; 779.
On bond for costs, § 2932; 782.
Sunday.
Judicial business not to be transacted on, § 191; 43
Protest of paper falling due on, § 2094; 587.
Service of original notice on, § 2607; 698.
Service of attachment on, § 2952; 783.
Issuance of execution on, § 3028; 807.
Process in action to recover personal property may issue on, § 3227; 853.
Issuance of warrant for seizure of boat or raft on, § 3434; 888.
Breach of, punished § 4072; 1027.
Supersedeas Bond.
To stay proceedings upon taking appeal, §§ 3186–3193; 843.
Superintendent of Hospital for the Insane.
Appointment of, § 1386; 386.
Powers and duties of, § 1391; 387.
Fees of, when called as witness, § 1429; 397.
To affix seal, § 1430; 398.
May adopt regulations, § 1432; 398.
To furnish patients with writing material, receive letters for them, etc., §§ 1437, 1438; 399.
To acknowledge service of notice upon person confined in, § 2616; 700.
To notify sheriff and district attorney when insane prisoner becomes sane, § 4626; 1126.
Superintendent of Markets.
May be elected by cities of the first class, § 535; 137.
Superintendent of Public Instruction.
To be furnished with fuel, stationery, etc., §§ 120, 122; 25.
Bond of, § 678; 172.
May appoint deputy, §§ 765, 767; 183.
OFFICE, DUTIES, ETC., of, §§ 1577, 1578; 459.

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Superintendent of Public Instruction.—*Continued.*
Publication of school laws by, § 1579; 459.
May subscribe for school journal containing decisions, etc., § 1581; 460.
Reports of, §§ 1582. 1583; 460.
May appoint teachers' institutes, § 1584; 460.
Appeals to, from county superintendents, § 1835; 522.
Salary of, § 3760; 944.

Superintendent of Weights and Measures.
Appointment and duties of, §§ 2052–2056; 576.
Salary of, § 3763; 944.

Superior Courts in Cities.
Establishment, jurisdiction, officers and proceedings of, 16 G. A., ch. 143; 140.
Legalized, 16 G. A., ch. 22; 143.

Supersedeas Bond. §§ 3186–3193; 843.

Supervisor Districts.
Establishment of, 15 G. A., ch. 39; 69.

Supervisor of Highways.
See HIGHWAY SUPERVISORS.

Supervisors.
See BOARD OF SUPERVISORS.

Supplemental Pleading.
When allowable, § 2731; 730.

Supplies of Penitentiary.
To be furnished on contract, §§ 4773–4775; 1150.

Support.
Of convicts in penitentiary; appropriation for, §§ 4783–4787; 1152.
Of insane persons:
When not admitted to hospital, §§ 1403–1406; 391.
Liability of estates for, § 1433; 398
Of minors, sale of property for, § 2257; 624.
Of poor:
By relatives, §§ 1330–1351; 377.
Contract for, §§ 1369–1371; 383.

Supreme Court.
ORGANIZATION OF, place of holding, general provisions, §§ 133–145; 32.
May order new edition of state reports, § 158; 34.
What evidence to go to, in trial of errors, § 2741; 732.
Not to regard exception unless the ruling is material and prejudicial, § 2836; 756.
APPELLATE PROCEEDINGS in, §§ 3163–3215; 835.
May make rules for allowing appeals from orders, § 3166; 835.
Approval of appeal bond by, § 3187; 843.
May order additional appeal bond, § 3188; 844.

Supreme Court.—*Continued.*
Power of, to enforce mandates by fine and imprisonment, § 3209; 847.
Executions from, § 3215; 849.
May grant writ of certiorari, § 3217; 850.
May issue order of mandamus, § 3374; 877.
Action to enjoin executions from, where brought, n. § 3396; 882.
APPEALS TO, IN CRIMINAL CASES:
By whom and how taken, §§ 4520–4524; 1108.
Trial of, §§ 4533–4545; 1109.
From judgment of district court, upon appeals from justices in criminal cases, § 4706; 1137.
Judicial power vested in. Const., Art. 5, § 1; 1233.
Jurisdiction of, Const., Art. 5, § 4; 1233.
JUDGES OF, see JUDGES OF SUPREME COURT.

Supreme Court Reporter.
Duties, etc., of, §§ 154–160; 34.
Preparation of reports for publication by, 18 G. A., ch. 60, § 1; 35.
Compensation of, 18 G. A., ch. 60, § 9; 37.
Election of, § 583; 157.
Bond of, § 678; 172.
Vacancy in office of, how filled, § 783; 186.

Supreme Court Reports.
Copyright of; new edition may be ordered, § 158; 34.
Distribution of, § 159; 35.
Publication of, 18 G. A., ch. 60; 35.

Sureties.
On official bonds, qualification of, affidavit, §§ 249, 250; 55.
—— number of; shall be freeholders, § 673; 172.
—— discharge of, §§ 775–777; 185.
May plead usury, n. § 2080; 582.
May require creditor to sue, §§ 2108–2110; 591.
On guardian's bond, not liable in case of sale of property, n. § 2246; 623.
Of administrator, may secure his removal, § 2496; 663.
Actions by, to be prosecuted by ordinary proceedings, § 2512; 666.
May join in action against principal for money paid, n. § 2545; 680.
Jointly or severally bound, action against, § 2550; 681.
May avail himself by way of counter claim of debt due principal, § 2661; 716.
Summary proceedings by, against principal or co-sureties, §§ 2906–2910; 779.
Attorneys or officers not to be received as, § 2931; 782.

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Sureties.—*Continued.*
On bonds for release of property in attachment, judgment against, § 2995; 800.
May have property of principal first exhausted under execution, §§ 3039–3042; 808.
On stay bond, qualification of, § 3062; 814.
——— cannot stay judgment on the bond, § 3063; 814.
——— bond operates as judgment against, § 3064; 814.
——— execution against, § 3067; 815.
——— may terminate stay, § 3069; 815.
May prevent stay of execution against principal, § 3068; 815.
On replevin bond, bound by judgment, n. § 3229; 854.
On bonds of officers, extent of liability of, § 3369; 875.
On replevin bond, cannot appeal from judgment against principal, n. § 3575; 907.
On bail bond, liability of, n. § 4574; 1115.

Surgeon.
May be summoned as witness at inquest; compensation, § 368; 86.
Not to testify as to privileged communications, § 3643; 920.

Surgeon General.
In militia, 18 G. A., ch. 74, § 49; 268.

Surplus.
Of proceeds of attached property returned to defendant, § 3014; 804.
Of proceeds of sale under execution, to be paid to defendant, § 3084; 819.
Of proceeds of sale under foreclosure, disposition of, § 3324; 869.

Surrender.
Of property in proceedings under execution, how enforced, § 3153; 830.
Of defendant, by bail, §§ 4593–4595; 1119.

Survey.
By county surveyor, notes, etc., of, §§ 369–378; 86.
Must be allowed by opposite party in action to recover real property, § 3256; 859.
Of lands, to establish permanent lines and corners, 15 G. A., ch. 8; 862.
See GOVERNMENT SURVEY.

Surveyor.
May be employed by referees in setting off widow's share, § 2446; 655.
May be employed by referees in partition proceedings, § 3291; 865.
Field notes and plat of, as evidence, § 3701; 933.
Compensation of, in laying out highway, § 3824; 963.
See COUNTY SURVEYOR.

Surveyor General.
Copies of maps and papers in office of, receivable in evidence, § 3707; 933.

Survival.
Of actions, § 2525; 669.

Surviving Husband or Wife.
Rights of, in homestead, §§ 2007–2010; 567.

Surviving Partner.
May sue as real party in interest, n. § 2543; 678.

Survivors.
Of parties jointly liable, action against, § 2550; 681.

Suspension.
Of attorney, §§ 217–223; 50.
Of state officers, §§ 759–765; 182.
Of clerk or sheriff, §§ 756–758; 182.

Suspension of Execution.
Of sentence of death, 17 G. A., ch. 165; 972.

Swamp Lands.
Belonging to county, taxation of, § 801; 192.

Swearing.
Includes affirming, § 45, ¶ 12; 10

Swearing of Jury.
In civil cases, n. § 2779; 741.
In trial upon information before justice, § 4082; 1133.

Sweet Potatoes.
Weight of, per bushel, § 2049; 575.

Swine.
To be restrained from running at large, § 1445; 401.

Swindling.
By three-card monte, etc., punished, 16 G. A., ch. 102; 1031.

Taking Private Property for Public Use.
For mill-dams and races, §§ 1188–1206; 321.
BY CITY:
For streets, squares, etc., § 470; 114; and § 1270; 342.
For water-works, § 474; 115.
BY RAILWAYS:
For what purposes, §§ 1241–1243; 333.
Manner of condemnation, §§ 1244–1253; 334.
Appeals, §§ 1254–1259; 338.
For channels and ditches, 18 G. A., ch. 191; 339.
Non-user of right of way, §§ 1260, 1261; 340.
Crossings of highways, how to be constructed, §§ 1262–1267; 341.
Private crossings, § 1268; 342.
For turnpikes, roads, or bridges, § 1269; 342.
By state, §§ 1271, 1272; 343.

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Taking Private Property for Public Use.—*Continued.*
For street railways over highways, 18 G. A., ch. 32; 343.
For public ways to mines and quarries, 15 G. A., ch. 34; 344.
Rights of riparian owners protected, 15 G. A., ch. 35; 345.
For school-house sites, §§ 1825–1828; 520.
Exercise of right of; compensation; advantages, Const., Art. 1, § 18; 1220.

Talesmen.
Selection of, by sheriff, to fill jury, § 2775; 740.
May be summoned to fill jury in criminal cases, § 4596; 1085.
In trial, upon information before justice, § 4679; 1133.

Tally Lists.
To be kept in canvass of votes, § 626; 164.
Preservation of, § 630; 165.

Taxation.
Lands owned by U. S. exempt from, § 4; 1.
Territory annexed to city cannot be exempted from, n. § 426; 98
Lands not laid out, included within city limits, not subject to, 16 G.A., ch 47, § 4; 102.
Of carts, taverns, saloons, peddlers, etc., by cities, § 463; 108.
Of dogs and domestic animals by cities and towns, § 499; 126.
City property not liable to, for township highway tax, n. § 527; 134.
EXEMPTION FROM, §§ 797–800; 189.
WHAT SUBJECT TO, how listed, §§ 801–817; 192.
Of national banks, §§ 818–820; 197.
Of savings banks, 15 G. A., ch. 60, § 28; 319.
Of railway property, §§ 1317–1323; 360.
Of sleeping and dining cars, 17 G. A., ch. 114; 382
Of telegraph lines, 17 G. A., ch. 59; 375.
School-lands subject to, after contract of purchase, § 1836; 526.
Church property, when leased, subject to, § 1921; 542
Uniformity in, n. Const., Art. 1, § 6; 1215.
Is not taking private property without due process of law, n. Const., Art. 1, § 9; 1216.
Is not taking private property for public use without due compensation, n. Const., Art. 1, § 18; 1220.
Power of, vested in general assembly, n. Const., Art. 3, § 1; 1224.
Of property of corporations, Const., Art. 8, § 2; 1237.

Taxation of Attorneys' Fees.
By the court, in action on contract, 18 G. A., ch. 185; 785.
——— in action on attachment bond, § 2961; 790.

Taxation of Costs.
In civil actions, §§ 2933–2948; 783.

Tax Books.
Form of, § 821; 198.
Correction of errors in, by county auditor, § 841; 205.
Auditor to note in, lands sold and not redeemed, § 842; 205.
Delivery of, to county treasurer, § 843; 206.

Tax Certificate.
Action for recovery of real property cannot be brought against holder of, n. § 3246; 857.
Owner of, may recover damages for waste or trespass, § 3343; 872.

Tax Deed.
Void for fraud of officer at sale, § 885; 218.
Notice of application for; execution of; form, §§ 894–896; 222.
Effect of, § 897; 225.

Tax List.
To be delivered to township collector; notice of, §§ 403, 404; 91.
To be made out by county auditor, §§ 837, 838; 204.
Correction of errors in, by county auditor, § 841; 205.
Auditor to note in, lands sold and not redeemed, § 842; 205.
Of highway taxes, §§ 973–975; 247.
Compensation for publication of, § 3833; 966.

Tax Payers.
Intervention by, in action against county, n. § 2683; 720.
Not competent as jurors in action against city, n. § 2772; 739.
May join in petition for injunction against public officer, n. § 3386; 879.

Tax Receipt.
Treasurer to give, § 867; 211.
For taxes voted in aid of railways, 16 G. A., ch. 123, § 5; 371.

Tax Sales.
When to be made, notice of, continuation, manner of, etc., §§ 871–886; 213.
Wrongfully made, effect of, §§ 899–901; 229.
Of school land, or land covered by school fund mortgage, 17 G. A., ch. 101; 229.
Not invalid for assessment to wrong person, § 904; 231.
Purchasers at, have color of title, § 1982; 559.

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Tax Titles.
Validity, etc., of, n. § 897; 225.
Cannot be bought in by county to protect school fund, n. § 1860; 527.
Tax Warrant.
Not essential to authorize treasurer to collect taxes, n. § 843; 206.
Taxes.
To be levied to pay county bonds, § 291; 64.
To pay funding bonds, 17 G. A., ch. 58, § 3; 66.
Question as to levy of, for certain purposes, submitted to vote, § 303, ¶ 24, § 309; 71.
Vote of majority of board of supervisors necessary to levy of, § 305; 74.
Voted for special purposes, to be paid in money, § 309; 75.
Provision to levy, must accompany proposition to expend, § 311; 76.
Limit as to rate of, § 312; 76.
Specially levied and not called for, transferred to general fund, 16 G. A., ch. 84; 77.
Separate accounts to be kept of, § 331; 81.
Levied to pay expenses of board of health, § 420; 95.
IN CITIES AND TOWNS:
Upon property for improvement of streets, § 463; 111.
For water-works, § 475; 115.
Special, upon lots, enforcement of, §§ 478, 479; 117.
——— may be certified to auditor, § 481; 118.
Special, for sewerage fund, 16 G. A., ch. 107, § 1; 17 G. A., ch. 162, § 1; 118.
To be certified to county auditor, and collected as other taxes, § 495; 124.
Limit of, § 496; 125.
For sinking fund, § 497; 125.
County treasurer to pay over, § 498; 125.
Upon dogs and other animals, § 499; 126.
STATE AND COUNTY:
Assessment of, see ASSESSMENT OF TAXES, §§ 796–853; 189.
Rebate of, by board of supervisors, § 800; 191.
Rate of, to be fixed by state board of equalization, § 835; 204.
Levy of, by board of supervisors, §§ 839, 840; 205.
For previous years, to be entered in tax book, § 845; 206.
Not brought forward remission of penalty on, 15 G. A., ch. 29; 206.
Certificate of treasurer as to amount due, §§ 848–850; 207.
Upon real property, when a lien, § 853; 208.
Taxes.
STATE AND COUNTY.—*Continued.*
Collection of, see COLLECTION OF TAXES, §§ 854–907; 208.
What receivable in payment of, §§ 854–856; 208.
When payable; collection of, by distress and sale, §§ 857–864; 209.
When become delinquent; lien of; penalty, §§ 865, 866; 211.
Erroneously exacted or paid, to be refunded, § 870; 212.
Paid by mistake, cannot be recovered, n. § 870; 212.
Paid by purchaser, recovery of, n. § 897; 225.
Upon peddlers, §§ 906, 907; 231.
Upon public shows, 16 G. A., ch. 131; 232.
STATE, SECURITY OF:
Responsibility of county to state for, § 908; 232.
——— where county treasurer is a defaulter, § 909; 232.
Highway, see HIGHWAY TAX, §§ 969–971; 246.
To pay for construction of drains, 18 G. A., ch. 85, § 5; 328.
IN AID OF RAILWAYS:
Conditions of, changed, § 1291; 352.
May be voted by township, town or city; method; conditions, etc., 16 G. A., ch. 123; 369; and 17 G. A., ch. 173; 372.
Forfeiture of, 16 G. A., ch. 123, § 7; 372; and 18 G. A., ch. 192; 372.
For support of poor, § 1381; 385.
For orphans' fund, § 1639; 472.
For county high school, §§ 1702, 1703; 487.
IN SCHOOL DISTRICTS:
May be voted by district township, § 1717; 490.
Not to be levied after third Monday in May, § 1733; 496.
How certified, apportioned and levied, §§ 1777–1780; 503.
To pay money borrowed from school fund, § 1788; 507.
For school houses, in independent districts, § 1807; 511.
To pay school bonds, 18 G. A. ch. 132, § 6; 519.
Payment of, gives color of title, § 1983; 559.
Homestead liable for, § 1991; 562.
Have priority under assignments, 16 G. A., ch. 14; 596.
On property of heir or devisee to be paid by administrator, §§ 2403, 2405; 647.
Due from estate, to be paid by administrator, § 2420; 650.
Parties in actions to enjoin collection of, n. § 2545, 2549; 680.
To be levied by municipal corporation to pay judgment, § 3019; 810.

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Taxes.—*Continued.*
Replevin of property levied on for, n. § 3225; 852.
Illegal, injunction to restrain collection of, n. § 3386; 879.
Treasurer to give information as to, §§ 3794, 3795; 955.
For religious purposes, not to be levied, Const., Art. 1, § 3; 1215.
Local and special laws for assessment and collection of, not allowed, Const., Art. 3, § 30; 1228.
To be voted to pay special state indebtness, Const., Art. 7, § 5; 1236.
Law imposing, continuing or reviving, to distinctly state the object, Const, Art 7, § 7; 1237.

Teacher.
Discharge of, by board of directors, § 1734; 495.
Employment, qualifications and duties of, §§ 1757–1760; 500.
Examination of, certificates issued to, §§ 1766–1768; 501.

Teachers' Institutes.
Superintendent of public instruction to attend, § 1577; 459.
Appointment of; appropriation for, § 1584; 460.
Teachers required to attend, § 1762; 501.
See, also, NORMAL INSTITUTES, § 1769; 502.

Telegraphs.
Construction and operation of, §§ 1324–1329; 374.
Taking of private property for, § 1326; 375.
Malicious injury to, punished, § 3979; 1003.

Telegraph Companies.
Taxation of, § 811; 195; and 17 G. A., ch. 59; 375.
Place of bringing action against, § 2582; 689.

Tenant.
Does not have color of title against landlord, § 1983; 559.
Holding during the life of another, liable for proportion of rent due at termination of estate, § 2011; 568.
Wilfully holding over, liable for double rental value, § 2012; 568.
Attornment of, to stranger, void, § 2013; 568.
Presumed to be tenant at will until contrary is shown, § 2014; 568.
Notice to quit, what sufficient, §§ 2015, 2016; 569.
Landlord's lien, §§ 2017, 2018; 569.
Action by, to recover property taken under landlord's attachment, § 2575; 687.
May have landlord substituted in action to recover real property, §§ 3252, 3253; 858.

Tenant.—*Continued.*
Liability of, in action to recover real property, § 3264; 859.
Disposition of interest of, in partition proceedings, § 3306; 866.
Liability of, for waste, § 3332; 871.

Tenant at Will.
Tenant presumed to be, until contrary is shown, § 2014; 568.
Tenancy of, how terminated, § 2015; 569.

Tenant for Life.
Interest of, in proceeds of property sold in partition proceedings, § 3306; 866.
Liable for waste, § 3332; 871.

Tenants in Common.
Conveyance to two or more, creates the relation of, § 1939; 546.
Occupying claimant and owner are, when, § 1981; 559.
May have homestead interest, n. § 1988; 560.
When possession of, is adverse to cotenant, n. § 2529; 671.
Cannot take advantage of exception in statute of limitations, in favor of minor co-tenant, n. § 2535; 676.
Redemption of interest of, from sale under execution, § 3122; 826.
Action by, to recover real property, § 3248; 858.
Liable for waste, § 3332; 871.

Tender.
Of property or labor, under contract, §§ 2098–2102; 589.
On instrument payable in money, § 2103; 589.
Of money or property, §§ 2104–2107; 589.
How kept good after suit brought, n. § 2104; 589.
In joint action against heirs and devisees of estate: § 2486; 661.
Judgment upon, n. § 2859; 766.

Term of Office.
Of officers of general assembly, § 13; 3.
Of officers in general, when to commence, § 576; 156.
To continue until successor is qualified, § 784; 187.
Length of, in particular cases, §§ 580–590; 157; and Const., Art. 3, §§ 3, 5; Art. 4, §§ 2, 3, 15, 22; Art. 5, §§ 3, 5, 11–13; 1225.

Term of Service.
Of militia, 18 G. A., ch. 74, § 17; 263.

Terms of Court.
Supreme, where to be held, §§ 133–135; 32.
DISTRICT AND CIRCUIT:
To remain as fixed, § 163; 38.
Number of, how fixed, § 165; 38.
Special, how ordered, § 166; 39.

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Terms of Court.
DISTRICT AND CIRCUIT.—*Continued.*
Special, held to try cases transferred by change of venue, expenses of, how paid, § 2598; 694.
Change in time of holding, not to affect notices served, § 2599; 694.
What considered first day of, for purposes of pleading, § 2637; 707.
At which causes may be tried, §§ 2744, 2745; 735.

Testimony.
On inquest, to be reduced to writing, § 358; 85.
Of plaintiff alone, not sufficient to entitle to divorce, § 2222; 617.
Continuance of cause to procure, § 2750; 736.
Order of introduction of, § 2779; 741.
Instruction of jury as to weight, sufficiency, etc., of, n. § 2889; 743.
Admitted after case closed, to correct oversight or mistake, § 2799; 747.
Effect of general objection to, n. § 2832; 754.
Upon a motion, form of, § 2913; 780.
HOW PROCURED, §§ 3671–3684; 929.
PERPETUATION OF:
In civil cases, §§ 3745–3750; 940.
In criminal cases, § 4572; 1115.
Upon preliminary examination before magistrate, to be written out, § 4241; 1057.
Before grand jury, minutes of, to be preserved by clerk, § 4275; 1063.
In criminal trials, minutes of, to be kept, § 4436; 1094.
See EVIDENCE.

Texas Cattle.
Bringing into the state, or keeping, punished, §§ 4058, 4059; 1024.

Text Books.
Change in, how made, § 1728; 494.

Thanksgiving Day.
Deemed holiday as to negotiable paper, § 2094; 587.

Theaters.
Regulation of, by city, § 460; 107.

Things in Action.
How levied on, sold, and assigned under execution, § 3046; 809.

Thirtieth Day of May.
Deemed holiday as to negotiable paper, § 2094; 587.

Thistles, Canada.
Highway supervisor to cause destruction of, § 995; 252.
Person or supervisor allowing, to mature, punished, § 4062; 1025.

Threats to Extort.
Punishment for, § 3871; 979.

Three-card Monte.
Swindling by means of, punished, 16 G. A., ch. 102; 1031.

Threshing Machines.
Running of, without boxing tumbling-rod, punished, § 4064; 1025.

Tickets in Lottery.
Sale of, not to be allowed, Const., Art. 1, § 28; 1228.

Tie Vote.
In election of township officer, how decided; § 632; 165.
——— of county officer, how decided, §§ 643, 644; 167.

Timber.
Cutting of, by occupying claimant, damages for, § 1985; 569.
Treble damages for injury to, § 3335; 871.
Use of, by occupant, during period of redemption, §§ 3340, 3341; 872.
——— by occupant of public land, § 3342; 872.
Setting fire to, and burning, punished, §§ 3889, 3890; 982.
Cutting down or carrying away, punished, § 3933; 1005.

Time.
Computation of, § 45, ¶ 23; 11.
For filing pleadings, §§ 2635, 2636, 2638; 707.
Denial concerning, how made, § 2701; 726.
When material, how stated; when immaterial, need not be stated nor proved, § 2702; 726.
Of commencing civil actions, limitation of, § 2529; 671.
Of commencing criminal actions, §§ 4165–4170; 1046.
Of commission of offense need not be stated in indictment, § 4301; 1070.

Timothy Seed.
Weight of, per bushel, § 2049; 575.

Title.
Of act to contain reference to Code, § 38; 7.
——— subject to be expressed in, Const., Art. 3, § 29; 1228.
Of cause, not to be changed, § 2721; 729.
To personal property, vests in whom, upon failure to take out administration, n § 2367; 641.
——— vests in purchaser at sale under chattel mortgage, § 3312; 867.
To REAL PROPERTY:
In state or county, how acquired; management and sale of, §§ 1910–1919; 540.
Person having, deemed in possession; § 1928: 544.
Court may instruct jury as to, n. § 2789; 743.
Action to quiet, §§ 3273-3276; 861.

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Title.
To Real Property.—*Continued.*
Actions affecting, before justice, transfer of, § 3535; 903.
In forcible entry and detainer, how set up by plaintiff, § 611; 913.
Not to be investigated in action of forcible entry and detainer, § 3620; 915.
Jurisdiction of justices not to extend to cases involving, Const., Art. 11, § 1; 1242.
Title Bond.
Foreclosure of, §§ 3329, 3330; 870.
Tolls.
Illegal, penalty for taking, § 1023; 257.
Penalty for refusal to pay, § 1025; 257.
Toll Bridges.
Franchises of, how taxed, § 801; 192.
License and right of way for; rates of toll, §§ 1003–1010; 254.
General provisions as to, §§ 1019–1030; 257.
Railway companies may construct, § 1031; 258.
Ton.
Standard of, § 2043; 574.
Tombs.
Desecrating, punished, § 4017; 1011.
Destroying or injuring, punished, § 4021; 1013.
Tools.
Burglars', possession of, with intent to commit crime, deemed misdemeanor, 15 G. A., ch. 13; 983.
For counterfeiting, making or having in possession, punished, § 3931; 995.
Tort.
Of wife, liability of husband for, § 2205, n. § 2212; 613.
Attachment in actions for, § 2955, n. § 2953; 789.
On navigable river, jurisdiction of federal courts over, n. § 3432; 888.
Town.
Term includes what, § 45, ¶ 16; 10.
Towns.
Unincorporated, changing names of, 16 G. A., ch 146; 77.
Incorporated, provisions applicable to, §§ 511–516; 129.
See, also, Cities and Incorporated Towns.
Town Lots.
Instruments affecting, how recorded, § 1947; 550.
Town Plats.
Description and conveyance of lots in, § 559; 147.
Plat of, to be signed, acknowledged and recorded, § 560; 148.
Dedication of streets, etc., in, § 561; 148.
Town Plats.—*Continued.*
Streets in, how altered or vacated, § 562; 149.
Vacation of, by proprietors, §§ 563–567; 149.
——— by proceedings in court, 15 G. A., ch. 61; 154.
Penalty for selling or leasing lots in, until plat is recorded, § 572; 151.
Land laid out in, to be free from incumbrance, 18 G. A., ch 53, § 1; 152.
Recorded plat of, shall give bearing and distance from corner of congressional subdivision, 17 G. A., ch. 53, § 3; 152.
Re-survey and re-platting of, 15 G.A., ch. 54; 153.
Extent of homestead within, § 1996; 565.
Special laws for vacation of, not allowed, Const., Art. 3, § 30; 1228.
Townships.
Board of supervisors empowered to organize, change boundaries of, and name, § 303, ¶ 7; 70.
Organization, change in number and boundaries of, §§ 379–381; 88.
Division of, when containing city, §§ 382–384; 88.
First election in; how called and conducted, §§ 385–388. 89.
Officers of, duties, etc., §§ 389–411; 89.
Person refusing to serve as officer of, liable to penalty, § 394; 90.
Notice of officers elected, to be sent to auditor, § 397; 91.
Changing names of, §§ 412–414; 94.
Not to give aid to sectarian institutions, § 552; 146.
May vote taxes in aid of railways, 16 G. A., ch. 123; 369.
Declared school districts, § 1713; 489
Boundaries of, not to be changed so as to divide school district, § 1799; 509.
Township Assessor.
To take census, §§ 113–115; 24.
Election of, in townships containing cities, §§ 389, 390; 89.
When to be elected, 18 G. A., ch. 161; 158.
To make list of voters, § 594; 159.
Method of voting for, 17 G. A., ch. 71; 163.
Bond of, § 678; 172.
Listing and assessment of property by, §§ 822–828; 199.
To meet with board of equalization and correct assessment books, § 831; 202.
To return list of persons subject to military duty, 18 G. A., ch. 74, § 2; 260.
To make enumeration of soldiers' orphans, §§ 1635–1637; 471.
Compensation of, § 3810; 960.
Township Board of Equalization.
Trustees to constitute, duties, etc., of, §§ 829–831; 201.

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Township Board of Health.
Trustees to constitute; powers of, §§ 415–420; 94; and 18 G. A., ch. 151, §§ 13, 14; 453.
Township Clerk.
Entitled to copy of session laws, § 40; 7.
To be elected, § 389; 89.
Powers and duties of, § 395–397; 90.
Time of election of, 18 G. A., ch. 161; 158.
With trustees, constitutes board of registry, § 595; 159.
To keep register of elections, § 596; 159.
To act as clerk of elections, § 606 161.
To preserve poll-book and register, § 629; 165.
To notify candidates to appear and decide tie vote, § 632; 165.
To post up list of township officers, § 633; 165.
Bonds of township officers to be approved by, § 680; 173.
Resignation of, § 782; 186.
To record filling of vacancy in township office by trustees, § 795; 188.
Bond of, custody of machinery, and compensation, § 970; 246.
To furnish supervisors with plat of highways, § 972; 247.
To make and certify highway tax-list, §§ 973–975; 247.
To fill vacancy in office of highway supervisor, § 978; 248.
To notify highway supervisor of his election, § 979; 249.
Duties of, in proceedings for drainage of swamp or marsh lands, §§ 1217–1223; 328.
To record marks and brands of animals, §§ 1480, 1481; 408.
To be clerk of local board of health, 18 G. A., ch. 151, § 14; 454.
Compensation of, § 3809; 960.
Township Collector.
Election, qualification, powers, duties, etc., of, §§ 400–411; 91.
Township Officers.
Refusing to qualify and serve, subject to penalty, § 394; 90.
Resignations of, to whom made, § 782; 186.
Vacancies, how filled, § 783; 186.
Township Trustees.
Number to be elected, § 389; 89.
To designate place for holding elections, § 391; 90.
To keep record of proceedings, § 392; 90.
To act as overseers of the poor, fence viewers, board of equalization, and board of health, § 393; 90.
As township board of health, powers, and duties of, §§ 415–419; 94; and 18 G. A., ch. 151, §§ 13, 14; 453.
To certify tax to pay expenses as board of health, § 420; 95.
Township Trustees.—*Continued.*
May purchase property for cemeteries, and levy tax to pay for same, 16 G. A., ch. 130, §§ 3, 4; 96.
Election of, 17 G. A., ch. 12; 158.
With clerk constitute board of registry, § 595; 159.
Not required to give bond, § 674; 171.
To fill vacancy in office of justice or constable, §§ 794, 795; 188.
Powers and duties of, as board of equalization, § 829; 201.
Levy and apportionment of highway tax by, §§ 969–971; 246.
Application to, for drainage of swamp or marsh lands; proceedings; damages assessed; repairs, §§ 1217–1226; 328.
May submit to vote, question of changing conditions upon which railway aid tax was voted, § 1291; 352.
May compel relatives to support poor person, § 1333; 377.
May seize property of person abandoning husband, wife or children, and leaving them chargeable on the public, §§ 1343–1346; 378.
May give warning to prevent pauper from acquiring a settlement, or remove him to county of settlement, §§ 1356, 1357; 380.
May relieve poor outside of poorhouse, §§ 1361–1363; 381.
To have charge of poor where there is no poorhouse, §§ 1364–1368; 382.
To assess damages for which stock is distrained, §§ 1454, 1455; 404.
To decide controversies as to fences, §§ 1490–1503; 414.
To prevent waste on school lands, § 1858; 527.
Compensation of, § 3808; 959.
Trains.
Speed of, within city limits, may be regulated by city, § 456; 106.
——— at depot grounds, limit of, § 1289; 350.
Throwing stones, or discharging firearms at, punished, 16 G. A., ch. 148, § 1; 985.
Getting on or off, while in motion, punished, 16 G. A., ch. 148, § 2; 985.
Transcript.
Of records, board of supervisors may have made and certified, §§ 1971–1974; 557.
Of certificate of limited partnership to be filed in counties where business is carried on, § 2152; 604.
Of register of marriages, as evidence, § 2197; 612.
Of proceedings as to property of minor, § 2245; 623.
Of record of will, as evidence, § 2342; 638.

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Transcript.—*Continued.*
OF JUDGMENT:
In action affecting real property, to be filed in county where property is situated, § 2629; 706.
To be filed in county where land is situated to effect lien, §§ 2884 2885; 773.
To be filed when execution issues to another county, § 3031; 807.
Execution not to issue on, n. § 3031; 807.
OF JUDGMENT IN FEDERAL COURT:
Filing of, to effect lien, 17 G. A., ch. 129; 773.
OF JUDGMENTS BEFORE JUSTICES:
In case of set-off of mutual judgments, §§ 3557-3565; 906.
Filing of, with clerk of circuit court, §§ 3567, 3568; 907.
Filed in circuit court, becomes judgment of that court, n. § 3496; 882
Can only be filed in court of same county, n. § 3567; 907.
Rendered by predecessor, how given, § 3627; 915.
Of notes of short-hand reporter, admissible in evidence; fees for, § 3777; 947.
Of public paper or record, fee for, § 3819; 962.
ON APPEAL TO SUPREME COURT:
What sufficient to entitle to review, § 3170; 837.
To be forwarded by clerk, § 3179; 840.
Filing of, §§ 3181-3183; 840.
What to contain, § 3184; 841.
How perfected, § 3185; 842.
In criminal cases, § 4525; 1109.
ON APPEAL IN JUSTICES' COURTS, §§ 3583-3587; 909.
On appeal, need not be forwarded by justice or clerk until fees are paid, n. § 3837; 966.
Upon change of place of trial in civil cases, §§ 2594, 2595; 693.
Upon change of venue in criminal cases, §§ 4377, 4378; 1083.

Transfer.
OF STOCK:
How made, § 1078; 273.
In insurance companies, how made, § 1134; 287.
——— pending proceedings, not to release stockholder, § 1151; 295.
Of freight and passengers by railways connecting at Council Bluffs, §§ 1310, 1311; 359.
Of action to proper docket, § 2514; 667.
Of interest in action, not to work abatement, § 2561; 684.
Of real property, fee for; entry of, in transfer book, § 3797; 955.
Of criminal causes to another county, by judge, §§ 4383, 4334; 1084.
——— to county having jurisdiction, §§ 4446-4449; 1096.

Transfer Books.
To be kept by auditor, entries in, etc., §§ 1948-1954; 551.

Transfer Company.
Liability of, for injury to baggage, § 2183; 609.

Transferee.
Of negotiable instrument, rights of, n. § 2 82; 584.

Transportation.
Of passengers and freight, maximum rates for, § 1305; 357; and 15 G A., ch. 68; 363.
To be furnished convict discharged from the penitentiary, § 4779; 1151.

Travelers.
Liability of common carriers for injury to baggage of, § 2183; 609.

Treason.
Defined and punished; not bailable, § 3845; 969.
Misprision of, defined and punished, § 3846; 969.
Evidence in prosecutions for, § 3847; 969.
Definition of; evidence necessary to convict, Const., Art. 1, § 16; 1220.
Sentence for, may be suspended by governor; pardons to be by general assembly, Const., Art. 4, § 16; 1232.

Treasurer of City.
See CITY TREASURER.

Treasurer of County.
See COUNTY TREASURER.

Treasurer of Incorporated Town.
Election of, § 514; 130.

Treasurer of School District.
Election of, § 1721; 492.
Vacancy in office of, how filled, § 1730: 495.
Bond of, § 1731; 495.
Examination of accounts of, § 1732; 495.
Compensation of, § 1733; 495.
Powers and duties of, §§ 1747-1751; 498.

Treasurer of State.
OFFICE, DUTIES, ETC., OF, §§ 75-82; 17.
May establish state depository, 17 G. A., ch. 57; 18.
To be furnished with stationery, fuel, etc., § 120; 25
Office of, to be inspected quarterly, § 132; 28.
May administer oaths, § 277; 59.
To endorse date of receipt on warrant, § 551; 147.
When to be elected, § 581; 157.
Bond of, §§ 678, 679; 172.
May appoint deputy, §§ 766-768; 183.
Required to receive treasury notes for taxes, or school fund, § 856; 209.

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Treasurer of State.—*Continued.*
Liable to penalty for discounting warrants, § 911; 233.
——— for loaning public money, § 912; 233.
To keep funds distinct, § 918; 234.
Salary of, § 3758; 943.
Election, term and duties of, Const., Art. 4, § 22; 1233.

Treasurers of State Institutions.
Of Hospital for the Insane, §§ 1384, 1390; 386.
Of State University, §§ 1593–1595; 462.
Of Agricultural College, § 1614; 467.
Of Soldiers' Orphans' Homes, § 1629, 471.
Of Asylum for Feeble-minded Children, 16 G. A., ch. 132, § 4; 474.
Of State Reform School, § 1647; 476.
Of College for the Blind, § 1673; 481.
Of Institution for the Deaf and Dumb, § 1690; 483.
Of State Normal School, 16 G. A., ch. 129, §§ 3, 4; 485.

Treasury.
Money not to be drawn from, except upon appropriation, Const., Art. 3, § 24; 1227.

Treasury Notes.
Receivable for taxes, § 855; 209.

Trees.
Exemption from taxation on account of, § 798; 191.
Not to be cut down by highway supervisor, § 989; 251.
Treble damage for injury to, § 3335; 871.
Injury to, or destruction of, punished, § 3890; 985.
Maliciously cutting down or injuring, punished, § 3981; 1004.

Trespass.
In cemeteries, punished, 17 G. A., ch. 106, § 2; 96.
To property, when action for, accrues, § 2550; 674.
Not necessary to constitute larceny, n. § 3906; 988.
Wilful, defined and punished, §§ 3983, 3984; 1005.
See, also, MALICIOUS MISCHIEF AND TRESPASS, §§ 3977–3992; 1003.

Trial.
Of causes at special term of court, § 166; 39.
Of contested election for county officer, §§ 695–717; 175.
——— for state officer, §§ 723–729; 178.
——— for member of general assembly, §§ 732–736; 179.
——— for governor, §§ 742–745; 180.
Of proceedings to remove officer, § 754; 181.
In proceedings against relative of poor person, to compel support, § 1349; 379.

Trial.—*Continued.*
Of issues in action by occupying claimant, § 1978; 559.
Of objections to claims against estate of insolvent, § 2121; 594.
Of action for divorce, cannot be before referee, n. § 2222; 617.
Of proceedings by apprentice against master, §§ 2290, 2291; 649.
Of equitable issues in actions by ordinary proceedings, § 2517; 667.
CHANGE OF PLACE OF, in civil actions in court of record, §§ 2590–2598; 691.
——— in civil cases before justices of the peace, §§ 3533, 3534; 903.
Order of, in case of separate trial of issues, § 2630; 706.
——— in case of separate trials of defendants jointly indicted, n. § 4424; 1092.
Not to be postponed for failure to answer interrogatories to pleadings, § 2696; 725.
Separate, when to be granted, § 2746; 735.
——— in criminal cases, § 4424; 1092.
Of challenge to jurors, §§ 2766, 2767, 2773, 2774; 739.
Order of, §§ 2779–2783; 741.
By referee, how conducted, §§ 2817, 2820; 751.
Of statement of omitted fact, upon motion for new trial, §§ 2842, 2843; 762.
Decision in, to be upon the merits, § 2845; 763.
In attachment, for debts not due, § 2957; 790.
Of intervention in attachment proceedings, § 3016; 804.
Of summary proceedings against debtor, §§ 3138, 3139; 828.
Of petition for new trial after term, § 3155; 832.
In supreme court, on appeal, §§ 3194–3201; 845.
——— *de novo*, in what cases allowed, how secured, n. § 2742; 733.
——— new evidence not to be received upon, n. § 3163; 835.
As to question of appellant's right to prosecute appeal, § 3213; 849.
In proceedings by certiorari, § 3222; 851.
In partition proceedings, § 3283; 864.
Of appeals from justices, §§ 3587, 3590–3592; 909.
OF CIVIL ACTIONS IN COURTS OF RECORD:
Issues divided and defined, §§ 2737, 2738; 731.
——— how tried, §§ 2739–2747; 732.
Trial defined, § 2739; 732.
Of issues of fact to be by jury, § 2740; 732.
When to be had, §§ 2744, 2745; 735.
Continuances, §§ 2748–2760; 735.

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Trial
Of Civil Actions in Courts of Record.—*Continued.*
Selection of jury, §§ 2761–2778; 738.
Order of trial, §§ 2779–2783; 741.
Instructions, §§ 2784–2789; 742.
Rules regarding juries, §§ 2790–2802; 746.
Verdict, §§ 2803–2814; 748.
Reference, §§ 2815–2830; 750.
Exceptions, §§ 2831–2836; 753.
New trial, §§ 2837–2843; 756.
Dismissal of action, §§ 2844–2848; 763.
Judgment, §§ 2849–2863; 764.
Of Civil Actions before Justices:
When to commence, § 3525; 902.
Postponement, § 3526; 902.
Continuances or adjournments, §§ 3527–3529; 902.
Change of place of, § 3533; 903.
By justice, if jury not demanded, § 3537; 904.
Default, and dismissal of action, §§ 3538–3543; 904.
Upon default being set aside, § 3544; 905.
By jury, §§ 3547–3550; 905.
Verdict, § 3551; 905.
Judgment, § 3552; 905.
Upon Preliminary Examination before magistrate, §§ 4239–4244; 1057.
In Criminal Cases:
Issues, how tried, §§ 4347–4350; 1079.
When presence of defendant is necessary, § 4351; 1079.
In case of demurrer, §§ 4352–4358; 1079.
Pleas, §§ 4359–4367; 1081.
Change of venue, §§ 4368–4388; 1082.
Formation of the jury, §§ 4389–4397; 1085.
Challenges to the jury, §§ 4398–4418; 1086.
Of Issue of Fact upon Indictment.
Continuances, § 4419; 1089.
Order of trial, §§ 4420, 4422; 1089.
Introduction of witnesses by the state, § 4421; 1090.
Counsel not to be restricted, § 4423; 1091.
Separate trials of joint defendants, §§ 4424; 1092.
In case of conspiracy, § 4425; 1092.
Evidence, § 4426; 1092.
Confession not sufficient to warrant conviction, § 4427; 1092.
Reasonable doubt entitles to acquittal, §§ 4428, 4429; 1092.
Defendant re-committed for higher offense, § 4430; 1093.
View of premises by jury, § 4432; 1093.
Rules as to jury, §§ 4433–4435; 1093.
Minutes of testimony, § 4436; 1094.
Separate conviction or acquittal of joint defendants, § 4437; 1094.

Trial.
Of Issue of Fact upon Indictment: —*Continued.*
Questions of law and questions of fact, how determined, §§ 4438, 4439; 1094
Instructions, §§ 4440–4442; 1095.
Discharge of jury before case submitted; disposition of defendant, §§ 4443–4451; 1096.
Conduct of jury after cause submitted, §§ 4452–4459; 1097.
Verdict, §§ 4460–4478; 1098.
Bill of exceptions, §§ 4479–4486; 1101.
New trial, §§ 4487–4490; 1103.
Arrest of judgment, §§ 4491–4494; 1104.
Judgment, §§ 4495–4511; 1104.
In Criminal Cases before Justices:
Appearance and pleas of defendant, §§ 4667–4669; 1132.
Change of venue, §§ 4670, 4671; 1132.
Summoning, selection, challenging and swearing of jury, §§ 4672–4682; 1132.
Proceedings, judgment, §§ 4683–4701; 1133.

Trial by Jury.
Waiver of, § 2814; 750.
Right of, infringed by compulsory reference in law actions, n. § 2816; 751.
Right of, in general, Const., Art. 1, § 9; 1216.
——— in criminal prosecutions, Const., Art. 1, § 10; 1218.
See, also, Jury.

Troy Weight.
Standards of, § 2042; 574.

Trustees.
May be ordered to deposit money or deliver property, § 255; 55.
May sue in their own names, § 2544; 679.
Of corporations, service of notice upon, § 2612; 699.
——— appointed upon dissolution, §§ 3360–3367; 874.
Of wills, jurisdiction for appointment of, § 2312; 634.
——— required to give bond, § 2350; 639.
Of incorporated towns, not to be appointed to office nor interested in contract, § 490; 125.
——— compensation of, § 505; 127.
——— election, powers, etc., of, §§ 511–516; 129.
Of state institutions, required to take oath not to enter into contracts exceeding appropriations, § 126; 27.
——— reports of, 16 G. A., ch. 159; 28
——— shall not contract indebtedness in excess of appropriations, nor divert funds, 17 G. A., ch. 67; 30.

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Trustees.—*Continued.*
Of state institutions shall not be interested in contracts, 17 G. A., ch. 144; 31.
——— compensation and mileage of, 17 G. A., ch. 92; 965.
Trusts.
Declarations of, to be executed as conveyances, § 1934; 545.
Ultimate Facts.
To be found in special verdict, § 2807; 749.
Undertaker.
May deliver dead body to medical college, when, § 4018; 1012.
Undertakings.
OF WITNESSES:
On preliminary examination, §§ 4248–4251; 1059.
How enforced, § 4568; 1114.
Upon appeal from justice on trial under information, § 4701; 1136.
Of bail, see BAIL.
To keep the peace, see SECURITY TO KEEP THE PEACE.
Uniforms.
Of militia, 18 G. A., ch. 74, §§ 27, 28, 37–9; 265.
Uniformity.
Of operation of laws, Const., Art. 1, § 6; 1215; and Art. 3, § 30; 1228.
Of tax, n. Const., Art. 1, § 6; 1215.
Union Schools.
Establishment of, § 1726; 494.
Units.
Of measure, weight and capacity, §§ 2038–2046; 574.
United States.
Jurisdiction of, over lands owned by it, § 4; 1.
Term may include what, § 45, ¶ 15; 10.
Lien and satisfaction of judgments in courts of, 17 G. A., ch. 129; 773.
To pay expense of its prisoners in county jails, § 4735; 1143.
University.
Of the State, lands, funds, etc., of, see STATE UNIVERSITY, §§ 1585–1603; 461.
Unknown Defendant.
To be described, and name substituted when ascertained, § 2557; 684.
Service of notice in action against, §§ 2622–2625; 703.
Unknown Owner.
Assessment of real property of, § 826; 200.
Unlawful Assembly.
Defined and punished, §§ 4065–4068; 1026.
Unlawful Assemblages.
Suppression of, §§ 4149–4154; 1044.
Unmarried Woman.
May sue for her own seduction, § 2555; 683.
Unmarried Persons.
Property exempt to, § 3075; 817.
Unwritten Contracts.
See CONTRACTS.
Unwritten Laws.
How proved, § 5719; 935.
Use and Occupation.
Recovery for, n. § 3250; 858.
Limitation of recovery for, § 3261; 859.
Usurer.
Assignee of usurious contract may recover usurious interest from, § 2051; 584.
Usury.
In loans by mutual building associations, § 1186; 310.
Prohibited, penalty for taking, §§ 2079, 2080; 580.
When paid, cannot be recovered back; application of payments, n. § 2079; 580.
In chattel mortgage, effect of, n. § 3317, 867.
Vacancies.
In council of incorported town, how filled, § 513; 130.
In city council or elective city office, how filled, § 530; 135.
Occurring in public office by expiration of a full term, when filled, § 57; 156.
Occur by failure to give new bond when required, §§ 774, 778; 185.
Occur in civil offices, when; how filled, §§ 781–790; 185.
In office, possession of papers, etc., during, § 788; 187.
In boards of trustees or directors of state institutions, how filled, 17 G. A., ch. 107; 185.
In office of justice or constable, how filled, §§ 794, 795; 188.
In office of highway supervisor, how filled, § 978; 248.
In office of inspector of coal mines, how filled, 18 G. A., ch. 202, § 5, 444.
In board of trustees of State Reform School, how filled, § 1644; 476.
——— of College for the Blind, how filled, § 1684; 482.
——— of County High School, how filled, § 1711; 489.
In position of executor, occur when, how filled, §§ 2346–2349; 638.
In jury, caused by challenge to juror, how filled, §§ 2772, 2775; 739.
In referees, how filled, § 2818; 751.
In office of justice, disposition of papers and docket during, § 3626; 915.
In office of warden of penitentiary, how filled, § 4792; 1153.

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Vacancies —*Continued.*
In general assembly, how filled, Const., Art. 3, § 12; 1226.
In offices, to be filled by governor, Const., Art. 4, § 10; 1231.
Persons elected or appointed to fill, shall hold for residue of term, Const., Art. 11, § 6; 1244.

Vacation.
Of streets, alleys, etc., by city or town, § 464; 108.
Of town plats by proprietors thereof, §§ 563–567; 149.
——— by proceedings in district court, 15 G. A., ch. 61; 154.
Of injunction, §§ 3399–3402; 882.

Vagrancy and Common Beggary.
Punished, 16 G. A., ch. 69; 1043.

Vagrants.
Who deemed, § 4130; 1041.
Arrest of, and binding over, §§ 4131–4138; 1041.
Trial of proceedings against, in district court, §§ 4139–4141; 1042.
Confinement of, at labor, §§ 4142–4144; 1043.

Validity.
Of marriage, how tested, § 2233; 621.
Of sale of property by guardian, how questioned, § 2265; 626.

Valuation.
Of property of railway companies, for taxation, § 1319; 361.

Value.
Allegations of, deemed controverted, § 2712; 726.
Of property in prosecutions for larceny, how determined, n. § 3902; 986.

Variance.
Between allegations and proof, when deemed material, § 2686; 721.
When not material, cured by amendment without costs, § 2687; 721.
Failure of proof not deemed, § 2688; 721.
May be cured by amendment, § 2689; 721.

Vendee.
When taxes become a lien as against, § 853; 208.
How charged with notice of action affecting real property, §§ 2628, 2629; 705.
Foreclosure of rights of, under title bond, § 3330; 871.

Vendor.
When taxes become a lien as against, § 853; 208.
Lien of, not recognized after subsequent conveyance, unless reserved by written instrument, § 1940; 546.
——— cannot be enforced without judgment, n. § 2882; 772.
Specific attachment in action by, § 3001; 802.

Vendor.—*Continued.*
Foreclosure of title bond by, §§ 3329, 3330; 870.

Ventilation.
Of coal mines, 18 G. A., ch. 202; § 10; 445.

Venue.
In civil actions, see PLACE OF BRINGING SUIT, §§ 2576–2589; 687.
Change of, in civil actions, see CHANGE OF PLACE OF TRIAL.
Of garnishment proceedings, not to be changed, n. § 2987; 798.
Of particular offenses, §§ 4155–4164; 1044.
Change of, in criminal cases, see CHANGE OF VENUE.

Verdict.
Return of, after opening of court in another county, § 185; 42.
Amendments after rendering of, when allowable, n. § 2689; 721.
Special finding by court to have effect of, § 2743; 734.
Of majority of jury, agreement to take, § 2778; 740.
Court may direct, when, n. § 2789; 743.
Court always open to receive, § 2798; 747.
FORM OF, KINDS, ETC. § 2803–2813; 748.
May be put in form by court, n. § 2803, § 2813; 748.
Sufficiency of, n. § 2803; 748.
Sealed, § 2805; 749.
Special, §§ 2806–2808; 749.
———controls general, § 2809; 750.
———referee's report to have force of, § 2822; 752.
Setting aside of, and granting new trial, grounds for, § 2837; 756.
Concurrent, effect of, as to granting new trial, n. § 2837; 756.
Reached by lot, or quotient verdict, not valid, n. § 2837; 756.
Affidavits of jurors not receivable to impeach, n. § 2838; 761.
Must distinguish between matter in abatement and in bar, § 2851; 764.
Judgment on, §§ 2857, 2858; 765.
Judgment notwithstanding, § 2859; 766.
In action to recover real property, §§ 3258, 3259; 859.
In justice's court, form of, § 3551; 905.
——— motion to set aside not allowed, § 3559; 905.
——— judgment on, § 3552; 905.
In trial for murder, must specify degree of offense, § 3851; 971.
In prosecution for larceny, should fix value of property, n. § 3902; 986.
IN CRIMINAL CASES:
In district court, §§ 4460–4478; 1093.
Before a justice, § 4685; 1134.
If defective, will not bar second prosecution, n. Const., Art. 1, § 12; 1219.

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Verification.
Of petition for divorce, § 2222; 617.
Of claim against estate of decedent, § 2408; 648.
Of Pleadings:
When necessary, § 2669; 717.
By whom made, §§ 2670–2673; 718.
Of counter claim, § 2674; 718.
When not to be required, §§ 2675, 2676; 718.
Want of, ground for striking out, § 2677; 718.
To what applies; effect of, §§ 2678, 2679; 719.
Not required to amendments, § 2680; 719.
May be added by way of amendment, n. §§ 2669, 2689; 717.
Of answers to interrogatories attached to pleadings, § 2698; 725.
In case of inconsistent defenses, § 2710; 726.
Of bill of particulars, § 2713; 727.
Of petition in attachment, de ect in, not fatal, n. § 2951; 787.
Of answer, in proceedings to subject property to payment of judgment, § 3151; 830.
Of petition for new trial, § 3157; 833.
Of petition in replevin, § 3225; 852.
Not required to answer or reply in habeas corpus proceedings, §§ 3474, 3481; 893.
Of pleadings in actions before justices, §§ 3518, 3530; 901.
Of petition in forcible entry and detainer, § 3615; 914.

Vessels.
Taking up of, when lost, §§ 1512, 1513; 419.
Burning of, punished, §§ 3880–3885; 981.
Maliciously injuring or cutting loose, punished, § 3980; 1004.
Lading or destroying to injure owner or insurer, punished, §§ 4082, 4083; 1030.
Making of false bill of lading or affidavit of loss by owner or officer, to injure insurer, punished, §§ 4084, 4085; 1030.
Jurisdiction of offenses committed upon, § 4161; 1045.
See, also, Boats.

Veto.
Passage of bill over, § 29; 5.

View of Premises.
By jury, in civil cases, § 2790; 746.
——— in criminal cases, § 4432; 1093.

View of Original Paper.
Party entitled to, § 2730; 730.
By supreme court, how secured, § 3209; 848.

Villages.
Changing names of, 16 G. A., ch. 146; 77.
Instruments affecting lots in, how recorded, § 1947; 550.

Violation of Injunction.
Punishment for, §§ 3403–3407; 883.

Violation of Sepulchre.
Punishment for, § 4017; 1011.

Visiting Committee to Hospital for the Insane.
Report of, 16 G. A., ch. 159, § 1; 28.
Appointment, duties, etc., of, §§ 1435–1441; 559.
Compensation and mileage of, § 3826, and 17 G. A., ch. 92; 964.

Visitor of Penitentiary.
Appointment of, by governor; compensation of, §§ 4799, 4800; 1154.

Voters.
Selling or giving liquors to, on day of election, prohibited, 18 G. A., ch. 82; 441.
Bribery of, and illegal voting by, punished, §§ 3993–3997; 1007.
Influencing of, by fraud, force, or threats punished, §§ 3998–4000; 1008.
Who entitled to be, Const., Art. 2, § 1; 1223.

Wager.
Making of, punished, § 4028; 1015.
Contracts of, void, § 4029; 1015.
Money lost on, cannot be recovered, n. § 4029; 1015.

Waiver.
Of service, equivalent to acknowledgment of service, n. § 2603; 697.
Of performance, must be specially pleaded, n. § 2646; 708.
Of peremptory challenge, effect of, n. § 2771; 759.
Of trial by Jury:
What amounts to, § 2814; 750.
May be made by defendant in criminal action, n. Const., Art. 1, § 9; 1216.
Of exemption laws, n. § 3072; 815.

Walls in Common.
General provisions as to, §§ 2019–2030; 570.

Walls of Public Buildings.
Defacing of, punished, § 3986; 1005.

Warden of Penitentiary.
Qualification and duties of, §§ 4745–4751; 1145.
Shall execute process, § 4772; 1150.
Shall advertise for contracts to furnish supplies, § 4773; 1150.
Shall receive and take care of property of prisoner, § 4778; 1151.
To collect debts due the state, §§ 4789–4791; 1153.

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Warden of Penitentiary.—*Continued.*
Removal of, by governor, § 4891; 1155.
Authorized to lease convict labor, 18 G. A., ch. 149; 1156.
AT ANAMOSA:
Appointment and duties of, 16 G. A., ch. 40, §§ 5, 7; 1158.
May employ guards, 17 G. A., ch. 149; 1159.

Wards.
See GUARDIANSHIP.

Warehouse Receipts.
General provisions as to, §§ 2171–2176; 606.
False, punishment for making, § 4088; 1031.

Warehousemen.
Receipts issued by, §§ 2171–2176; 606.
Lien of, for charges, sale of unclaimed property, etc. §§ 2177–2180; 607.
Issuing false receipts, or removing property, punished, § 4088; 1031.

Warning.
To prevent poor persons from acquiring settlement, §§ 1355, 1356; 380.

Warrant.
Of Coroner:
For jury, § 352; 84.
For arrest, §§ 360–364; 85.
In proceedings against apprentice, § 2294; 629.
For arrest of debtor in summary proceedings, § 3148; 829.
For seizure of boat or raft, § 3433; 888.
Of arrest for contempt, § 3496; 896.
Of commitment for contempt, § 3498; 897.
For execution of sentence of death, 17 G. A., ch. 165; 972.
Of governor for arrest of fugitive from justice, §§ 4171–4175; 1047.
Of arrest on preliminary information, §§ 4185–4188; 1049.
Of justice for arrest on information, § 4665; 1131.
For search, only to issue, when, Const., Art. 1, § 8; 1216.
See BENCH WARRANT, §§ 4318–4326; 1074.

Warrant of Attorney.
To confess judgment, not valid, n. § 2896; 775.

Warrants.
STATE:
To be issued by auditor, § 66; 14.
In what amounts may issue, § 67; 16.
Memorandum of, by treasurer of state, § 76; 17.
When to bear interest, § 78; 17.
Duty of treasurer as to payment of, §§ 78–80; 17.
COUNTY:
Not to be issued by county auditor except upon recorded vote, § 321; 79.

Warrants.
COUNTY.—*Continued.*
To be signed and sealed, § 327; 80.
To draw interest, when, § 328; 80.
Division of, § 329; 80.
Record of, § 330; 81.
Cancellation of, § 332; 81.
OF COUNTY OR CITY:
Not to be taken by officers below par, § 556; 147.
Date of receipt to be endorsed on, by treasurer, § 557; 147.
STATE OR COUNTY:
Receivable in payment of taxes, § 854; 208.
Interest paid on, to be receipted by holder, § 910; 232.

Warranty Deeds.
Forms for, § 1970; 556.

Waste.
Upon school lands, prevention of, § 1858; 527.
Committed by occupying claimant, damages for, § 1985; 560.
Action for, §§ 3332–3334; 871.

Watch-house.
To be provided by city council, § 542; 139.

Watchmen.
In cemeteries, powers of, 17 G. A., ch. 105, § 3; 96.

Water Courses.
Between two counties, action for offense committed on, where brought, § 2579; 687.

Water Power.
Partition of, n. § 3277; 863.

Water Power Improvements.
Corporations organized for making, powers, etc., of, §§ 1236–1240; 332.

Water Rents.
Assessment and collection of, §§ 473, 475; 115.

Water Tax.
City or town may levy, § 475; 115.

Water Works.
Erection of, by or under authority of city, §§ 471–475; 114.
Not exempt from taxation, n. § 797; 189.

Weapons.
Carrying concealed, punished, § 3379; 980.

Weighmasters of Public Scales.
Oath, duties, penalties, §§ 2065–2068; 578.

Weight of Testimony.
Court not to instruct as to, n. § 2789; 743.

Weight of Evidence.
Verdict against, may be set aside, § 2837; 756.

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Weights.
Standard, §§ 2037–2043; 574.
Of different articles, per bushel, § 2049; 575.

Weights and Measures.
To be compared with standard, § 2064; 578.
False, use of, punished, § 4076. 1029.
See SUPERINTENDENT OF WEIGHTS AND MEASURES.

Wells.
Throwing dead animals into, punished, § 4041; 1018.

Wharfinger.
Receipts or certificates of, §§ 2171, 2172; 606.

Wharfmaster.
In cities, appointment or election of, § 528; 134.
In cities of first class, 16 G. A., ch. 33; 136.

Wharves.
Establishment of, etc., by city, § 464; 108.
Control of, by city council, § 528; 134.
Taking and carrying away goods from, punished, § 3983; 1005.

Wheat.
Weight of, per bushel, § 2049; 575.

Widow.
Homestead exempt to, § 1989; 561.
Administration granted to, § 2354; 640.
Exempt property of husband set apart to, § 2371; 643.
Allowance to, out of estate of decedent, §§ 2375, 2377; 643.
Dower of, not subject to payment of debts of decedent, n. § 2387; 645.
Allowance for, how paid, § 2419; 650.
Can assert no claim to personal property, contrary to will, n. § 2436; 652.
Share of, in real property of deceased husband, § 2440; 653.
——— how set off. § 2441; 655.
Of non-resident alien, rights of in property of deceased husband, § 2442; 655.
Proceedings to set off, §§ 2443–2451; 655.
Share of, not affected by will of husband, § 2452, 656.
Share of, in lands of intestate, in absence of issue, § 2455; 657.
See, also, WIFE.

Widower.
Homestead exempt to, § 1989; 561.

Wife.
Absconding, leaving family a charge on the county, property of, may be seized, § 1343; 378.
After-acquired interest of, does not pass by previous relinquishment of dower, n. § 1931; 545.

Wife.—*Continued.*
Must join husband in conveyance of homestead, § 1990; 561.
Interest of, in homestead, n. § 1990; 561.
May have homestead platted, § 1998; 565.
Surviving husband, to occupy homestead, §§ 2007, 2008; 567.
Mechanic's lien upon property of, for debts contracted by husband, n. 16 G. A., ch. 100, § 3; 596.
Liability of, for civil injuries, § 2205; 613.
Liable for family expenses, § 2214; 615.
Entitled to custody of children when abandoned by husband, § 2215; 616.
Of decedent, administration granted to, § 2354; 640.
Share of, in real property of deceased husband, § 2440; 653.
Share of, in property of intestate husband in absence of issue, § 2455; 657.
May prosecute or defend in her own right, when, §§ 2562, 2563; 684.
May prosecute or defend for husband, when, §§ 2563, 2564; 684.
Of insane person, service of original notice on, § 2615; 709.
Interest of, in property sold in partition, protected, § 3303; 866.
Competency of, as witness, § 3639; 918.
May be witness for or against husband, when, § 3641; 919.
Credibility of testimony of, n. § 3641; 919.
Not to be examined as to privileged communications with husband, § 3642; 920.
Prosecution against husband for adultery must be commenced by, § 4008; 1009.
See, also, HUSBAND AND WIFE, §§ 2202–2215; 613.

Wills.
Term includes codicil, § 45, ¶ 17; 10.
Married women may dispose of property by, § 2202; 613.
Jurisdiction for probate of, § 2312; 634.
EXECUTION OF, CUSTODY, PROBATE, ETC., §§ 2322–2353; 635.
Probate of, not conclusive on adverse parties, n. § 2312; 634.
Revocation of, by subsequent birth of child, n. § 2329; 636.
Custodian of, duty, penalty, §§ 2338, 2339; 637.
Probate of, notice, etc., §§ 2340, 2341; 637.
Recording of, § 2343; 638
Foreign, probate of, §§ 2351–2353; 639.
Probate of, essential; conclusive as to due execution, § 2353; 640.
Proceedings to set aside, may be brought in district court, n. § 2353; 640.
Not to affect widow's distributive share, § 2422; 656.

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Wills.—*Continued.*
Service by publication, in actions to establish or set aside, § 2618; 701.
Suppression of, punished, § 4075; 1029.
Windows.
Use of, gives no easement, § 2032; 573.
Wine.
See INTOXICATING LIQUORS, §§ 1523–1559; 422.
Witnesses.
May be compelled to appear before general assembly, § 17; 4.
Compensation of, in such cases, § 18; 4.
Before coroner's jury, §§ 355–358; 84.
Compensation of physicians summoned by coroner as, § 368; 86.
On trial of contested elections, subpœnas for, §§ 704, 723; 176.
——— compelled to testify, § 709; 177.
To prove acknowledgments, subpœnas for, § 1968; 555.
To wills, number of, § 2326; 636.
———, not to derive benefit therefrom, §§ 2327, 2328; 636.
Continuance to procure attendance of, § 2750; 736.
To be examined by one counsel only, § 2779; 741.
Number of, to same point, may be limited by court, n. § 2779; 741.
Attendance of, how enforced by referee, § 2820; 751.
May be cross-examined, by party in default, § 2873; 770.
Taxation of fees of, §§ 2940, 2942; 784.
In case of summary proceedings against debtor, § 3139; 828.
——— compensation of, § 3147; 829.
——— punishment of, for contempt in failure to appear in, § 3145; 829.
Disobedience to subpœna by, punishable as contempt, § 3491; 895.
Failure by, to testify before grand jury, deemed contempt, § 3492; 895.
Who competent as, § 3636; 917.
Defendant competent, in criminal proceedings, § 3636; 917.
Not excluded on account of interest, § 3638; 918.
Competency of, in action against executor, etc., § 3639; 918.
Husband or wife may be, for or against the other, when, § 3641; 919.
Not to testify as to privileged communications, §§ 3642–3644; 920.
Judge competent, § 3645; 920.
Not excused on ground of civil liability, § 3646; 921.
Excused where he might be rendered criminally liable, § 3647; 921.
Moral character, or previous conviction of a felony, may be shown, §§ 3648, 3649; 921.
Witnesses.—*Continued*
Subscribing, testimony of, not conclusive, § 3654; 922.
Opposite party called to prove contract not in writing, § 3667; 928.
Subpœnas for, § 3672; 929.
How far may be compelled to attend under subpœna, § 3673; 929.
May demand fees in advance, § 3674; 929.
Penalty for failure of, to obey subpœna, §§ 3675, 3676; 930.
Service of subpœna upon, §§ 3676, 3677; 930.
Making affidavit, subjected to cross-examination, §§ 3694, 3695; 932.
When testimony of, may be taken by deposition, § 3721; 936.
Testimony of, perpetuated, §§ 3745–3750; 940.
Fees of, to be paid into county treasury by clerk, § 3786; 951.
Compensation of, § 3814; 961.
Fees of, to be reported by justice of the peace, §§ 3815, 3816; 962.
———, party paying, entitled to, when collected, § 3817; 962.
———, for defense in criminal cases, to be paid by county, § 3818; 962.
For defense in criminal cases to be subpœnaed on order of court, § 3818; 962.
Presence of, at execution of sentence of death, 17 G. A., ch. 165, § 13; 973.
Falsely certifying as to attendance, punished, § 3950; 998.
On preliminary examination, testimony of, § 4239; 1057.
———, bound over to appear, §§ 4248–4251; 1059.
Before grand jury, subpœnas for, § 4279; 1064.
———, refusing to testify, how dealt with, § 4287; 1065.
———, failing to attend, how punished, § 4288; 1065.
——— names of, to be endorsed on indictment, § 4293; 1066.
——— failure to endorse names of, on indictment, ground for setting aside, § 4337; 1077.
For state in criminal cases, notice of, § 4421; 1090.
Juror having personal knowledge must be sworn as, § 4433; 1093.
Defendants may be, in criminal prosecutions, n. § 4556; 1112.
Disobedience of, to subpœna, punished; civil liability for, §§ 4566, 4567; 1114.
Undertakings of, in criminal cases, how enforced, § 4568; 1114.
May be examined conditionally, or on commission, §§ 4571, 4572; 1114.
In trial upon information before justice may be bound to appear upon appeal, § 4701; 1136.

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Witnesses.—*Continued.*
Who may be, Const., Art. 1, § 4; 1215.
Not to be rendered incompetent by religious opinion, Const., Art. 1, § 4; 1215.
Defendant in criminal prosecution entitled to be confronted with, Const., Art. 1, § 10; 1218.
——— entitled to compulsory process for, Const., Art. 1, § 10; 1218.

Women.
Eligible to office of county recorder, 18 G. A., ch. 40; 81.
Eligible to school offices, 16 G. A., ch. 136; 492.
Married, liable for arson upon property of husband, § 3887; 9-2.
See, also, MARRIED WOMEN.

Words.
In statutes, how construed, § 45, ¶ 2; 9.

Work-house.
May be established by city council, § 539; 138.

Works, Historical, Scientific, Etc.
As presumptive evidence, § 3653; 922.

Working Highways.
Levy, apportionment and expenditure of tax; purchase and care of machinery, etc., §§ 969–971; 246.
Clerk to provide plat, make out tax list and certify delinquent property, §§ 972–975; 247.
Treasurer to pay over tax, § 976; 248.
Account of tax for each district kept separate, 18 G. A., ch. 36; 248.
Supervisor to reside in district, give bond, and be notified; penalty for failure to serve; vacancy in, how filled, §§ 977–979; 248.
——— to post notices of tax; how expended, §§ 980–982; 249.
Who required to labor; notice of time and place; amount and method of labor; certificate, §§ 983, 984; 249.
Penalty for failure to attend or work, § 985; 250.
Supervisor to labor; compensation for; report, §§ 986, 987; 250.
Amount due from delinquents to be certified, § 988; 251.
Supervisor not to cut down trees, § 989; 251.
——— to be notified when bridge or highway is unsafe; duty of, as to repairs; liability, § 990; 251.
Extraordinary repairs, how made, § 991; 252.
Penalty for failing to respond to summons for extra labor, § 992; 252.
Supervisor to remove obstructions, keep highways in good condition, erect guide-boards, remove Canada thistles, etc., §§ 993–995; 252.
——— to settle with trustees, §§ 996, 997; 253.

Working Highways.—*Continued.*
Penalty against supervisor for neglect of duty, § 998; 253.
Hedges upon highways, § 999; 253.
Turning to the right, § 1000; 254.
Firemen exempt from labor upon highway, § 1560; 441.

Working Streets.
Within city, § 487; 121.

Worship.
Disturbance of, punished, §§ 4023–4025; 1013.

Writs.
Sheriff to execute, § 337; 82.
May be issued by supreme court, § 3172; 838; and Const., Art. 5, § 4; 1233.
Of attachment, see ATTACHMENT.
——— how issued, service of, §§ 2962–2972; 791.
——— upon fund in court, § 2977; 796.
Return of, § 3010; 803.
Defects in, not vital, n. § 3010; 803.
Amendment of, § 3021; 805.

Writ of Certiorari.
When granted; proceedings under, §§ 3216–3224; 849.

Writ of Error.
Judgments rendered upon, not to be stayed, § 3361; 813.
From justice of the peace, §§ 3597–3604; 911.
In action of forcible entry and detainer, suspends execution, § 3623½; 915.

Writ of Habeas Corpus.
Allowance and service of, §§ 3451–3468; 891.
Not to be suspended or refused, Const., Art. 1, § 13; 1220.

Writ of Injunction.
Granting, vacation, violation, etc., of, §§ 3386–3407; 879.

Writ of Possession.
In action to recover real property, § 3266; 860.

Writ of Replevin.
Service and execution of, §§ 3229–3232; 854.

Writ of Restitution.
May be awarded after decision of appeal, § 3198; 846.
In action for recovery of real property, § 3272; 861.

Writing.
What sufficient as admission to take debt out of statute of limitations, n. § 2539; 677.
Failure to attach to petition, ground of demurrer, § 2648; 710.
When a part introduced in evidence, all admissible, § 3650; 921.

Writings.
Comparison of, upon question as to handwriting, § 3655; 922.

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Writings—*Continued.*
When acknowledged, may be read in evidence, § 3656; 923.
Of deceased persons receivable in evidence, § 3657; 923.

Written Contracts.
Limitation of actions on, § 2529; 671.
See CONTRACTS.

Written Instruments.
See INSTRUMENTS.

Yard.
Standard of measure; divisions and multiples of, §§ 2038–2041; 574.

Year.
Term, how construed, § 45, ¶ 11; 10.

Yeas and Nays.
Of members of general assembly, to be entered on journal, when, Const., Art. 3, § 10; 1226.
——— to be entered on final passage of bill, Const., Art. 3, § 17; 1225.

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SUPPLEMENT

TO

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SUPPLEMENT

TO VOL. II.

666.

SEC. 2510.

Even if there is misjoinder of causes of action, objection thereto is deemed waived unless made as provided in § 2632. (See, also, § 2633): *Flynn v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 769.

Under Rev. §§ 1858 and 1859, which provided that in case of death of one of the parties, the executor or administrator of such party should be made plaintiff or defendant, as the case might require, and it should not be necessary to make the heirs or devisees of such deceased persons parties to such suit, *held* that a proceeding against the administrator of the deceased owner, without notice to the heir to whom the property had descended, was binding upon such heir: *Welch v. McGrath*, 59-519.

667.

SEC. 2516.

Where an amendment is made during the trial, changing the nature of the action, motion to change the cause to the proper docket should then be made, and not a motion to strike the amendment from the files, on that ground: *Weaver v. Kintzley*, 58-191.

Error of the court in sustaining motion to transfer to the equity docket, will not be ground of reversal on appeal, where it does not appear that the party excepted to such action or demanded a jury trial: *State v. Craig*, 58-238.

SEC. 2517.

The interposition of an equitable defense in an action at law, does not give rise to an equitable issue, unless defendant asks relief in equity. The issue arising upon an equitable defense in such action is to be tried according to legal and not according to equitable procedure: *Carey v. Gunnison*, 17 N. W. Rep., 881.

668.

SEC. 2519.

This section *held* applicable in cases where a proceeding in the circuit court which should have been brought in probate was entitled in equity or at law: *Ashlock v. Sherman*, 56-311; *McName v. Malvin*, 56-362; *First Nat'l Bank of Garrettsville v. Greene*, 59-171.

SEC. 2520.

Provisions of civil Code as to change of place of trial, *held*, applicable in an appeal to the circuit court in a proceeding to condemn land for right of way: *Whitney v. Atlantic Southern R'y Co.*, 53-651.

SEC. 2521.

An action to foreclose a mortgage given to secure a note which is already reduced to judgment, is not prohibited by this section: *Matthews v. Davis*, 61-225.

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669.

SEC. 2525.

Although an action for slander will survive against the personal representatives of defendant, the plaintiff cannot recover as against such representatives exemplary or punitive damages: *Sheik v. Hobson*, 19 N. W. Rep., 875.

The right of recovery for an injury resulting in death, being statutory, exists only by the law of the place of injury; therefore, *held*, that the personal representatives of the person whose death was caused by an injury in Missouri, where the statute does not authorize a recovery in such cases by the personal representatives, could not maintain an action for such injury in the courts in Iowa: *Hyde v. W., St. L. & P. R. Co.*, 61–441.

670.

SEC. 2527.

A deposition taken after plaintiff's death, upon notice served before his death, should be stricken from the files on motion: *Kershman v. Sichela*, 59–93.

671.

SEC. 2529.

The statute of limitations applies to equitable actions: *District Township of Spencer v. District Township of Riverton*, 17 N. W. Rep., 105.

The statute of limitations cannot be relied upon at the trial unless pleaded: *Brush v. Peterson*, 54–243.

The fact that a claim was barred by the statute of limitations before suit was brought thereon, does not affect title acquired through such action if parties have failed to interpose the defense of the statute at the proper time. They are deemed to have waived it: *Welch v. McGrath*, 59–519.

The statute of limitations will run in favor of the trustee of a resulting or constructive trust, from the time he disowns the trust and claims title in his own right to the trust property: *Otto v. Schlapkahl*, 57–226.

The cause of action for damages from the improper construction of a ditch does not arise until the ditch first begins to affect the party's premises: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

As against a cause of action for injury to property from the construction of a ditch which is of such character as to cause permanent injury unless human agency intervene to prevent it, the statute of limitations commences to run from the beginning of the injury. In such case there cannot be successive actions, but the whole injury is to be compensated in the one action: *Powers v. City of Council Bluffs*, 45–652. But this does not apply to a case where one party is under obligation to protect another from injury and fails from time to time to do so: *Drake v. C., R. I. & P. R. Co.*, 19 N. W. Rep., 215.

A party holding a claim or right of action cannot be allowed to prolong the operation of the statute by refusing to take the steps which the law requires in order to authorize the maintenance of the action: *Baker v. Johnson Co.*, 33–155; *Prescott v. Gonser*, 34–175; *Hintrager v. Hennessy*, 46–600; *First Nat'l Bank of Garrettsville v. Greene*, 17 N. W. Rep., 86.

When the right of action depends upon a demand, such demand must be made within the time prescribed by the statute of limitations, when there are no special circumstances which excuse the party from making the demand; otherwise the demand will be considered as not made within a reasonable time: *Ball v. K. & N. W. R. Co.*, 16 N. W. Rep., 592.

The statute of limitations commences to run against warrants drawn by a district township on its own treasurer, at least from the time of their presentation for payment, although such payment is refused only for the reason that there are not funds on hand at the time: *Carpenter v. District Township of Union*, 58–335.

Where a township clerk paid an order which should have been allowed by the township trustees at the first

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settlement thereafter, *held*, that the statute of limitations, as against an action of mandamus to enforce the allowance of the claim, commenced to run from that time, and not from the time of subsequent demand: *Dewey v. Linn*, 57-235.

Where the transaction constitutes a partnership, the statute will not commence to run against an action between the partners relating thereto, until the partnership is dissolved, or until a sufficient time has elapsed after the demand for an accounting and settlement: *Richards v. Grinnell*, 18 N. W. Rep., 668.

As against an action by one of two claimants of land who, in a litigation between them as to title, has been defeated, and thereupon seeks to recover from the successful claimant the amount of taxes paid while claiming title, the statute of limitations commences to run from the time the question of title is finally adjudicated: *Goodnow v. Stryker*, 17 N. W. Rep., 506.

Action against a clerk of the court for improperly approving a stay bond does not accrue until the expiration of the stay (*Steel v. Bryant*, 49-116), and therefore an action by the clerk against his deputy for the default of the latter in approving such bond, does not accrue until the same time: *Moore v. McKinley*, 60-367.

The penalty provided by 15 G. A., ch. 68 (now repealed), of five times the amount of overcharge to be recovered from a railway company charging a greater amount of freight than allowed by law, *held*, to be a statute penalty, within ¶ 1 of this section, action for which was barred in two years: *Herriman v. B., C. R. & N. R. Co.*, 57-187.

Although the filing of a statement for a mechanic's lien, within the thirty or ninety days provided by statute (16 G. A., ch. 100, § 6, *supra*, p. 598) is not essential to enable the mechanic to enforce his lien against any one except purchasers or encumbrancers in good faith, without notice, after the expiration of that time, yet the two years' limitation, under ¶ 2 of this section, commences to run from the expiration of the period of thirty or ninety days as the case may be, whether the statement for the lien is filed within that time or not: *Squier v. Parks*, 56-407; *Dimmick v. Hinckley* 57-757.

If action against the sureties of an officer on his official bond be not brought within three years after the breach thereof, it is barred, although in the meantime action may have been brought and judgment recovered against the principal: *Wadsworth v. Gerhard*, 55-367.

A person entering into possession as tenant in common, is presumed to continue to hold in that manner, and not adversely, until he has done some act amounting to eviction of his co-tenant: *Shell v. Walker*, 54-386.

One going into possession under a quit-claim deed from a tenant in common, does not thereby assert adverse possession as against the other tenant in common, so as to set the statute of limitations in motion: *Moore v. Antill*, 53-612; and see *Hume v. Long*, 53-299.

An owner of land, who, through ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, does not hold such portion by adverse possession, so as to set the statute of limitations in motion: *Skinner v. Crawford*, 54-119.

Where a party was in possession of land under claim of title from the United States government at the time that an adverse title was acquired and remained in such possession for the period of limitation, *held*, that his defense as against such adverse title was complete: *Tremaine v. Weatherby*, 58-615.

The party claiming under a quit-claim deed, though he is not to be regarded as a good faith purchaser without notice, nevertheless has sufficient color of title to enable him to set up adverse possession: *Ibid.*

Where one takes possession of a government subdivision of land under a claim of title to the whole of it, breaks it up and puts part of it under cultivation, and no other person is in possession of any part, his possession must be held as applying to the whole tract claimed by him, especially when the actual possession extends to every government subdivision embraced in the whole tract: *Ibid.*

Actual possession of a part of a tract is legal possession of the whole of the tract covered by the title under which the actual possession is taken, and possession of the part will impart notice of the claim to the whole tract: *Watters v. Connelly*, 59-217.

Where a party erects upon a lot to

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which he claims title, a substantial and permanent brick building, which he claims to own throughout its entire extent, such circumstance amounts to a claim of title to the land upon which the building is erected; that is in view of the provision of § 2019 as to party walls to the center of the walls: *Crapo v. Cameron*, 61–447.

Where parties agree as to a certain line between their property being the true division line, and occupy to such line, each is to be considered as in adverse possession of the property so occupied, whether the line is correct or not: *Tracy v. Newton*, 57–210.

The rule that an action by a junior mortgagee to redeem from a senior mortgage is barred in ten years, is in no wise dependent upon the question of adverse possession: *County of Floyd v. Cheney* 57–160.

674.

SEC. 2530.

The recording of a deed is sufficient notice of any fraud in its execution to cause the statute to begin to run against an action based upon such fraud: *Bishop v. Knowles*, 53–268.

Where a judgment plaintiff failed to credit a payment made on the judgment and afterward, on execution, recovered the whole amount thereof, *held*, that the action to recover back the amount of the payment was barred in five years, although the judgment defendant was not aware of the failure to credit the payment until the expiration of the five years: *Shreves v. Leonard*, 56–74.

Evidence in a particular case, *held* sufficient to show that the discovery of the mistake relied upon was made within five years: *Eggspieller v. Nockles*, 58–649.

675.

SEC. 2531.

An interval of one year and nine months between two of the consecutive items of an account, both of which were on the credit side, *held*, not sufficient to show such break in the account or cessation of dealing as to cause the statute of limitations to commence to run, it appearing that all the items had relation to the same open and continuous transaction between the parties: *Keller v. Jackson*, 58–629.

That an account appears to be barred is no ground of objection to the introduction in evidence of the book containing it: *Ibid.*

The claim of a public officer for compensation is not in the nature of an open account. Each one of successive terms of office is to be deemed a separate employment: *Griffin v. County of Clay*, 19 N. W. Rep., 327.

676.

SEC. 2533.

Where the only evidence of absence of defendant from the state (so as to bring the case within the doctrine of *Heaton v. Fryberger*, 38–185) was that he went East, *held*, that non-residence did not sufficiently appear: *Tremaine v. Weatherby*, 58–615.

Where a person leaves the state in the employ of the general government, with the intention of returning when such employment shall cease, but the time of his return is indefinite, and he retains no domicile in the state, he is to be deemed a non-resident: *Hedges v. Jones*, 19 N. W. Rep., 675.

677.

SEC. 2537.

This section applies only when no judgment on the merits has been rendered, and another suit is brought upon the same cause of action: *McDonald v. Jackson*, 55–37.

The provisions of this section will

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not operate to extend the period of the statute where a condition precedent to the right to bring the action has not been complied with in proper time, for instance the presentation of a claim to the board of directors of a school district: *District Township of Spencer v. District Township of Riverton*, 17 N. W. Rep., 105.

SEC. 2539.

Where a junior mortgage was taken while a senior mortgage was in existence and not barred by the statute of limitations, and the senior mortgage afterward became barred, but was subsequently revived by a new promise of the mortgagor to pay the debt, made while junior mortgage was in process of foreclosure, *held*, that no equities having intervened in favor of junior mortgagee, the debt secured by the senior mortgage was still a prior lien to that of the junior mortgage: *Kerndt v. Porterfield*, 56–412.

Without determining whether an indorsement of payment signed by the party to be charged would remove the bar of the statute, *held*, that such endorsement, signed by the treasurer of a district township, had no such effect, as he had no authority to bind such township by his contracts or admissions: *Carpenter v. District Township of Union*, 58–335.

678.

SEC. 2540.

Any counter-claim, which may be interposed under § 2659, may be thus pleaded, although barred, and the provisions of this section are not limited to the counter-claims mentioned under the second subdivision of that section: *Folsom v. Winch*, 19 N. W. Rep., 305. (Overruling on rehearing the former opinion in the same case.)

SEC. 2543.

A sale of a promissory note on execution, as the property of one who had, as agent for the real owner, wrongfully converted it to his own use, conveys no title to the purchaser, and the latter cannot maintain action thereon or on a guaranty thereof: *McCormick v. Williams*, 54–50.

Where it appeared that the owner of negotiable instruments had deposited them with his agent as collateral security for another party, and to be applied in payment of the debt so secured, *held*, that such other party became the owner thereof in such sense that he might have brought action on the securities in his own name as owner, and, therefore, that the death of the original owner did not terminate the right of such agent to possession of the notes and their proceeds: *Bennett v. Stoddard*, 58–654.

679.

SEC. 2544.

An agent who is left in charge of real property has not such interest therein as to enable him to maintain in his own name an action for the possession thereof: *McHenry v. Painter*, 58–365.

680.

SEC. 2545.

Misjoinder of parties plaintiff or defendant must be raised by motion. It cannot be taken advantage of on demurrer or in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

SEC. 2546.

The assignee, by endorsement or otherwise, of a negotiable instrument transferred after maturity, holds subject to any counter-claim, though it be an independent cause of action, acquired by the maker of the note

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against the assignor before notice of the assignment (overruling *Richards v. Daily*, 34–427); *Downing v. Gibson*, 53–517; and this rule applies to negotiable paper transferred before due, if the transfer was not made in good faith and for a valuable consideration: *Bone v. Thorp*, 18 N. W. Rep., 906.

Payment of a negotiable note to the payee, by the maker, without notice of a transfer made after maturity, is a defense to an action by an endorsee who takes by such transfer after maturity: *Haywood v. Seeber*, 61–574.

681.

SEC. 2547.

The grantor is not a necessary, though a proper party defendant in an action to set aside a fraudulent conveyance of property and subject it to payment of claims of creditors: *Potter v. Phillips*, 44–353.

SEC. 2548.

Joint owners of a note should join as plaintiffs, or if one refuses to join he should be made defendant: *McNamee v. Carpenter*, 56–276.

SEC. 2550.

Where action upon a joint contract is brought against a survivor and the executors of a deceased party in the same court in which the claim against the decedent's estate might have been filed, the bringing of such action will be deemed a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60–367.

In case of an action against two defendants jointly and severally liable, judgment may be entered against one although the case is not disposed of as to the other: *Poole v. Hintrager*, 60–180.

682.

SEC. 2552.

In an action against a road supervisor upon his official bond, *held*, that the township clerk entitled to the money, for the misappropriation of which the action was brought, was the proper party to sue: *Wells v. Stomback*, 59–376.

Section applied: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

683.

SEC. 2553.

A partnership may be sued before a justice of the peace, and notice of service upon the resident partner will give the justice jurisdiction of the partnership so that judgment may be rendered against the firm as such and enforced against the partnership property; but the justice will not thereby acquire jurisdiction as to an individual partner residing in another county: *Ebersole v. Ware*, 59–663.

684.

SEC. 2558.

Where the action is against defendant by the name in which it signs the contract, it is not necessary to allege either copartnership or corporate capacity: *Wendall v. Osborne*, 18 N. W. Rep., 709.

685.

SEC. 2565.

Under a finding made by the court that the action was not being prosecuted for the benefit of the minor and that the further prosecution was not for his best interests, *held*, that the court was authorized to dismiss

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the action upon a stipulation signed by the next friend who brought it: *Ball v. Miller*, 59–634.

A guardian *ad litem* may present by way of defense matter which is proper in an action in which he is appointed, although the same subject-matter might have been the ground of an original suit, which could only be brought by his regular guardian or next friend: *Kelsey v. Kelsey*, 57–383.

686.

SEC. 2573.

In so far as it is attempted by this and the preceding and following sections to deprive a property owner of his right of action against a sheriff to recover property wrongfully seized by such officer under an execution against another person, these three sections are unconstitutional: *Sunberg v. Babcock*, 61–601; *Maish v. Littleton*, 17 N. W. Rep., 182.

687.

SEC. 2574.

This provision is independent of the two preceding sections, and the application here provided for need not be made before answer of defendant served: *Bixby v. Blair*, 56–416.

SEC. 2578.

[20 G. A., ch. 126, amends this section by striking out the word "may" in the third line thereof and inserting in its place the word "*shall.*" It also contains the following provision: "This act shall not *effect* [affect] existing contracts."]

[Decisions under the original section.]

Where the note secured by a mortgage is made payable at a particular place, action to foreclose the mortgage may be brought in the county in which the note is made payable, although the land mortgaged be situated in another county: *Equitable Life Insurance Co. v. Gleason*, 56–47.

An action against husband and wife for indebtedness incurred for family expenses, and in which it is sought to make such indebtedness a lien upon real property of the wife, may be brought in the county where such real property of the wife is situated, although neither husband nor wife be a resident of that county: *Hawke v. Urban*, 18–83.

A mortgage may be foreclosed in any county in which the court can acquire jurisdiction to render a personal judgment on the debt, but if the proceeding is upon publication only, and the defendant does not appear, the foreclosure cannot be had in a county where no portion of the property is situated: *Iowa Loan and Trust Co. v. Dory*, 19 N. W. Rep., 301.

688.

SEC. 2581.

An action upon service by publication to foreclose a mortgage cannot be brought in the county in which the note is made payable, if no portion of the property is situated in that county: *Iowa Loan and Trust Co. v. Dory*, 19 N. W. Rep., 301.

689.

SEC. 2582.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state: *Mooney v. U. P. R. Co.*, 60–346.

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SEC. 2583.

Where an action was brought by a sub-contractor, entitled to a mechanic's lien, against the contractor for the construction of a railway, on an agreement to pay the amount of such lien, *held* that the action was properly brought in the county through which the railroad was being constructed, and could not be removed to the county of defendant's residence: *Vaughn v. Smith*, 58–553.

The facts showing that the contract has been performed or the work done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

On the motion for change of venue the question as to plaintiff's right of recovery against a portion of defendant's cannot be raised, as such a question must be determined upon demurrer: *Ibid.*

SEC. 2585.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency: *Milligan v. Davis*, 49–126.

An action by the agent against the principal for services as agent, is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency: *Ockerson v. Burnham*, 19 N. W. Rep., 676.

690.

SEC. 2587.

This section has no application to an action for the recovery of specific personal property brought in the county in which the property is situated: *Porter v. Dalhoff*, 59–459.

SEC. 2589.

Where a transfer is ordered, but the papers are filed in the court to which the case is transferred after the time required by this section, the other party will not be held to waive the right to have the action discontinued by appearing in the court where the papers are filed and moving for a discontinuance: *Hall v. Royce*, 56–359.

691.

SEC. 2590.

[20 G. A., ch. 94, amends this section by adding to subdivision 3 thereof the following:]

But when either party files an affidavit as provided by this subdivision the other party shall have a reasonable time to file counter affidavits, and the court or judge, in the exercise of a sound discretion, must decide whether a change shall be granted, when fully advised, according to the very right and merits of the matter.

The court may in its discretion cause the affiants upon either side to be brought into court for examination upon the matters contained in their said affidavits.

[Decisions under the original section.]

A court has no authority to change the venue of an action, on its own motion, to another court. Therefore, *held*, that a change ordered in a case in which no application was made, was erroneous, although in another

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case between the same parties an application had been made, supported by affidavit, on the ground of prejudice of the judge: *Bennett v. Carey*, 57-221.

A change of place of trial cannot be had while the case is pending on motion for new trial, after verdict: *Perkins v. Jones*, 55-211.

Motion for change of venue on account of prejudice of the judge, if properly made in vacation, should be granted, even though the judge to whom objection is made is to go out of office before the next term of court. The change is not merely for purposes of trial, but where the objection is to the court, the statute contemplates that it may be had before the issues are made up and the case ready for trial: *Allerton v. Eldridge*, 56-709.

A change of place of trial may be had as here provided, on an appeal to the circuit court in proceedings to assess damages for taking property for right of way: *Whitney v. Atlantic Southern R'y Co.*, 53-651.

The party by whom the principal affidavit is made cannot be compelled to submit to an examination as to the truth of the matters stated in his affidavit: *McGovern v. Keokuk Lumber Co.*, 61-265.

Where a cause is taken to another county by agreement that it shall be tried therein without further change, and subsequently additional parties are brought in, such stipulation does not prevent further change of trial according to law, even on the motion of one of the parties to the original agreement: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

In a suit against principal and sureties, where a ground for a change of place of trial is shown by the principal, the sureties, if they desire, may have the change granted as to them also, if their ground of defense is the same as that of the principal: *Sweet v. Wright*, 17 N. W. Rep., 468.

If the motion is made by more than one party it must distinctly appear from the affidavit that neither one of the three disinterested persons subscribing thereto is related nearer than the fourth degree to either of the parties making the motion: *Fairburn v. Goldsmith*, 58-339.

Where the affiants in their affidavit collectively declare that they are not related within the degree herein specified to the one party making the motion, that is sufficient: *Goodnow v. Litchfield*, 19 N. W. Rep., 226.

Where the affidavit for a change on the ground of undue influence of the adverse party or his attorney stated that "defendants and their attorney" had such undue influence, *held*, that it was sufficient to authorize a change: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

An application for change of venue on the ground of alleged prejudice of the inhabitants of a county must be sworn to by the party asking the change if he is a natural person: *Hedge v. Gibson*, 58-656.

Where a change of venue is desired by a corporation, the requisite affidavit must be made by its officers or agents and, *held*, that an affidavit commencing "I., A. B., Vice President of the defendant above named, being duly sworn," etc., and not otherwise showing that the affiant was vice president, was not sufficient for the reason that the connection of the affiant with the corporation was thus shown merely by an unverified statement: *McGovern v. Keokuk Lumber Co.*, 61-265.

The affidavits on file become part of the record and may be certified by the clerk on appeal in the same manner as other matters of record; it is not necessary that they be preserved by bill of exceptions: *Ibid.*

An appeal will not lie from an order granting or refusing a change of venue, but upon a subsequent appeal properly taken, even from an intermediate order before final judgment, the order as to change of venue may be reviewed: *Allerton v. Eldridge*, 56-709.

By an appeal from an order granting a change of venue the supreme court acquires no jurisdiction, and will refuse to consider the case even though objection to the jurisdiction is not made by either party: *Groves v. Richmond*, 58-54.

The fact that a party, after properly excepting to the ruling granting a change of venue, goes to trial in the court to which the change is granted and does not raise an objection to the change by motion for new trial or in arrest of judgment, does not prevent his alleging it upon appeal: *Michaels v. Crabtree*, 59-615; *Bennett v. Carey*, 57-221.

Where the supreme court on appeal determines that a change of venue

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has been granted without authority, it will not review errors in the proceeding subsequent to such change but will remand the case to the court from which it was improperly changed: *Bennett v. Carey*, 57–221; *Gilman v. Donovan*, 59–76.

692.

SEC. 2591.

After one change of venue, a party applying for another change must allege and show that the cause upon which he bases his application was not in existence when the first change was obtained: *Michaels v. Crabtree*, 59–615.

A previous change, had by agreement of parties, does not, under this section, prevent a subsequent change on statutory grounds, whether existing at the time of the first change or not: *Bixby v. Carskaddon*, 18 N. W. Rep., 875.

693.

SEC. 2592.

Where the case is one in which the circuit court has exclusive jurisdiction, it cannot be changed to the district court, but it should be sent to some other circuit court: *Schuchart v. Lammey*, 17 N. W. Rep., 467.

SEC. 2594.

A party who has procured the dismissal of an action in one court on the ground that it is properly pending upon change of venue in another, is estopped from afterwards denying the jurisdiction of the latter court: *Perkins v. Jones*, 17 N. W. Rep., 573

694.

SEC. 2596.

Costs accrued at a former term of the court are not to be taxed up to the party asking a change. It is not competent for the court to impose upon him conditions not authorized by the law. Upon a proper showing he is entitled to a change as a legal right: *Bannigan v. Central Iowa R. Co.*, 58–671.

SEC. 2599.

Where a penal bond provided that it should be deemed fulfilled unless action thereon was begun by Oct. 1st, and notice of suit thereon was placed in the hands of the sheriff Sep. 27, but not served until Oct. 8, *held*, that action was not commenced in time (following *Parkyn v. Travis*, 50–436): *Proska v. McCormick*, 56–318.

A notice, not stating the term of court at which defendant is required to appear, does not confer jurisdiction. And in a case where it was required by statute that suit be brought within a limited time, and the notice served did not contain a statement as to the next term. *held*, that a second notice served after the expiration of the time limited, to which the defendant appeared, would not enable the court to entertain the action: *Jones, &c., Co. v. Boggs*, 19 N. W. Rep., 678.

696.

SEC. 2600.

Where a petition is marked filed by the clerk within the proper time, but he makes no memorandum of the fact upon the appearance docket, it cannot (under the provisions of § 200) be considered filed, and the provisions of this section are applicable: *Nickson v. Blair*, 59–531.

A judgment recovered upon a petition filed after the time named in the notice, is not void and cannot be collaterally impeached: *Hildreth v. Harney*, 17 N. W. Rep., 584.

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697.

SEC. 2603.

In an appeal from an assessment of damages for the location of a highway, acknowledgment of service, signed by the auditor, is sufficient to constitute a valid service upon him, although he is not "defendant" in the action: *Libbey v. McIntosh*, 60–329.

SEC. 2604.

Where a notice and return of service were sufficient in form, but the copy delivered erroneously stated the date at which the term of court would commence, *held*, that the case was not one of no service, but of merely defective service, and that the judgment rendered was not void, and defendant might, under such circumstances, have applied to the officer to amend his return, and during the same term, or under § 3154 during a subsequent term, he might have had relief from the default: *Irions v. Keystone Man'f'g Co.*, 61–406.

699.

SEC. 2609.

[20 G. A., ch. 77, amends this section by adding thereto the following:]

Provided, that service may be made on any patient confined in the hospitals for the insane by the superintendent or assistant superintendent of such hospitals, and the certificate of such officer under the seal of such hospital shall be proof of such service. How served on patients in hospitals for the insane.

SEC. 2610.

If a claim is allowed in part, an acceptance of the allowance is a bar to an action for the balance claimed: *Brick v. Plymouth Co.*, 19 N. W. Rep., 304.

The board cannot, by refusing to act or make record of their action, deprive a claimant of his right to sue. Proof of demand may be made by the testimony of the person making it: *Ferguson v. Davis Co.*, 57–601.

SEC. 2612.

An agent having no authority to act for a corporation within the state, and whose duties outside of the state were limited to investigation of facts and reporting them to general manager, *held* not such an agent as that service upon him would constitute service upon the company: *Philp v. Covenant Mut., &c., Ass'n*, 17 N. W. Rep., 903.

As to appointment by foreign insurance companies of agents upon whom service may be made, see § 1165.

700.

SEC. 2613.

In an action growing out of business done by one agent in a county, service can not be made upon another agent of the same party in that county whose agency is of a different scope. The service should be made upon some one connected with the business out of which it grew. If made upon an agent not connected with the business out of which the action arose it is a case not of defective service, but of entire want of service: *State Insurance Co. v. Granger*, 17 N. W. Rep., 504.

This section allows service upon the agent in a suit against the principal in matters connected with the agency, but the principal is not required to respond to service upon the agent of a notice of garnishment of the principal in a proceeding for the collection of a debt from the agent in no manner connected with the agency: *Upton Manuf'g Co. v. Stewart*, 61–209.

SEC. 2616.

[Additional provisions for service of notice on patient in hospital for the insane are made by the act inserted *supra* in supplement to page 699.]

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701.

SEC. 2618.

When notice of an action for a divorce is served by publication the court acquires jurisdiction to allow alimony: *Twing v. O'Meara*, 59–326.

An indebtedness due from a resident to a non-resident may be subjected to the payment of claims against such non-resident, although the court acquires no jurisdiction to render a personal judgment. The *situs* of the debt regarded as property may be for such purposes treated as distinct from that of the owner: *Mooney v. U. P. R. Co.*, 60–346.

In a suit against a non-resident by an attachment, notice being served by publication, a debt due for personal services rendered by such non-resident in the state of his residence and payable there may be subjected, by garnishment of his creditor in this state, to the payment of the claim, although by the laws of the state of his residence the debt would be exempt from execution: *Ibid;* and see notes to § 2975.

702.

SEC. 2619.

Publication of notice in which the defendant's name was stated as "P. T. B. Hopkins," in place of "T. P. B. Hopkins," *held*, insufficient to confer jurisdiction: *Fanning v. Krapfl*, 61–417.

703.

SEC. 2621.

Personal service upon the defendant made outside of the state supersedes the necessity of service by publication, and has the same force and effect, and the same jurisdiction is acquired as would be if the service were by publication: *Mooney v. U. P. R. Co.*, 60–346. See also § 2881 and notes.

704.

SEC. 2626.

Subsequent appearance of defendant will validate the previous service of a writ of injunction made without the court having obtained jurisdiction of defendant: *Dist. T'p of Lodomillo v. Dist. T'p of Cass*, 54–115.

The filing of a demurrer by non-resident defendants constitutes an appearance to the action, and gives the court jurisdiction: *Johnson v. Tostevin*, 60–46.

705.

SEC. 2628.

After action is brought to set aside a deed for fraud, a purchaser at execution sale from the defendant in such action, of the property conveyed thereby, is charged with notice of the action: *Rider v. Kelso*, 53–367.

It is the *filing* of the petition which imparts notice. The indexing in the appearance docket is no part of the filing, and failure to index reversely in name of defendant will not invalidate the notice. Nor is the service of original notice an essential of the filing or necessary to constitute notice: *Haverly v. Alcott*, 57–171.

707.

SEC. 2636.

Refusal by the court on motion to strike a demurrer from the files, because filed after the time herein provided, amounts in effect to an extension of the time and granting leave to file under § 2638: *Rumsey v. Robinson*, 58–225.

Where plaintiff was allowed a cer-

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tain time to file an amended petition, after a demurrer to the original petition had been sustained, but did not file such amendment until after the expiration of the time fixed, and defendant thereupon moved to strike it from the files, and plaintiff asked for time to make resistance to the motion by filing an affidavit of excuse, which he did not file within the time fixed by the court nor until after the argument of defendant on the motion to strike was closed, *held*, that it was not error to strike the amended petition from the file, as asked: *Hayward v. Goldsbury*, 19 N. W. Rep., 307.

708.

SEC. 2639.

Where a demurrer has been submitted and not yet decided, the court may allow the party filing the demurrer to amend it and re-submit it, the prior submission having been set aside: *Poweshiek Co. v. Cass Co.*, 18 N. W. Rep., 895.

SEC. 2640.

The substitution of the word "noon" for the word "morning," in this section, as here made, *held* correct: *Brandt v. Wilson*, 58–485.

SEC. 2646.

Where defendant was sued as a partner, *held*, that evidence that he held himself out to the public as a partner was admissible in evidence without such fact being pleaded: *Hancock v. Hintrager*, 60–374.

An allegation as to the doing of an act by the party, may be established by proof that the act was done by his agent: *Poole v. Hintrager*, 60–180.

710.

SEC. 2647.

Leave of court is not necessary to entitle plaintiff to file such amendment as here contemplated, and an appearance of defendant to move to strike such amendment from the files or to demur or answer thereto, obviates the necessity of notice of the amendment: *Kimball v. Bryan*, 56–632.

SEC. 2648.

The fact that the averments of the petition do not entitle plaintiff to the relief demanded should be raised by demurrer, and not through motion to strike them from the petition; but if the motion is made and passed upon without objection on that ground, the form of raising the question will not constitute reversible error: *Rhodabeck v. Blair Town Lot & Land Co.*, 17 N. W. Rep., 582.

Objection on ground of defect of parties, unless raised by demurrer or answer, will be deemed waived: *Lillie v. Case*, 54–177.

Misjoinder of parties is not a ground of demurrer. If not raised by motion it is waived, and cannot be afterwards raised, even in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

712.

SEC. 2649.

The objection in a demurrer to a petition in a law action that "the averments of the petition are insufficient to entitle the plaintiff to recover," is not sufficiently specific: *Davidson v. Biggs*, 61–309.

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SEC. 2650.

Misjoinder of parties is waived where it does not appear on the face of the petition, if not taken by answer: *McKeever v. Jenks*, 59-300.

Such defect cannot be first raised by motion in arrest of judgment: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. B., C. R. & N. R. Co.*, 59-73.

An objection that the facts stated in the petition do not entitle the plaintiff to any relief whatever, unless raised by demurrer, must be taken advantage of by motion in arrest of judgment. Such an objection, apparent upon the face of the petition, is waived by going to trial on the merits and cannot be first raised in an instruction: *Cruver v. C., M. & St. P. R. Co.*, 17 N. W. Rep., 661.

Where a defect in a petition which might be raised by demurrer is not thus attacked, and defendant succeeds on the trial, he cannot, upon appeal by plaintiff, insist that on account of such defect plaintiff was not entitled to recover: *Kendig v. Overhulser*, 58-195.

An objection which might be raised by demurrer or motion in arrest, cannot be raised for the first time on appeal: *Church v. Higham*, 44-482.

Section applied: *Hanks v. North*, 58-396.

713.

SEC. 2654.

The rule that the filing of an amended pleading waives any error in sustaining a demurrer to such pleading is only applicable where the party, by pleading over, supplies omissions or cures defects in his pleading pointed out by the demurrer. Therefore, the filing of an amendment to an answer setting up a new defense does not waive error in sustaining a demurrer to the defense set up in the original answer: *Ingham v. Dudley*, 60-16.

The fact that the defendant, after excepting to the overruling of his demurrer, files an answer which is withdrawn before the case comes on for trial, does not constitute a waiver of error in the overruling of his demurrer. The withdrawal of the answer restores the parties to the position they were in before the answer was filed: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

Where one division of an answer sets out a counter-claim, and a demurrer to that division as well as another portion of the answer is sustained, an amendment as to the other portion will not waive error in the ruling as to the counter-claim: *Folsom v. Winch*, 19 N. W. Rep., 305.

SEC. 2655.

A statement that defendant has no *information* sufficient to form a belief, &c., is not sufficient to raise an issue. The denial should be of any *knowledge* or information: *Claflin v. Reese*, 54-544.

Where the defendant sets out an equitable defense in an action at law, but does not ask equitable relief, the issue is to be tried as one at law; and *held*, that in an action upon a contract the defendant might set up mistake as a defense without asking a reformation of the contract in equity: *Carey v. Gunnison*, 17 N. W. Rep., 881.

715.

SEC. 2659.

The provisions of § 2540 allowing a counter-claim to be pleaded, even when barred as an independent cause of action, are applicable to counter-claims under the first or third subdivision of this section, as well as to those under the second: *Folsom v. Winch*, 19 N. W. Rep., 305 (overruling on rehearing the former opinion in same case).

In an action in equity by an insurance company for the cancellation of a policy, *held*, that a cause of action in behalf of defendant for a loss un-

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der the policy was sufficiently "connected with the subject of the action" to be set up as a counter-claim under ¶ 2 of this section: *Revere Fire Ins. Co. v. Chambers*, 56–508.

In an action to recover upon a promissory note, a counter-claim in the nature of an action for the possession of the note, for the purpose of cancellation, is proper: *Sigler v. Hidy*, 56–504.

Although action on an attachment bond may be brought by way of counter-claim in the attachment proceeding (see § 3017 and notes), this applies only to a case where the right of action for damages for the wrongful suing out of the attachment inured to the attachment defendant and was held by him at the very instant it came into existence. Where such defendant had previously made an assignment of his property, *held*, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim under subdivision 3 of this section: *Rumsey v. Robinson*, 58–225.

A counter-claim does not deny the cause of action or plaintiff's right to recover thereon. A defense denies the right to recover and shows either that plaintiff never had a right of action or that it is discharged: *Haywood v. Seeber*, 61–574.

716.

SEC. 2663.

The defendants to cross-bills or cross-actions brought by co-defendants, must be served with notice of the claim made against them: *Thode v. Spofford*, 17 N. W. Rep., 561.

Where plaintiffs brought action to set aside a guardian's deed to property held by defendant, and defendant by cross-petition against certain mortgagees of the property from plaintiff, sought to have such mortgages set aside, *held* that the mortgagees were properly brought in by cross-petition and their rights determined: *Bunce v. Bunce*, 59–533.

717.

SEC. 2665.

As a mere denial of affirmative matter not constituting a counter-claim is not permitted in a reply, such denial, if coupled with matter in confession and avoidance, will be disregarded and the reply will be regarded as containing nothing further than an admission and avoidance of the allegations of the answer, notwithstanding the provisions of § 2710, allowing inconsistent defenses to be stated in the same reply: *Meadows v. Hawkeye Ins. Co.*, 17 N. W. Rep., 600.

Where defendant in an action on a written contract of subscription set up want of consideration, *held*, that plaintiff might prove facts showing the incurring of expenses on the faith of such subscription, without having pleaded it in reply, such matter being in denial and not in confession and avoidance of the matter averred in the answer: *University of Des Moines v. Livingston*, 57–307.

Where a defendant pleads a defense which avoids the cause of action, plaintiff cannot introduce evidence to show the waiver of such defense without having set up such waiver in the reply: *Zinck v. Phœnix Ins. Co.*, 60–266.

SEC. 2669.

Where an affidavit was headed "State of Iowa, Delaware County," and a signature with the addition "Notary Public" was authenticated with a seal, *held* that it was sufficient: *Stone v. Miller*, 60–243.

It seems that since the provisions of Rev. § 2913 are not retained, it is not necessary that the certificate to the affidavit show the name of the affiant. There is no such requirement of law as to affidavits not made to pleadings: *Ibid.*

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718.

SEC. 2673.

Where the certificate shows that affiant was possessed of the requisite knowledge of the facts to make a verification, that is sufficient, although it be not certain to a certain intent, in every particular: *First National Bank of Bellaire v. Mason*, 57-105.

719.

SEC. 2681.

As to what is sufficient to constitute a libel, see § 4097 and note in supplement.

SEC. 2682.

The rule that in order to establish the truth of a charge imputing a crime as a defense in an action for slander, the crime must be proved beyond a reasonable doubt, is not applicable in other civil cases where the commission of a criminal act is in question: See notes in supplement to § 4428.

720.

SEC. 2683.

While a party interested in the subject-matter involved may unite with the defendant in resisting the claim of the plaintiff, he cannot ask to be substituted as the defendant to the action in place of the original defendant: *Britton v. D. M., O. & S. R. Co.*, 59-540.

721.

SEC. 2684.

An intervenor cannot be allowed to tender an issue which can be tried only by a change in the form of proceeding, and a continuance of the cause for testimony: *VanGorden v. Ormsby*, 55-657.

SEC. 2685.

A party cannot, by one petition, intervene in several distinct and unconsolidated actions, nor can an agent make his principal a party to the intervention by filing the petition in his (the agent's) name: *Rosenbaum v. Adams*, 61-382.

SEC. 2689.

Where the amendment set up a distinct cause of action, which when pleaded, was barred by the statute of limitations, *held*, that it would not be considered as dating back to the date of the original petition, so as to avoid the bar: *Van der Haar v. Van Domseler*, 56-671.

A demurrer may be amended: *Poweshiek Co. v. Cass Co.*, 18 N. W. Rep., 895.

It is not error to allow an amendment after the conclusion of the testimony, and for the purpose of conforming the pleadings to the proof, even when such amendment changes the issue. If, after the amendment, the opposing party can make it appear that he is surprised, or is not prepared to meet the issue raised by the amendment, a continuance will be allowed at the cost of the other party. If such continuance is not applied for, the objection is waived: *Thomas v. Town of Brooklyn*, 58-438.

Held, error to refuse leave to plaintiff after the close of the arguments to file an amendment to his petition for the purpose of conforming the allegations to the proofs: *Tiffany v. Henderson*, 57-490.

Where suit was brought in the name of a township, *held*, that, although the township had no capacity to sue, the name of the township officer entitled to the possession of the money sued for might, on motion, be substituted as plaintiff and the action proceed: *Wells v. Stomback*, 59-376.

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724.

SEC. 2690.

Where, after a verdict for defendant, plaintiff moved to set aside the verdict and for a new trial on the ground of error in the admission of evidence, and the court overruled such motion, *held*, that as plaintiff's petition was not sufficient to show a cause of action, the decision of the court below would not be reversed although the defects in the petition had not been raised by demurrer: *Wetmore v. Mellinger*, 18 N. W. Rep., 870.

725.

SEC. 2695.

Where the interrogatories are attached to an answer which requires no reply, the court should be asked to fix a time within which they should be answered, before moving to dismiss the action for want of such answers: *Hogaboom v. Price*, 53–703; *Garvin v. Cannon, Id.*, 716.

726.

SEC. 2710.

Notwithstanding this section, a denial and a confession and avoidance of the affirmative allegations of an answer not constituting a counter claim, cannot be set up in the reply. The denial, being improper under § 2665, will be disregarded: *Meadows v. Hawkeye Ins. Co.*, 17 N. W. Rep., 600.

SEC. 2711.

Section applied in a particular case: *First National Bank of Davenport v. Baker*, 57–197.

SEC. 2712.

A denial of an indebtedness to the plaintiff in any sum whatever, raises no issue: *McIntosh v. Lee*, 57–356.

727.

SEC. 2713.

In an action founded upon tort, plaintiff cannot be required to attach a bill of particulars of the items included in his claim for damages, although his petition may, in a proper case, be required to be made more specific in this respect under provisions of § 2720: *McDonald v. Barnhill*, 58–669.

728.

SEC. 2716.

This section implies that where the plaintiff or defendant is a corporation or partnership, such averment of corporate or partnership capacity should be made: *Sweet v. Ervin*, 54–101; and see *Steamboat, etc., v. Wilson*, 11–479; *Byington v. M. & M. R. Co., Id.*, 502; *Hard v. City of Decorah*, 43–313.

SEC. 2717.

An answer of a defendant denying that it was or ever had been a corporation, etc., *held*, sufficiently specific: *Folsom v. Star Union, etc., Line*, 54–490. A general denial does not put in issue the fact of administratorship where it is generally averred: *Mayes v. Turley*, 60–407.

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SEC. 2719.

Immaterial matter is anything stated in the pleading which, if established, would not entitle the party to, or aid him in obtaining the relief demanded, or in sustaining the defense pleaded. Any party required to answer a pleading containing irrelevant matter is aggrieved thereby and may have it stricken out on motion: *Johns v. Pattee*, 55–665.

729.

SEC. 2727.

The averment of malice by plaintiff should be made in the petition or an amendment thereto. Such allegation made in the reply only, would not be sufficient: *Jones v. Marshall*, 56–739.

730.

SEC. 2730.

[The word "denying," in the seventh line of this section is a misprint. It should be "deny."]

Where a written assignment was not so incorporated into an answer as to render denial of signature under oath necessary, *held*, error to receive such assignment in evidence without proof of the signature: *Hay v. Frazier*, 49–454.

731.

SEC. 2732.

This section does not prohibit a defendant who has filed a plea in abatement which has been held bad on demurrer, from answering in bar: *Winet v. Berryhill*, 55–411.

732.

SEC. 2740.

Issues of fact in an action at law may be such as rest upon an equitable defense, and the fact that the party interposes such equitable defense where he does not ask equitable relief, does not entitle him to a trial of the issue by equitable procedure: *Carey v. Gunnison*, 17 N. W. Rep., 881.

SEC. 2741.

The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. Upon no other question would it be proper to take all the evidence to the supreme court on appeal. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable, or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises. The issues in the case in determining the applicability of instructions and the competency and relevancy of the evidence are to be determined from the pleadings: *Kelleher v. City of Keokuk*, 60–473.

In order to determine whether prejudice resulted to appellant by reason of the exclusion of evidence, not only the questions, but the answers, or the facts that they would tend to establish, should appear in the record. Unless prejudice be thus shown, the judgment cannot be disturbed on account of exclusion of evidence: *Jenks v. Knott's Mexican Silver Mining Co.*, 58–549; and see cases in supplement to § 2836.

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733.

SEC. 2742.

[19 G. A., ch. 35, repeals this section and substitutes and enacts a substitute therefor, with an additional section, as follows:]

SEC. 2742. But in equitable actions, wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within the time allowed for the appeal of said cause, and be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew.

SEC. 2. This act shall apply to all causes not already submitted to the supreme court, and any certificate heretofore made by the said trial judge within the six months allowed for appeal shall be deemed to be made within proper time.

The substitute for the original section (17 G. A., ch. 145), *held*, applicable to the trial of a case commenced before the act was passed, but not tried until after it took effect: *Bailey v. Malvin*, 53–371.

Where an equitable action was sent back, on appeal upon errors assigned, for a new trial, with permission to the parties to replead, and new pleadings were filed and a trial thereon was had after the repeal of § 2742 and the enactment of this substitute, *held*, that the method of securing trial *de novo* on appeal was not determined by that section, though it was in force when the first trial was had: *Cross v. B. & S. W. R. Co.*, 58–62.

The taking of the testimony in short-hand, no transcript thereof being filed, is not a taking down "in writing": *Godfrey v. McKean*, 54–127.

Where the certificate of the judge stated that the record contained all the evidence "introduced" on the trial, *held*, that this was insufficient to show that it contained all the evidence *offered*, as required by this section: *Taylor & Co. v. Kier*, 54–645. So *held*, as to a certificate showing that the record contained all the evidence *used* on the trial: *Hart v. Jackson*, 57–75. So *held*, also, as to a certificate that the record contained all the evidence "adduced," it further appearing from the record itself that in several instances evidence was offered and excluded which was not made part of the record: *Tuttle v. Story County*, 56–316.

A certificate that the evidence certified was all that was "offered, adduced and introduced," *held* sufficient: *City of Marshalltown v. Forney*, 61–578. So *held*, also, as to a certificate that the evidence certified "is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial": *Wood v. Wood*, 61–256.

A certificate that the evidence certified was "all the evidence submitted in said cause," *held* sufficient: *Miller v. Wolf*, 18 N. W. Rep., 889.

A certificate not attached to any evidence, but merely showing the names of the witnesses, and the side upon which they were introduced, respectively, without referring to any testimony as taken in writing, *held* insufficient: *Alexander v. McGrew*, 57–287.

Where the issues in the case are equitable, it will be presumed that it was tried as an equitable action, unless the record otherwise shows: *Baldwin v. Davis*, 18 N. W. Rep., 897.

An action to test the validity of a will is not triable *de novo* on appeal: *Kelsey v. Kelsey*, 57–383.

On trial *de novo* in the supreme court, the appellant, having secured a reversal, is entitled to have such decree entered as the lower court should have entered upon the record as made: *First National Bank of Davenport v. Baker*, 60–132.

Where, by an agreement of the parties in an equity case, the facts are reduced to a statement in writing which takes the place of depositions, or oral testimony reduced to writing, an appeal and a trial *de novo* may be

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had thereon: *Williams v. Wells*, 16 N. W. Rep., 513.

Where appellant insists upon a trial *de novo*, and appellee objects, there can be no ground of complaint of either party where the court tries the cause anew, and affirms the judgment: *McClain v. McClain*, 57–167.

Upon trial of an equitable action *de novo*, the supreme court passes upon the sufficiency of the evidence properly admitted, and need not consider the objections to the admissibility of evidence made in the court below: *Hanks v. Van Garder*, 59–179. And the court will consider all questions presented which legitimately appear on the record, whether urged or relied on in argument in the lower court or not: *Seymour v. Shea*, 16 N. W. Rep., 196.

Where a case is tried without objection or exception in the court below as a case in chancery, and appealed to the supreme court in form to be tried *de novo*, it will be so tried, whether properly triable as an equitable action or not: *Clute v. Frasier*, 58–268.

As the provisions of this section, as amended, can be complied with and the full benefit of a trial *de novo* be secured only by causing all the evidence offered to be written down, if questions asked are not permitted to be answered, and thus made part of the record, the defeated party must be allowed to have a review of such questions upon error. Otherwise he would be denied the benefit of an appeal: *Clinton Lumber Co. v. Mitchell*, 61–132.

Under the section as it stood before the passage of the last substitute, *held*, that the certificate of the judge must be made at the term at which the cause is tried, or during the following vacation: *Cornell v. Cornell*, 54–366.

Evidence certified at such time as is provided for under 19 G. A., chapter 35, although before the passage of this act, may be considered in an appeal submitted after the taking effect of the act: *Starr v. Case*, 59–491.

The judge may certify to the record within the proper time, even though it be after the appeal is taken: *Goff v. Hawkeye Pump, etc., Co.*, 18 N. W. Rep., 307.

Where the abstract does not show that the judge's certificate of the evidence was made within the period required by law, the case cannot be tried *de novo*: *Mitchell v. Laub*, 59–36.

Where it appears that the evidence on the trial of an equitable action consists wholly of depositions and papers on file, the certificate of the clerk to such evidence, as provided for in § 3184, is sufficient to authorize the supreme court to entertain the appeal. The rule requiring the certificate of the judge to be made during the term has no application to such certificate of the clerk: *Cross v. B. & S. W. R. Co.*, 58–62.

That in order to enable the supreme court to try the case anew the abstract must purport to contain all the evidence introduced on the trial, see notes in supplement to § 3184.

Where a party in an equitable action stands upon the ruling upon a motion or demurrer and desires to appeal therefrom, he should take exception to the ruling and assign errors, as in a law action: *Powers v. County of O'Brien*, 54–501; *Patterson v. Jack*, 59–632; and see notes to § 2831.

Where an appeal is taken from a decree in an equitable case triable *de novo*, an exception to such decree is not necessary: *Dicken v. Morgan*, 59–157.

735.

SEC. 2746.

Where a plaintiff, seeking to recover a sum of money, based his right in the first count of his petition upon the ground of his minority at the time of making a contract, and in the second count upon the ground of fraudulent representations, *held*, that it was not error in the court to refuse to grant separate trials upon the two counts: *Childs v. Dobbins*, 61–109.

SEC. 2747.

A bar-docket printed in pursuance of the provisions of this section is no part of the official records of the court: *Gifford v. Cole*, 57–272.

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736.

SEC. 2749.

Under this section there is a judicial discretion in the court which, when exercised, will not be reversed unless such discretion has been abused, and in such cases counter affidavits on the part of the state, denying the facts shown by defendant in a criminal prosecution to obtain a continuance, may be considered: *State v. Wells*, 61–629.

739.

SEC. 2767.

The fact that vacancies in the panel from which the jury is drawn have been filled with talesmen in an illegal manner, is not a ground for challenge to the panel. The objection should be raised by challenge to such talesmen when called: *Buford v. McGetchie*, 60–298.

SEC. 2771.

Error in overruling a challenge for cause will be considered as without prejudice, if the party does not exhaust his peremptory challenges: *State v. George*, 18 N. W. Rep. 298.

SEC. 2772.

Where it was shown that a juror had a bet of twenty-five cents outstanding which would be affected by the result of the trial, and this fact was not disclosed when he was interrogated as to his qualifications, *held*, that he was incompetent, and that a new trial should have been granted: *Seaton v. Swem*, 58–41.

741.

SEC. 2779.

Where the court, in advance, informed the respective parties that the number of witnesses as to a particular point (the value of property in an appeal from an assessment for damages for right of way) would be limited to five on each side, *held*, that such action was not erroneous: *Everett v. U. P. R. Co.*, 59–243; and see *Bays v. Hunt*, 60–251.

Unless an abuse of discretion is shown, the action of the court in allowing the plaintiff on rebuttal to introduce evidence which is not strictly rebutting, furnishes no ground of reversal: *Hess v. Wilcox*, 58–380.

The absence of the judge during the argument of the case to the jury will not constitute error sufficient to authorize reversal of a judgment, unless prejudice resulting from his absence, or some ground from which such error can be presumed, is shown: *Baxter v. Ray*, 17 N. W. Rep, 576. See, also, *Hall v. Wolff*, 61–559.

Under the circumstances of a particular case, *held*, that the order of argument rested largely in the discretion of the court, and a reversal would not be justified on account of the ruling in relation thereto, in the absence of a clear showing of abuse of discretion and prejudice: *Van Horn v. Smith*, 59–142.

743.

SEC. 2789.

Instructions written with a lead-pencil are sufficiently "in writing": *Harvey v. Tama Co.*, 53–228.

A cutting out of a portion of the instruction as asked, will not constitute error where the change is a proper one: *Ham v. W., I. & N. R'y Co.*, 61–716.

Where a court is warranted in directing a jury to return a verdict of a particular character, it is not prejudicial error to do so orally instead of in writing: *Milne v. Walker*, 59–186.

All instructions should be read together for the purpose of determining

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the accurateness of any part of the charge: *Beazan v. Incorporated Town of Mason City*, 58-233; *Gronan v. Kukkuck*, 59-18.

It is error to give instructions based upon a state of facts o · an issue as to which there is no proof: *Clark v. Ralls*, 58-201; *Hess v. Wilcox*, 58-380; *Hall v. Wolff*, 61-559; *Manning v. B., C. R. & N. R. Co.*, 17 N. W. Rep., 669. But an instruction embodying a correct presentation of the law, which may have been given to meet positions taken in argument, will not be ground for reversal, although not applicable to the evidence, if not of such nature as to mislead the jury: *Hall v. Stewart*, 58-681.

It is error to give an instruction which assumes the existence of a material fact about which there is conflict in the evidence: *Roach r. Parcell*, 61-98.

An instruction to the jury as to liability for a cause of injury not alleged in the petition is ground for a reversal: *Cressy v. Town of Postville*, 59-62.

An erroneous instruction cannot be said to have been without prejudice unless that fact affirmatively appears: *Roby v. Appanoose Co.*, 18 N. W. Rep., 711.

Where an erroneous instruction as to a particular matter is given, but from the verdict it is apparent that the jury have adopted a view of the case which renders such matter immaterial, the error will be considered as without prejudice: *Hall v. Stewart*, 58-681; *Hall v. Ballou*, 58-585.

In a particular case *held* that there was no prejudicial error in referring in an instruction to the matter charged in the petition, without specifying also an amendment to the petition: *Fuhs v. Osweiler*, 59-431.

The giving of an erroneous instruction *held* not to be error without prejudice in a particular case: *Kendig v. Overhulser*, 58-195.

If the facts stated in the petition do not entitle plaintiff to relief, the court may, at the trial, direct the jury to find for defendant: *Smith v. B. C. R. & N. R. Co.*, 59-73.

It is not proper to direct a verdict against a party for failure to allege and prove an essential element of his cause of action or defense (as, for instance, for failure to aver performance of conditions of a contract on which he relies). Such failure is a ground for motion in arrest of judgment, and the party should be allowed the opportunity to cure it as provided in § 2842: *Wrought Iron Bridge Co. v. Greene*, 58-562.

In a particular case, *held*, that if the court had submitted the case to the jury on the evidence, and there had been a verdict for the plaintiff, it would have been its duty to set the verdict aside as being wholly unsupported, and therefore that the instruction to the jury to find for the defendant was proper: *Bothwell v. C., M. & St. P. R. Co.*, 59-192.

Under the facts in a particular case, *held*, that the court should have given an instruction asked by plaintiff directing the jury to find a verdict for him and assessing his damages at a certain sum: *Fairburn v. Goldsmith*, 58-339.

Where the court dismisses an action or counter claim, after the evidence has been introduced, the party prejudiced by such ruling is entitled to have every thing on which his right to recover depends, which the evidence tended to prove, regarded as established: *Welch v. Jenks*, 58-694.

It is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are or what is or is not admitted or denied: *Porter v. Knight*, 19 N. W. Rep., 282; *Bryan v. C., R. I. & P. R. Co.*, *Id.*, 295.

It is error in the court to submit the construction of a contract to the jury: *Vaughn v. Smith*, 58-553.

The court cannot, by instructions to the jury, cure error in admitting evidence: *Wicks v. Town of De Witt*, 54-130.

Where the instructions given are correct as far as they go, there will be no error in failing to give instructions as to other points, upon which no instructions were asked: *Mackie v. Central Railroad of Iowa*, 54-540.

A party cannot complain of failure of the court to instruct with reference to a particular matter, if he has not asked specific instructions in reference thereto: *Hall v. Stewart*, 58-681.

It is error sufficient to warrant a reversal that instructions laid down two contradictory rules for the guidance of the jury, if it appears that they may have adopted the erroneous instead of the correct one: *State v. Hartzell*, 58-520.

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Instructions to the jury constitute the law of the case, and must be followed by the jury whether right or wrong: *Stewart v. Smith*, 60–275. Where the verdict is in conflict with the instructions a judgment will be reversed on appeal without inquiry as to the correctness of the instructions: *Musser v. Maynard*, 59–11; *Griffith v. Parton*, 59–31. Therefore it cannot be presumed in favor of the verdict on appeal that it was upon the theory of the case which is correct in law, but in violation of an instruction given: *Mast v. Pearce*, 58–579.

A justice of the peace has no authority to give instructions to a jury in his court: *St. Joseph M'f'g Co. v. Harrington*, 53–380.

A general exception to the *refusal to give* several instructions, is sufficient: *Harvey v. Tama Co.*, 53–228; *Williamson v. C., R. I. & P. R. Co.*, 53–126, 143.

If there is but a single proposition stated in the charge, an exception thereto, if taken at the time the charge is given, is sufficient: *Boyce v. Wabash R'y Co.*, 18 N. W. Rep., 673.

Instructions cannot be considered on appeal which are not excepted to within the time here specified, even though exceptions thereto are taken in the bill of exceptions filed within such time as is agreed upon by the parties: *Bailey v. Anderson*, 61–749.

Where the motion for new trial stated that "the court erred in its charge to the jury excepted to at the time by the plaintiff," and it did not appear that exceptions were taken to the instructions when given, *held*, that error in giving instructions could not be urged: *Stevens v. Taylor*, 58–664.

In order to secure the review of instructions properly excepted to, it is only necessary that the record present so much of the evidence as will show that facts to which instructions are applicable were before the court. And what is usually necessary is a statement in the bill of exceptions that there was evidence tending to prove such facts: *Kelleher v. City of Keokuk*, 60–473.

746.

SEC. 2790.

Where the value of property is in issue and the jury have inspected the premises, it is not error to instruct them that in determining the market value of the property they are to weigh the evidence in the light of what they have seen: *Thompson v. City of Keokuk*, 61–187.

747.

SEC. 2799.

This section is applicable to a case where a witness is by accidental delay prevented from reaching the place of trial in time for the introduction of his testimony at the proper time: *Smith v. State Insurance Co.*, 58–487.

Even if the power of the court under this section is discretionary, the abuse of such discretion in refusing to admit testimony in a proper case, will be ground for reversal: *Smith v. State Insurance Co.*, 58–487.

This section was applied in a case tried in equity upon depositions, and the party was allowed, after the announcement of the decision of the court and before entry of judgment, to introduce oral evidence to correct a misstatement in the witness's deposition: *Eggspieller v. Nockles*, 58–649.

749.

SEC. 2808.

Where the jury in answer to special interrogatories used the words "think" and "have reason to believe," *held*, that such answer presented in positive language the conclusion reached by the jury: *Martin v. Central Iowa Railway Co.*, 59–411.

It is not error to refuse to submit to the jury interrogatories not submitted to opposing attorneys until after the argument has commenced. It is not sufficient that they are submitted to the court before that time: *Crosby v. Hungerford*, 59–712.

Held, not prejudicial error to

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dismiss the jury without requiring answer to an interrogatory propounded, where such answer if given could not have controlled the general verdict: *Dreher v. I. S. W. R. Co.*, 59–599.

This section contemplates that specific questions of fact shall be submitted to the jury, and not such questions as whether a person was guilty of negligence as to a certain matter, and if so, in what manner, etc.: *Lewis v. C., M. & St. P. R. Co.*, 57–127.

The court cannot be required to ask special findings as to immaterial facts: *Lawson v. C., R. I. & P. R. Co.*, 57–672.

A special finding by one jury is not binding upon the court on a second trial: *Hollenbeck v. City of Marshalltown*, 17 N. W. Rep., 155.

The court has no authority against the objection of the party to direct the jury to return only a special verdict. Either party has a right to a general verdict if he demands it and the jury renders it: *Shultz v. Cremer*, 59–182.

The fact that the answer to a special interrogatory is not inconsistent with the general verdict, and nothing is claimed for it, does not prove that its submission to the jury was not erroneous; it may nevertheless have misled the jury as to the effect to be given to the facts therein referred to: *Ferguson v. Central Iowa R. Co.*, 58–293.

751.

SEC. 2816.

As to reference in matters of administrator's accounts see § 2412 and notes.

Where, upon the evidence it was impossible to determine whether a referee's report was correct or not, *held*, that it should be allowed to stand: *In re Heath's Estate*, 58–36.

SEC. 2821.

Where the report of the referee is to be reviewed, exceptions should be taken to it as the foundation of the review; an exception to the final judgment will not enable the supreme court on appeal to inquire into the correctness of the report: *Bauder v. Hinckley*, 60–185.

753.

SEC. 2831.

Exception to a judgment must be taken at the time it is rendered: *Nagel v. Guittar*, 17 N. W. Rep., 671.

Where a party in an equitable suit stands upon the ruling upon a motion or demurrer, and desires to appeal therefrom, he should except thereto as in a law action: *Powers v. County of O'Brien*, 54–501; *Patterson v. Jack*, 59–632; and see notes to § 2742.

An exception to a final decree in an equitable action is not necessary where the party is entitled to a trial *de novo* on appeal: *Dicken v. Morgan*, 59–157.

An exception to the overruling of a demurrer is all that is necessary to preserve the party's right of appeal from such ruling. It is not necessary for him to except again when the final judgment is entered: *Jordan v. Kavanagh*, 18 N. W. Rep., 851.

An exception to the overruling of a motion for a new trial is sufficient exception to the judgment: *Gulliher v. C., R. I & P. R. Co.*, 59–416.

Where a motion asking for judgment on the findings of a special verdict was overruled, and proper exception taken, *held*, that it was not necessary to except to the judgment afterwards rendered: *Aldrich v. Price*, 57–151.

Where time is not extended for the settling of the bill of exceptions, it must be signed and filed within the time fixed by this section: *Hahn v. Miller*, 60–96; *Gates v. Brooks*, 59–510.

If the bill of exceptions is not filed within the time prescribed in the order, it will be disregarded or stricken from the record: *Fuller v. C., R. I. & P. R. Co.*, 61–125.

Where it appears that the bill of exceptions was signed within proper time and it is made part of the transcript, it will be presumed, in the absence of all showing to the con-

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trary, that it was filed within the proper time: *Wilson v. First Presbyterian Church of Mt. Ayr*, 60–112.

It is not necessary that affidavits which have been presented on the motion for change of venue be preserved and made matter of record by bill of exceptions. When filed they become part of the record, and may be certified by the clerk on appeal in the same manner as other matters of record: *McGovern v. Keokuk Lumber Co.*, 61–265.

A bill of exceptions, when signed and filed, becomes a part of the record and the judge cannot change or modify it by a contradictory statement or certificate filed with the papers of the case. Where a party has excepted to rulings upon the evidence when made and has not waived his objection, and his bill of exceptions is filed within the time allowed by law or agreed upon between the parties, it is competent for him to embody in it all ground of objection upon which he desires a review of the cause, and to waive such others as he sees fit: *Dedric v. Hopson*, 17 N. W. Rep., 772.

755.

SEC. 2834.

A skeleton bill of exceptions which does not identify the evidence which is to be inserted, but merely directs the clerk to insert all the evidence, or "plaintiff's evidence" and "defendant's evidence," is not sufficient. The clerk has no power to determine what is to be inserted under such a direction. The bill must so identify the evidence that a mistake of the clerk as to what is to be inserted in the transcript may be readily corrected: *Tootle v. Phœnix Ins. Co.*, 17 N. W. Rep., 583; *Wells v. B. C. R. & N. R. Co.*, 56–520; *Wilson v. Tenant*, 61–194.

A bill of exceptions referring to the evidence in the following manner: "the following rulings were had and reduced to writing by said reporter, being all the testimony in said trial. Here insert evidence in full": *held* to sufficiently identify the evidence: *Wilson v. First Presbyterian Church of Mount Ayr*, 60–112.

Where the original notes of the reporter are filed, and the reporter has therein marked and identified, in writing, the papers offered in evidence, and the clerk is directed to insert in the bill of exceptions all exhibits referred to and identified by said reporter, the written evidence offered is sufficiently identified to become a part of the record: *Town of Manson v. Ware*, 19 N. W. Rep., 275.

The evidence may be sufficiently incorporated into the bill of exceptions by reference to the stenographer's report of the evidence, whether such report is certified by the reporter or not. A transcript or extension in long-hand of the reporter's notes is not necessary to complete the bill of exceptions, and is not necessary unless a transcript is required: *Hampton v. Morehead*, 17 N. W. Rep., 202.

The only way oral evidence introduced on the trial of the cause can be preserved and identified for the purposes of an appeal, is by bill of exceptions signed by the trial judge. A paper purporting to contain a portion of the evidence introduced on a trial, and certified to by the official reporter, but not embodied in the bill of exceptions, cannot be recognized as a part of the transcript: *State v. Hemrick*, 17 N. W. Rep., 594.

As to incorporating short-hand report of testimony in bill of exceptions, see § 3777 and notes.

Where the bill of exceptions directed the clerk to insert the instructions given by the court on its own motion, and such instructions were incorporated by the clerk in the transcript, *held*, that it would not be presumed that instructions were given by the court other than on its own motion, and therefore that it would be considered that all the instructions given were before the court, and that the identification of the instructions in the skeleton bill of exceptions was sufficient: *King v. Barber*, 17 N.W. Rep., 88.

Where the affidavits on which the change of venue is asked in a civil case are before the court, it will presume that it has before it all the evidence upon which the court acted. In such case the opposite party cannot file counter affidavits, and in the absence of any showing it will not be presumed that affiants were produced in court and subjected to a cross-examination: *Mc Govern v. Keokuk Lumber Co.*, 61–265.

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756.

SEC. 2836.

The fact that the court erroneously sustains a demurrer to a count of the answer is error without prejudice, where the issue raised by such count is elsewhere presented and passed upon by the jury: *McKeever v. Jenks*, 59-300.

The admission of evidence and giving instructions as to a certain matter, held to be error without prejudice, in view of the fact that the successful party was entitled to recover without regard to such evidence and instructions: *Langford v. Ottumwa Water Power Co.*, 59-283.

Where evidence is admitted over the objection of a party it will be presumed that the court considered it and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

In order to determine whether prejudice has resulted to a party by the exclusion of evidence offered by him, the answers, or the facts proposed to be proved by the witness in response to the question asked, must be made to appear. Unless prejudice be thus shown, the error in sustaining objection to the question or the evidence offered will not be ground of reversal: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; *Bays v. Hunt*, 60-251; *Kelleher v. City of Keokuk*, 60-473; *Klaman v. Malvin*, 61-752.

SEC. 2837.

While it is the general rule that the order of the court granting a new trial will not be as readily reversed on appeal as when the motion has been denied, yet it is limited to cases where there is a discretion reposed in the court below, or where the new trial is granted on the ground that the verdict is against the evidence, or because injustice has been done. No discretion is reposed in the court in determining whether or not evidence which is relied on to entitle the party to new trial on the ground of newly discovered evidence, is cumulative, and a ruling of the court in granting a new trial upon the showing as to such evidence, will be reviewed as readily as though the court had refused to grant the new trial: *Town of Manson v. Ware*, 19 N.W. Rep., 275.

There are very many things attendant upon the trial in a *nisi prius* court which never can be presented to an appellate court. The *nisi prius* court has much better facilities for determining whether justice has been done and hence its ruling is always regarded by the supreme court as having a presumption in its favor: *Conklin v. City of Dubuque*, 54-571; *Hill v. Denslinger*, 61-240; *Johnson v. C., R. I. & P. R. Co.*, 58-348.

When the trial court determines that the verdict is contrary to the evidence, and ought to be set aside on that ground, the case must be a very clear one to warrant an appellate court in interfering with its action: *Moran v. Harris*, 19 N. W. Rep., 278.

The fact that a juror had an outstanding bet, which would be directly affected by the result of the trial, which fact was not disclosed by him when questioned as to his competency and was not known to the adverse party, *held*, sufficient ground for a new trial, although the bet was trifling in amount: *Seaton v. Swem*, 58-41.

Acts of social intimacy between a juror and an attorney in the case, during the progress of the trial, *held* sufficient misconduct to require the granting of a new trial: *Stafford v. City of Oskaloosa*, 57-748.

The drinking of intoxicating liquors at the instance and solicitation of one of the parties cannot be made ground for new trial on the motion of such party: *Webster Co. v. Hutchinson*, 60-721.

An affidavit of a person who states that he heard a juryman talking about the evidence that had been produced in the case, but not giving the name of the juryman nor the statements made by him, is not sufficient to require the verdict to be set aside for misconduct: *Brant v. City of Lyons*, 60-172.

The fact that a juror is shown to have gone to sleep during the trial of the case, if known to the attorney of the party at the time, should be called to the court's attention at once and cannot be raised for the first time in a motion for a new trial: *Carey v. Gunnison*, 17 N. W. Rep., 881.

Where statements were made by an attorney in his concluding argument not warranted from anything

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in the evidence and relating to the animus actuating the other party, etc., *held*, that it was misconduct for which a new trial should have been granted; and that where such statements were made while the judge was not present but was hearing another case, the fact that objection was not made to the court by the opposite party at the time of the misconduct, did not defeat his right to call it into question: *Hall v. Wolff*, 61–559.

That the successful party has introduced false testimony constitutes misconduct which, upon motion, requires granting of a new trial: *First National Bank of Shenandoah v. W., St. L. & P. R'y Co.*, 17 N. W. Rep., 48.

The question whether the verdict ought to be set aside on account of alleged misconduct, is left very largely to the sound discretion of the trial court, and, in the absence of a showing of an abuse of discretion, its action will not be reversed upon appeal: *Perry v. Cottingham*, 18 N.W. Rep., 680.

The fact that a material witness who is expected to be present at the trial is accidentally delayed and unable to reach the place of trial in time, would be ground for a new trial. But if he might be introduced after the conclusion of the testimony, and even after some of the arguments have been made to the jury, application for leave to introduce him should be made under § 2799: *Smith v. State Insurance Co.*, 58–487.

The incompetence of an attorney does not ordinarily constitute ground for a new trial. Indeed in civil cases the rule may be regarded as almost invariable: *State v. Benge*, 61–658.

In a particular case, *held*, that the verdict was not so wanting support in the evidence as to warrant the court in saying the jury were governed by either passion or prejudice, and therefore it could not reverse the judgment: *Beazan v. Incorporated Town of Mason City*, 58–233.

Where the direct testimony and circumstances shown could be reconciled and made harmonious, *held*, that a verdict in conflict with such testimony should have been set aside and a new trial granted: *Sullivan v. W., St. L. & P. R. Co.*, 58–602.

The party moving for a new trial on the ground of newly discovered evidence, must make it appear that the proposed evidence is competent and material: *Town of Manson v. Ware*, 19 N. W. Rep., 275.

Newly discovered evidence in a particular case, *held*, not sufficient ground for a new trial: *Harnett v. Harnett*, 59–401.

Affidavit for new trial in particular case on ground of newly discovered evidence, *held*, not to show sufficient diligence in attempting to secure the evidence before the former trial: *Smith v. Wagaman*, 58–11.

A new trial should not be granted upon the ground of newly discovered evidence which is merely cumulative or impeaching: *Morrow v. C., R. I. & P. R. Co.*, 61–487.

Evidence as to declarations of a party in relation to the terms of the contract sued upon, is not to be deemed cumulative with other evidence of such contract: *Cook v. Smith*, 58–607.

761.

SEC. 2838.

It is not required that the motion for new trial be determined at the term at which it is filed. It stands like any other matter submitted to the court, and upon final adjournment, in absence of agreement that it may be decided in vacation, goes over to next term by operation of law; and the court has jurisdiction to determine it at such term: *Van der Haar v. Van Domeeler*, 56–671.

A motion filed after the time herein specified cannot be considered for any cause except newly discovered evidence: *Clinton National Bank v. Graves*, 48–228; *Patterson v. Jack*, 59–632.

Under facts in particular case, *held*, that there was not sufficient excuse for not filing motion for new trial by the time stipulated by the parties, even conceding that in a proper case such failure might be excused: *Beems v. C., R. I. & P. R. Co.*, 58–150.

This section is not applicable to a motion by the plaintiff to reinstate a cause which has been dismissed for want of prosecution: *Byington v. Quincy*, 61–480.

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A judgment entered before the expiration of the time for filing motion for a new trial, under the statute or stipulation of the parties, could not be set aside on that account: *Beems v. C., R. I. & P. R. Co.*, 58–150.

Where a court takes a recess during the term, such recess is not to be excluded in determining the time when a motion for a new trial shall be filed: *Ewaldt v. Farlon*, 17 N. W. Rep., 487.

The affidavit of a juror is not receivable to show that he only concurred in the verdict because he had learned that his father was very sick, and for that reason was unwilling to hold out longer, and that the verdict was not his deliberate judgment: *Fox v. Wunderlich*, 20 N. W. Rep., 7.

When it is sought to sustain the verdict, or to show the basis upon which the verdict was found, not for the purpose of impeaching, but for the purpose of determining the rights of the parties in a mere matter of costs, affidavits of jurors may be considered; for instance, on the question whether any allowance of interest was included in the verdict: *Swails v. Cissna*, 61–693.

Affidavits of the attorney of the unsuccessful party as to statements made to him by jurors, showing misconduct of the jury, *held*, not admissible to impeach such verdict. Such evidence is merely hearsay: *State v. Quinton*, 59–362.

762.

SEC. 2842.

It is not proper to direct a verdict against a party on account of the insufficiency of his pleading (as, for instance, where he has failed to aver performance of conditions of a contract on which he relies), as such action of the court would deprive such party of the benefit of this section: *Wrought Iron Bridge Co. v. Greene*, 53–562. See, also, on this point, notes in supplement to § 2650.

763.

SEC. 2844.

Where the character of the court's instructions to the jury was stated to the parties, but they had not yet been read over to the jury, *held*, that plaintiff had a right to dismiss: *Mullen v. Peck*, 57–430.

Where the cause has been dismissed for want of prosecution and not for default in pleading, the court may, at its discretion, reinstate it on the motion of plaintiff: *Byington v. Quincy*, 61–480.

SEC. 2845.

This section and the preceding are applicable in equitable actions as well as in actions at law, and the court has no authority upon the final submission of an equitable action to dismiss the bill at plaintiff's cost without prejudice: *Forsythe v. McMurty*, 59–162.

765.

SEC. 2853.

Judgment against one of two defendants, jointly and severally liable, may be rendered without the case being disposed of as to the other: *Poole v. Hintrager*, 60–180.

SEC. 2855.

That the court should not grant plaintiff relief in any respect greater than what is claimed in his petition, see *Tice v. Derby*, 59–312.

SEC. 2856.

See *Musser v. Crum*, 48–52

SEC. 2858.

The court cannot properly render judgment for a party upon a special verdict, unless, taken in connection with the pleadings, it is such as to

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show conclusively that the party is entitled to judgment: *Crouch v. Deremore*, 59–43.

Where the general verdict is contrary to instructions it should be set aside, but it does not necessarily follow that judgment should be rendered upon a special verdict in accordance with the court's instructions; for, while the instructions were binding upon the jury, they are not binding upon the court, and it is under no obligation to follow them: *Evans v. St. Paul Harvester Works*, 18 N. W. Rep., 881.

When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury: *Baird v. C., R. I. & P. R. Co.*, 61–359.

Under peculiar facts, *held*, that a special verdict was not sufficient to entitle plaintiff to judgment in a case where a general verdict for defendant was set aside on account of error in the instructions: *Pettus v. Farrell*, 59–296.

766.

SEC. 2864.

There can be no judgment until it is entered in the proper records of the court: *Balm v. Nunn*, 19 N. W. Rep., 810.

767.

SEC. 2867.

Where a cause has been dismissed, not for default in pleading, but merely for failure of the plaintiff to appear and prosecute at the time set for trial, it may be reinstated on the motion of the plaintiff at the discretion of the court: *Byington v. Quincy*, 61–480.

Where an answer was filed some eighteen days after the time allowed for filing of answer by agreement of parties, but some months before the next term of court, and in answer to an amended petition setting up a new cause of action, and in pursuance of an order of court made in vacation upon application extending the time, but without notice to the adverse party, *held*, that there was no abuse of discretion on the part of the court in refusing to grant default on motion: *Redfield v. Miller*, 59–393.

768.

SEC. 2871.

Where rules of court provided for the filing of a copy of petition for the use of defendant, and three days before the appearance day defendant applied for such copy and it was not on file, and he thereupon filed an affidavit of such fact and asked to have a copy, and to be allowed reasonable time thereafter to defend, and thereafter was detained at home by sickness for nine days, *held*, that upon proper application default against him entered on the regular appearance day, should have been set aside: *Brett v. Farr*, 58–442.

In a particular case, *held*, that the motion to set aside default made a sufficient showing of a meritorious defense: *Willett v. Millman*, 61–123.

Default improperly entered should be set aside without showing of excuse or affidavit of merits: *Brandt v. Wilson*, 58–485.

769.

SEC. 2872.

A party in default waives his right to demand a jury to assess the damages: *Preston v. Wright*, 60–351.

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770.

SEC. 2873.

A party in default cannot object to the evidence offered, nor cross-examine the witnesses in relation to portions of the claim which are not referred to in the testimony in chief of such witness; thus *held*, that where a portion of plaintiff's claim was sufficiently established by a sworn account, and a witness was introduced to prove another portion, the cross-examination could not be extended to items of account established by the sworn account: *Lyman v. Bechtell*, 58–755.

SEC. 2877.

The provisions of this section are, under § 3516, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57–33.

This section authorizes a re-trial in all cases where a judgment by default has been rendered against one served by publication only. It has no reference to a case wherein a judgment is void for want of jurisdiction to render it: *Smith v. Griffin*, 59–409.

771.

SEC. 2881.

In a proceeding by attachment, when the defendant is personally served, the judgment should be *in rem* only, and a personal judgment would be void even though the attached property were sold thereunder: *Smith v. Griffin*, 59–409.

772.

SEC. 2882.

A judgment recovered by a creditor after a fraudulent conveyance by his debtor, does not become a lien upon the property so conveyed in the absence of proceedings to subject the property to such judgment. The conveyance is absolute as to the grantor, and leaves no interest in him subject to the lien: *Howland v. Knox*, 59-46.

The fact that a party has a verdict against another does not give him any interest in or lien upon the property of the latter in advance of the rendition of a judgment, nor will a *nunc pro tunc* judgment of the court become a lien upon his property prior to its actual rendition so as to bind third persons: *Miller v. Wolf*, 18 N. W. Rep., 889.

775.

SEC. 2895.

The omission of the notary to write his full name to the jurat, when the seal is added showing his full name, is not sufficient to vitiate the judgment: *Grattan v. Matteson*, 54–229.

SEC. 2896.

That the confession recites that the indebtedness accrued for borrowed money is sufficient: *Kendig v. Marble*, 58–529.

776.

SEC. 2897.

Judgment may be entered by the clerk in vacation and approved at the next term: *Kendig v. Marble*, 58–529.

The mere fact that the note upon which judgment by confession is rendered is usurious, does not authorize the conclusion that the parties caused judgment to be entered for the purpose of concealing usury or to avoid the statute against it: *Ibid.*

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SEC. 2899.

If the offer to confess is insufficient, it is to have no effect on the question of costs: *McClatchey v. Finley*, 17 N. W. Rep., 469.

778.

SEC. 2903.

Where the adverse party is not within the jurisdiction of the court, and cannot be served or cannot be readily served with notice, the court may, under some circumstances, appoint a receiver without notice: *Maish v. Bird*, 59–307.

Under the facts in a particular case, *held*, the party was not entitled to the appointment of a receiver: *Sleeper v. Iselin*, 59–379.

In a prosecution for larceny of goods from the possession of a receiver, *held* that it was not necessary upon the part of the state to prove that a bond had been given before the property was taken by such receiver, it appearing that he was acting under a proper order of the court, and that defendant, before the commission of the acts charged, knew that he was so acting: *State v. Rivers*, 60–381.

In an indictment for larceny of goods from a receiver, the ownership of the property may be laid in the receiver. It is not a case falling under section 3915, which relates to the wrongful taking of property while in possession of an officer by virtue of legal process: *Ibid.*

Where a chattel mortgagee brought an action in equity to foreclose his mortgage against the mortgagor and certain attaching creditors, the mortgage being upon a stock of dry goods which would have been greatly depreciated in value if taken and withheld from sale by the mortgagee, and the mortgagee having by the mortgage the right to take possession whenever he should choose to do so, and proceed to subject the property to the payment of the amount due or to become due on his mortgage, *held* that the case was a proper one for the appointment of a receiver upon request of such mortgagee, although the action was commenced before the mortgage indebtedness had become due: *Maish v. Bird*, 59–307.

779.

SEC. 2905.

A receiver may appeal from an order erroneously fixing the amount of property in his hands, and directing him to turn over more than he has in custody: *How v. Jones*, 60–70.

781.

SEC. 2927.

This section does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something, and if he chooses to make the motion, he must make it instanter, or within such time as is given him by the court. If he fails, without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur: *Sprague v. Haight*, 54–446.

783.

SEC. 2933.

In an action by a minor in his own name, a valid judgment for costs may be rendered against him: *Albee v. Winterink*, 55–184.

Equitable apportionment of costs made in a particular case: *Starr v. Case*, 59–491.

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784.

SEC. 2935.

The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered, but, under the provisions of § 3842, that he shall only be rendered liable on motion as here provided: *McConkey v. Chapman*, 58-281.

SEC. 2942.

The judgment, so far as it covers costs, is for the use of the parties entitled to such costs, and the successful party has no interest in that part of the judgment except in so far as such costs have been paid by him; therefore a payment to him of the costs covered by the judgment will not release his judgment debtor from the claims of parties entitled to such costs: *McConkey v. Chapman*, 58-281.

785.

18 G. A., Ch. 185.

An attorney's fee is to be treated as part of the costs and not as part of the amount in controversy: *Speisberger v. Thomas*, 59-606.

The attorney's affidavit here contemplated is not evidence to be introduced by the plaintiff; it is rather a condition precedent to be performed by the attorney before the attorney's fee can be allowed in his favor: *Ibid.*

789.

SEC. 2955.

Where a writ of attachment in an action not founded on contract, issues and is levied, without an allowance being made as here required, and a motion is made to quash the writ on that ground, the court may then make an allowance, to relate back, as between the parties, to the issuance of the writ, and fix the additional amount of property which may be levied on: *Magoon v. Gillett*, 54-54.

Action for tortious conversion of property still in possession of defendant cannot be considered as on contract: *Moses v. Arnold*, 43-187.

790.

SEC. 2961.

In action on the bond for wrongful suing out of the writ, the burden of proof is on defendant in the attachment suit to show that no reasonable grounds for belief of the facts stated existed: *Dent v. Smith*, 53-262.

To entitle himself to exemplary damages on the bond, it is not sufficient that attachment defendant show that the facts alleged as basis for the attachment were not true, and that attachment plaintiff had no reasonable grounds to believe them true. He must prove these facts to entitle himself to actual damages. To recover exemplary damages, he must show that plaintiff acted with intention, design, or set purpose of injuring him: *Nordhaus v. Peterson*, 54-68.

A verdict for actual damages, in an action on the bond, and a special finding that the attachment was wrongfully sued out, are sufficient to warrant the allowance of an attorney's fee. That there was no reasonable cause to believe the ground upon which the attachment was issued to be true, is implied in such verdict and special finding: *Nockles v. Eggspieler*, 53-730.

Although proof that plaintiff had no cause of action whatever would be admissible if attachment was wrongfully sued out, yet in fixing the attorney's fee the court is not to take into account the trial of the whole case: *Porter v. Knight*, 19 N. W. Rep., 282.

In an action upon a bond, it must be alleged that the damages sustained have not been paid, and a failure to make such averment may be raised for the first time on motion in arrest of judgment, at least in a case where there is no evidence offered of any damages: *Hencke v. Johnson*, 17 N. W. Rep., 766.

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792.

AFTER SEC. 2964.

INDEMNIFYING BOND.

[Twentieth General Assembly, Chapter 45.]

SECTION 1. An officer is bound to levy an attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which the plaintiff directs him to levy. But if after such levy he shall receive notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest and the facts showing how he acquired such interest and for what consideration, such officer may release the property unless a bond is given as provided in the next section. But such officer shall be protected from all liability by reason of such levy until he receives such written notice.

Levy of attachment.

Notice that property belongs to another.

Protection of officer.

SEC. 2. When the officer receives such notice, he may forthwith give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sureties, to be approved by the officer, to the effect that the obligors will protect and indemnify him against the damages which he may sustain in consequence of the seizure and sale, and warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer shall proceed to subject the property to the attachment, and shall return the bond aforesaid to the district or circuit court of the county in which the levy is made.

Notice to plaintiff.

Indemnifying bond.

Proceedings where bond is given.

SEC. 3. If such bond is not given, the officer holding the attachment may, within a reasonable time after demand being made by said officer, restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

Proceedings where bond is not given.

SEC. 4. The provisions of the foregoing sections shall apply to attachments issued by justices of the peace, and such bonds shall be returned to the justice issuing said writ.

Applies to attachments issued by justices.

SEC. 5. All acts and parts of acts in conflict with this act are hereby repealed.

Repealing clause.

[The provisions of this act are almost identical with those found in sections 3055–7 in relation to indemnifying bond in case of levy under execution.]

SEC. 2967.

In order to make a legal and valid levy, an officer must do such acts as that, but for the protection of the writ, he would be liable in trespass. Therefore, *held*, that a levy upon certain patterns, which remained locked up in a building, the key of which was in the possession of the owner, was not sufficient: *Rix v. Silknitter*, 57–262.

793.

SEC. 2970.

To authorize the appointment of a receiver under this section, there must be some showing that the exercise of the power is necessary: *Silverman v. Kuhn*, 53–436.

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SEC. 2972.

The sheriff or constable is only held to the exercise of ordinary care in the preservation of the property in his hands: *Creswell v. Burt*, 61–590.

794.

SEC. 2975.

While a garnishment of an employer for wages of his employe will hold not only wages due but such as afterwards become due, yet, as the employe, if a married man, is entitled to have ninety days' wages exempt (by § 3072), the employer is not to be held liable to judgment in such case unless it appears that at the time of garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands: *Davis v. Humphrey*, 22–137.

The notice upon the defendant required by this section, as amended by 18 G. A., ch. 58, should be served ten days before the trial of the issue, and in case there is no issue, ten days before the judgment is rendered against the garnishee. This notice is essential to the jurisdiction of the court over the subject-matter in controversy, and if the garnishee fails to assert his right to be discharged on account of such want of notice but submits the case without making that question of record, it is proper for the court to set aside the trial and submission as premature and continue the cause for such action as either of the parties may take: *Williams v. Williams*, 61–612.

An answer of the garnishee that he was informed and believed that the defendant was a married man living with his family, *held*, not sufficient to show the right of exemption, for the reason that it did not allege such to be the fact, nor allege that he was a resident of the state: *Smith v. C. & N. W. R'y Co.*, 60–312.

An indebtedness due from a resident to a non-resident, even for services rendered outside of the state, is subject to attachment by garnishment in an action brought against such non-resident by publication. Therefore, *held*, that where the defendant in an action by publication was a non-resident, a railway company which was operating a railway from a point within to a point without the state and was indebted to such non-resident defendant for services rendered outside the state, might be held liable as garnishee for such indebtedness: *Mooney v. U. P. R. Co.*, 60–346.

The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property and passes under a general assignment. After such general assignment the mortgagee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 53–414.

Where it was agreed by and between the mortgagor and attaching creditors and the mortgagee, that the property should be sold in bulk and the proceeds applied upon the attachment, *held*, that the proceeding operated as a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor of the surplus in the sheriff's hands after the satisfaction of the first mortgage: *Phelps v. Winters*, 59–561.

Judgment against a garnishee cannot be properly entered where there is no return to the writ of attachment showing the fact of garnishment: *Rock v. Singmaster*, 17 N. W. Rep., 744.

As to garnishment upon judgment, see § 3051 and notes.

796.

SEC. 2979.

Garnishee's answer is not a pleading in the case, but in the nature of evidence, and is not a part of the record unless made so by bill of exceptions: *Brainard v. Simmons*, 58–464.

A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58–703.

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SEC. 2980.

A debtor who procures himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and does not set up such exemption, or notify his creditor so that the latter may do so, is guilty of fraud, and will not be released from liability by a judgment against him: *Smith v. Dickson*, 58–444.

Where a corporation aggregate is garnished, it is competent for such corporation to answer in writing through some officer or agent authorized by the corporation to do so: *Bailey v. U. P. R'y Co.*, 17 N. W. Rep., 567.

SEC. 2981.

The plaintiff is not precluded by the fact that the garnishee makes answer to the sheriff from prosecuting the examination further if he sees fit: *Thompson v. Silvers*, 59–670.

Where a commissioner is appointed to take the answer of garnishee, and the court does not fix a time and place for the answer to be taken, the commissioner may fix such time and place and give the garnishee notice thereof, and without such notice the garnishee is not in default for failing to appear and answer: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

797.

SEC. 2982.

It is within the discretion of the court to require that questions to be propounded to the garnishee shall be reduced to writing and submitted to the court before answer: *Elwood v. Crowley*, 19 N. W. Rep., 857.

A wife garnished as a debtor of her husband is not exempt from answering questions touching such indebtedness, on the ground that such answers would be testimony against her husband. It could not be regarded as against her husband's interest that his property be subjected to the payment of his debts: *Thompson v. Silvers*, 59–670.

SEC. 2984.

Where a court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer, the garnishee should not be judged in default for failure to appear and answer unless notified by the commissioner of the time and place fixed for taking his answer: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

Where a garnishee refuses to answer questions propounded before a referee appointed to take such answers and plaintiff upon the facts being reported by the referee moved for an order requiring her to answer at a particular time, at which time she refused to answer and her refusal was sustained by the court, *held*, upon appeal, that although the plaintiff might have been entitled to judgment by default against the garnishee for refusal to answer questions propounded by the referee, yet having obtained an order for further examination he could not have judgment against the garnishee for refusal to answer when the court sustained her objections, although in so doing the court erred: *Thompson v. Silvers*, 59–670.

SEC. 2985.

The garnishee is entitled to reasonable notice to show cause, but it is not necessary that such notice be served ten days before the term. Ten days notice during term, *held*, sufficient in particular case. After failure to appear in response to such notice, no motion is necessary, and no new judgment should be entered: *Langford v. Ottumwa Water Power Co.*, 53–415.

Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause why execution should not issue against him, appears and protests that the court has acquired no jurisdiction, will not render judgment by it valid: *Padden v. Moore*, 58–703.

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SEC. 2986.

Where property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court, and carried out: *Buckham v. Wolf*, 58-601.

798.

SEC. 2987.

When trial is required to determine the rights of all the parties, the question as to whether the garnishee is indebted to the defendant is not to be presented separate from that as to whether the debt in the hands of the garnishee is to be condemned for the payment of such indebtedness: *Williams v. Williams*, 61-612.

The answer of a garnishee is not a pleading and does not become a part of the record unless embodied in a bill of exceptions: *Brainard v. Simmons*, 58-464.

The venue of the garnishment proceeding cannot be changed to the county of garnishee's residence: *Smith v. Dixon*, 58-444.

SEC. 2988.

Where a garnishee seeks in equity to have a judgment against him set aside on the ground that the notice was not sufficient to give the court jurisdiction, the burden is not upon him to show that the judgment is also erroneous, but is upon the adverse party who insists that it is just. The garnishee is not presumed to be indebted: *Padden v. Moore*, 58-703.

800.

SEC. 2994.

The delivery bond is not superseded or rendered null by a supersedeas bond given on appeal: *State v. McGlothlin*, 61-312.

SEC. 2996.

A mistake in the bond as to the court in which the attachment issued will not render the bond invalid as to the sureties: *Ripley v. Gear*, 58-460.

803.

SEC. 3010.

The return of the writ is the statutory evidence of what it purports to show. It must be endorsed upon the writ or made upon a paper annexed thereto. The writ and return constitute essentially one record and must go together. Therefore, *held*, that judgment against a garnishee could not be properly rendered in the absence of a return of the writ showing the garnishment: *Rock v. Singmaster*, 17 N. W. Rep., 744.

804.

SEC. 3016.

A third person, not a party to the action, claiming to be owner of attached property, having discharged it by giving bond as provided in § 2996, may still proceed under this section. The property does not cease to be attached property, though released by the bond: *Tuttle v. Wheaton*, 57-304.

This section clearly contemplates that any claim, lien, interest, or title, in and to the property attached, may be set up at any time before the proceeds are paid to the plaintiff in attachment: *Howe v. Jones*, 57-130.

SEC. 3017.

Where, in an attachment suit brought against a partnership and the individual partners jointly, the writ directed the attachment of any prop-

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erty of said partnership, and the attachment bond was executed to the partnership and the attachment was levied upon individual property of a partner not served with notice, who appeared and interposed a counterclaim on the bond, *held*, that such partner could therein recover for injuries to his individual property: *Mason v. Rice*, 19 N. W. Rep., 897.

805.

SEC. 3018.

Where it was shown that the property attached was exempt, *held*, that it should have been discharged upon motion, and that such showing was not inconsistent with the allegations in the petition for attachment, that plaintiff was about to remove his property from the state: *Hastings v. Phœnix*, 69–394.

SEC. 3021.

Where the writ was defective in not stating the sum claimed in the action, *held*, that it might be amended in this respect after levy: *Atkins v. Womeldorf*, 53–150.

Where, in an action not founded on contract, there was no allowance by the judge of the amount of property to be attached, as required by § 2955, *held*, that upon motion to discharge attached property on that ground, the court might order as to how much property should be held: *Magoon v. Gillett*, 54–54.

806.

SEC. 3025.

If there is no valid existing judgment when the execution is issued, it is void: *Balm v. Nunn*, 19 N. W. Rep., 810.

An execution must be regarded as existing until it is returned, although the return day has passed; and a sale under a second execution, issued before the first is returned, should, as to judgment creditor purchasing thereat, be set aside: *Merritt v. Grover*, 57–493.

The provision that but one execution can be in existence at the same time is mandatory and not merely directory; nevertheless, it may be waived by the party for whose benefit it was enacted; and where it appeared that the party against whom the execution was issued knew that another execution was in existence and not only stood by and made no objection to the sale under the second, but at the expiration of the time for redemption surrendered the possession of the property without objection, *held*, that he could not thereafter in the absence of a showing that the land was sold for less than its value and an offer to pay the judgment, take advantage of the error: *Merritt v. Grover*, 61–99.

The mere issuance of a second writ before the return of the prior execution under which the levy has been made, is not of itself sufficient to establish the abandonment of such levy: *West v. St. John*, 19 N. W. Rep., 238.

SEC. 3026.

The proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt: *State v. Baldwin*, 57–266.

807.

SEC. 3029.

As to effect of statements in sheriff's return entered by the clerk on the judgment docket, see notes to section 3038.

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808.

SEC. 3037.

Failure to return execution within the time here required, does not render the officer liable to an action for damages, unless special injury is alleged and proved: *Musser v. Maynard*, 55–197.

The rule that a sale made after the expiration of the execution is valid applies to executions issued by justices of the peace: *Walton v. Wray*, 54–531.

An officer is required to make his return in writing endorsed on the execution. If the execution is lost or destroyed, it may be that it would be competent to make the return on a copy, but unless the fact of such loss or destruction is shown by the return, a return made upon a copy cannot be introduced in evidence; nor can the return be explained by parol, unless it is shown that it has been made and lost or cannot be produced: *West v. St. John*, 19 N. W. Rep., 238. And see notes in supplement to § 3043.

Where the right of the sheriff to subject the property levied on to the satisfaction of the execution, is contested by an action of replevin, he should not make any return until after the disposition of the replevin suit. Having made a levy it is competent for him to exhaust the property on that execution, no matter what time expires between the levy and sale of the property: *Cox v. Currier*, 17 N. W. Rep., 767.

SEC. 3038.

A return upon an execution should be a statement of what is done by the officer in obedience to the writ; and a statement therein purporting to show the acts of a person other than the officer is without authority of law, and surplusage; therefore *held* that a statement in the return that the execution was satisfied by defendant giving security, which was taken by order of plaintiff and an entry by the clerk upon the judgment record of the same facts, did not show a satisfaction upon which a subsequent encumbrancer could rely: *Aultman v. McGrady*, 58–118.

SEC. 3039.

This statute only applies when judgment has been obtained against both principal and surety; and not then, unless the order of liability is stated in the judgment: *Bonney v. Cocke*, 61–303.

809.

SEC. 3043.

The officer's return endorsed on the writ, is the evidence as to what property is covered by the levy, and it is not proper for the officer as a witness to testify as to whether other property was levied upon: *Flannigan v. Althouse*, 56–513.

If the execution and return be shown to be lost, parol evidence may be introduced to show the contents of such return, but for no other purpose: *LeBarron v. Taylor*, 53–637.

SEC. 3044.

In order to make a legal and valid levy upon personal property, the officer must take possession and control, by doing such acts as that, but for the protection of the writ, he would be liable in trespass therefor. Levy upon property which remained locked in an outbuilding, the key of which was in possession of the debtor, *held*, not sufficient: *Rix & Stafford v. Silknitter*, 57–262.

The sheriff or constable is only held to the exercise of ordinary care in the preservation of the property in his hands: *Creswell v. Burt*, 61-590.

810.

SEC. 3048.

The question decided in *Loring v. Small*, 50–271, again considered and that case followed: *Whiting v. Story Co.*, 54–81.

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811.

SEC. 3051.

There is no provision requiring notice of the garnishment proceeding to be served on the judgment debtor, and the court may proceed in such cases against the garnishee without having jurisdiction of such debtor: *Smith v. Dixon*, 58–444.

SEC. 3054.

Where a creditor levied on firm property upon a judgment against one partner on an individual debt, and sold such property without bringing action as here contemplated, *held* that a creditor of the firm, obtaining judgment against the partners individually, might subsequently levy on such property, and maintain an action in equity to have the property subjected first to the payment of the firm debt, it appearing that there was no other partnership property: *Aultman v. Fuller*, 53–60.

812.

SEC. 3055.

Showing and delivering to the officer a bill of sale purporting to transfer the property to claimant, is not sufficient to constitute notice to the officer: *Gray v. Parker*, 53–505.

It is the imperative duty of the officer under this section to make a levy at once, and it is not his duty, on the mere disclaimer by the defendant of any interest in the property, to institute an inquiry as to the truth of the statement: *West v. St. John*, 19 N. W. Rep., 238.

Where the officer has been indemnified, it is his duty to use all proper means to make the levy effective on the property: *Cox v. Currier*, 17 N. W. Rep., 767.

This section does not apply to a case where the execution defendant claims that the property is exempt from execution: *Parsons v. Thomas*, 17 N. W. Rep., 526.

Acceptance of service of such notice by the sheriff's deputy is not binding: *Chapin v. Pinkerton*, 58–236.

Where the sheriff seizes property of one person under an execution against another, the owner may maintain replevin to recover the value of the property, even though it has been sold by the sheriff, proper notice of ownership having been given: *Hardy v. More*, 17 N. W. Rep., 200.

Notice served upon an officer by a mortgagee of property under chattel mortgage that such party is the owner of the property by virtue of a certain chattel mortgage and demanding the immediate return of the goods to the place from which they were taken, is sufficient notice to constitute a taking possession of the property under the terms of the chattel mortgage authorizing the mortgagee to do so whenever he chooses, and such notice evidences the intention of the party to claim his right of possession and foreclosure as provided in the mortgage: *Wells v. Chapman*, 59–658.

These provisions do not relate to levy of attachments and in an action of replevin against an officer holding property under attachment it is not necessary to aver the service of notice of ownership as herein contemplated: *Hall v. Ballou*, 58–585. (But now there is a statute in relation to attachment containing provisions similar to these three sections: See 20 G. A., ch. 45 in supplement to page 792.)

SEC. 3056.

If indemnifying bond is given, the officer must hold the property and cannot relieve himself from such duty, even by releasing to the rightful owner. His liability is absolute, unless the property is taken from him by legal process: *Evans v. Thurston*, 53–122.

A sheriff is not liable in damages for failure to levy upon property in the execution defendant's possession if it is shown that such execution defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59–712.

Where an officer has several writs

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of execution under different judgments against the same defendant, and another person claiming the property serves notice of his claim upon the officer, an indemnifying bond may be given jointly by the execution plaintiffs and on such bond an action may be maintained against them jointly: *Baxter v. Roy*, 17 N. W. Rep., 576.

SEC. 3058.

This section, in so far as it denies to the party whose property is wrongfully levied upon under an execution against another any action against the officer, is unconstitutional, as depriving the owner of his property without due process of law by substituting the liability of the party to the bond for that of the officer for his trespass: *Craig v. Fowler*, 59-200; and see *Sunberg v. Babcock*, 61-601.

814.

SEC. 3062.

A right of action against the clerk for damages arising from his fault in approving a stay bond does not accrue until the expiration of the stay; and so the right of action by the clerk against his deputy for fault of the latter in making such approval arises at the same time. In the latter action, it is no defense for the deputy that his principal had previously approved bonds signed by the same surety: *Moore v. McKinley*, 60-367.

SEC. 3064.

The determination of the clerk as to whether the bond is filed within the time required by § 3061, or whether the filing within the time specified is essential to its validity, is a judicial act, and an error in his decision on that question will render the judgment voidable, and not void: *Maynes v. Brockway*, 55-457.

815.

SEC. 3068.

Unless the surety objects, and such objection appears of record, he will be presumed to have consented to the stay and (under § 3102) thereby waived the right to redeem his property, if sold under execution: *Chase v. Welty*, 57-230.

SEC. 3072.

[19 G. A., ch. 49, amends this section by adding at the end thereof, after the word "dollars," the following:]

Exemption not waived.

Any person entitled to any of the exemptions mentioned in this section does not waive his right thereto by failing to designate or select such exempt property or by failing to object to a levy thereon, unless failing or refusing so to do when required to make such designation or selection by the officers about to levy.

Where husband and wife lived separate and apart for seven years prior to his death, and he neither contributed or was asked to contribute to her support, and during that time he lodged in his office and boarded in the family of others, it not appearing that the separation was intended to be temporary, *held*, that he was not the "head of a family" within the meaning of this section, and therefore, upon his death, his widow was not entitled, under § 2371, to claim personal property as having been exempt in the hands of the husband. The construction given to the expression "head of a family," as used in Rev. § 2277, in relation to homestead exemptions, is not applicable as to this section: *Linton v. Crosby*, 56-386. [The expression "head of a family" is not used in the Code in relation to homestead exemptions: See § 1988]

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Proceeds of a voluntary sale of exempt property are not exempt: *Harrier v. Fassett*, 56–264.

Where it appears that the debtor has the right to select one of several vehicles as exempt and such selection is made before levy, it should be respected by the officer: *Parker v. Haley*, 60–325.

Wages for personal services earned in the use of exempt property are exempt, and it is not fraudulent for the husband to contract to render such services to another: *Patterson v. Johnson*, 59–397.

The exemption of pension money, provided in R. S. of U. S. § 4747, applies only to such money while in course of transmission to the pensioner, and not after it comes into his possession: *Webb v. Holt*, 57–712; *Triplett v. Graham*, 58–135. (But see 20 G. A., ch. 23, inserted below in supplement to page 816.)

Standing by, and failing to object to a levy on exempt property amounts to a waiver of the exemption: *Moffitt v. Adams*, 60–44. But in a particular case, *held*, that the facts did not show a failure on the part of the debtor to object to the levy sufficient to constitute a waiver of exemption: *Green v. Blunt*, 59–79.

A non-resident is not entitled to an exemption of his wages, even where the services are rendered in the state where he resides and are such that under the laws of that state they would be exempt in an action brought there: *Mooney v. U. P. R. Co.*, 60–346.

816.

AFTER SEC. 3072.

PENSION MONEY.

[Twentieth General Assembly, Chapter 23.]

SECTION 1. All money received by any person, resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him, shall be exempt from execution or attachment, or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not. Moneys and credits.

SEC. 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads; and such exemption shall also apply to debts of such pensioner contracted prior to the purchase of such homestead. Homestead.

SEC. 3. When a debtor absconds and leaves his family, the property exempted by this act, shall also be exempt to his wife and children, or either of them. Absconding debtor.

SEWING MACHINE.

[Nineteenth General Assembly, Chapter 62.]

SECTION 1. If the debtor is a seamstress, one sewing machine shall be exempt from execution and attachment. Sewing-machine exempt.

817.

SEC. 3074.

The person entitled to hold earnings exempt from execution may use such earnings in payment of property purchased by his wife, and such property will be held by the wife free from his debts: *Robb v. Brewer*, 60–539.

The object of this section is to exempt the earnings for personal service, as contra-distinguished from the

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income arising from a business involving other elements of gain than the mere personal service of those conducting it; therefore, *held*, that the business of keeping a boarding house involves many elements of profit aside from the mere personal earnings of the proprietor and of his family, and that money due to him in that business is not exempt from execution as personal earnings: *Shelly v. Smith*, 59–453.

To entitle a debtor to this exemption, it must be shown that he is a resident of the state: *Smith v. C. & N. W. R. Co.*, 60–312.

If defendant is a non-resident he cannot claim exemption of earnings, even if they are rendered in the state of his residence, and are exempt by the laws of that state: *Mooney v. U. P. R. Co.*, 60–346.

SEC. 3076.

Facts considered and *held* to show a starting to leave the state, although the debtor had not actually set out upon his journey: *Graw v. Manning*, 54–719.

SEC. 3078.

To constitute an absconding, such as to entitle the wife to hold property as exempt, the departure of the husband need not be without the knowledge and consent of the wife: *Malvin v. Christoph*, 54–562.

820.

SEC. 3088.

This section applies to sales under special, as well as general execution: *Taylor v. Truloch*, 59–558.

SEC. 3090.

Where the sale has been judicially set aside, the satisfaction of the judgment which followed the sale, and was entered of record by reason thereof, should be set aside also: *Farmer v. Sasseen*, 18 N. W. Rep., 714.

821.

SEC. 3092.

The judgment should be filed and approved as a claim of the fourth class, within the time specified in § 2420, for payment out of the personal estate: *Bayliss v. Powers*, 17 N. W. Rep., 907.

SEC. 3097.

The fact that a judgment has been assigned to the attorney in the case to secure his lien will not prevent the opposite party from setting off against it a judgment in his favor for costs in the same action: *Tiffany v. Stewart*, 60–207.

SEC. 3100.

The fact that where it appears that the sheriff appointed one appraiser, his return does not show that the party for whom he acted in making such appointment was absent or refused to appoint, will not render the sale void: *Preston v. Wright*, 60–351.

822.

SEC. 3102.

The taking of an appeal defeats the right of redemption, although no *supersedeas* bond be filed: *Dobbins v. Lusch*, 53–304.

Where the execution defendant has no right of redemption, a judgment creditor, who did not become such until after the sale, cannot

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redeem (distinguishing *Sieben v. Becker*, 53-24): *Brown v. Markley*, 58-689.

The term "defendant" in the first sentence of this section includes a vendee of the execution defendant, and such vendee may redeem as here provided. An appeal or stay of execution by the defendant in the action will not defeat the right of redemption in such vendee: *Thayer v. Coldren*, 57-110.

Where a surety does not object (as provided in § 3068) to stay of execution being granted, he will be considered as having assented thereto, if taken, and held to have thereby waived the right to redeem his property, if sold under such judgment: *Chase v. Welty*, 57-230.

A party who is surety on a debt for which a judgment is rendered, but has no interest in the property sold, cannot make redemption; he is not a defendant within the meaning of this section: *Miller v. Ayres*, 59-424.

This section is applicable to stay of execution on judgments in justices' courts: *Brown v. Markley*, 58-689.

Where the debtor redeems property sold in part satisfaction of a prior judgment, the unsatisfied portion of the judgment attaches as a lien upon the land (explaining *Clayton v. Ellis*, 50-590). Therefore, *held*, that where a debtor conveyed his right of redemption to his wife, and furnished her the money to make redemption, with intent to hinder and delay his creditors, the land so redeemed remained subject to his debts: *Peckenbaugh v. Cook*, 61-477.

823.

SEC. 3103.

The holder of a junior judgment lien, who is not made party to the foreclosure of a prior mortgage, is not limited to this statutory right of redemption, but may redeem by action in equity in the same manner as a junior mortgagee under similar circumstances: *American Buttonhole, etc., Co. v. Burlington Mutual Loan Association*, 61-464. In such equitable action the lien holder may have an accounting of the rents and profits, and have them applied in satisfaction of the mortgage debt from which he is seeking to redeem: *Bunce v. West*, 17 N. W. Rep., 179.

Where a mortgage is foreclosed for one installment of a mortgage debt, a purchaser from the mortgagor, prior to redemption, acquires, upon making redemption, title to the property, free from the lien of the mortgage for the unpaid balance: *Fischer v. Simmons*, 54-269; *Mickleweait v. Raines*, 58-605.

The foreclosure of a mortgage for part of the sum secured thereby, and the sale of the land, exhausts the remedy of the mortgagee under the mortgage against the land so sold, and he cannot after redemption by the mortgagor under the statute, through the mortgage, subject the land to the payment of a part of the debt remaining unsatisfied. This rule holds where the mortgage secures different notes, some of which are assigned to a third party, and the foreclosure and sale of the premises in an action by the assignee exhausts the lien of the mortgage upon such premises: *Harms v. Palmer*, 61-483. See also notes to § 3321.

While it may be true that the debtor's statutory right of redemption may be sold upon execution, it cannot be sold under an execution issued on the balance of the same judgment under which the original sale is made: *Hardin v. White*, 16 N. W. Rep., 580.

A creditor who obtains judgment against a grantor who has made a fraudulent conveyance, is not entitled to redeem from execution sale of the property fraudulently conveyed, which is made under a decree obtained by other judgment creditors subjecting such property to the lien of their judgment: *Howland v. Knox*, 59-46.

Where the party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity declared subject to their judgments and sold to satisfy the same, *held*, that redemption could not be made by him, the doctrine of *Clayton v. Ellis*, 50-590, being applicable: *Hayden v. Smith*, 58-285.

The creditor or lien holder cannot make statutory redemption after the expiration of nine months: *Newell v. Pennick*, 17 N. W. Rep., 432.

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After sale of land upon foreclosure, the mortgagee cannot redeem from the sale: *Todd v. Davy*, 60-532.

A purchaser of land at tax sale, which is covered by school fund mortgage, acquires a lien which is not extinguished by the sale unless he is made party to the suit, and not having been made party he may maintain an equitable action to redeem: *Ayres v. Adair Co.*, 17 N.W. Rep., 161.

SEC. 3104.

A creditor holding a judgment which is a lien upon real property of his debtor may become the purchaser of such real property at a sale under another judgment and make redemption from such sale in the same manner as if some other person had been the purchaser: *Citizens Savings Bank of St. Louis v. Percival*, 61-183.

824.

SEC. 3106.

The rule of *Tuttle v. Dewey*, 44-306, is not applicable to an *equitable* redemption by a junior mortgagee who was not made party to the foreclosure: *Iowa County v. Beeson*, 55-262.

SEC. 3109.

The purchaser under a judgment may redeem from a prior mortgage previous to the foreclosure thereof: *Hammond v. Leavitt*, 59-407.

SEC. 3112.

If no redemption by a creditor is made within nine months, none can be made afterward, even though the purchaser is also a junior judgment creditor: *George v. Hart*, 56-706.

826.

SEC. 3123.

The purchaser of property at a sale under a judgment which is junior to a mortgage may redeem from such mortgage before the foreclosure thereof, in the same manner as the debtor himself might have redeemed: *Hammond v. Leavitt*, 59-407.

SEC. 3124.

The estate of the debtor is not divested until execution of the deed, and any crops upon the premises already matured do not pass thereby, although they were not matured when the purchaser became entitled to his deed: *Everingham v. Braden*, 58-133.

827.

SEC. 3128.

The term defendant, as here used, must be construed to mean the particular debtor or person who has the legal or possibly an equitable title in and to the premises sought to be redeemed, but does not include the surety for the indebtedness who has no interest in the property sold: *Miller v. Ayres*, 59-424.

SEC. 3130.

Where action is brought, by mistake, in the name of a deceased person, and judgment is rendered and sale had thereunder, the proceedings are invalid: *White v. Secor*, 58-583.

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831.

SEC. 3154.

Where, in an action against a minor, an attorney appeared for him and was appointed guardian *ad litem*, *held*, that there was no ground, in the absence of prejudice being shown, to authorize setting aside the verdict and granting a new trial: *Webster v. Page*, 54–461.

A judgment rendered after the death of a party to the action, without substitution being made, is voidable and not void, and must stand unless set aside under ¶ 6 of this section, upon an adjudication that there is a valid defense to the action: *Gilman v. Donovan*, 53–362.

Fraud of the prevailing party on the former trial being shown which is sufficient to constitute reasonable grounds to believe that a different result may be anticipated on the retrial, the judgment should be vacated and the new trial ordered: *Brown v. Byam*, 59–52.

That defendant was misled by an error in the copy of the notice served upon him in regard to the date of commencement of the term of court might be a sufficient averment of unavoidable casualty or misfortune, but where the petition contained an inconsistent averment that defendant had taken legal advice as to whether the error relieved him from obligation to appear at the proper time, *held*, that he did not make out a case for relief: *Irions v. Keystone Man'f'g Co.*, 61–406.

The provisions of this section are applicable to a judgment in an adversary proceeding but not to an order for a guardian's sale of property: *Bunce v. Bunce*, 59–533.

Although the application under this section should be by petition and not by motion, yet where a motion was filed and the question as to the right to a new trial was determined thereunder without objection to the form, *held*, the supreme court would not reverse the proceedings for the defect: *Incorporated Town of Storm Lake v. I. F. & S. C. R. Co.*, 17 N. W. Rep., 489.

Where there is one judgment against two defendants, and one of them shows himself entitled to have it set aside, it should be set aside as to both: *Ibid.*

The proceedings authorized under this statute are in the nature of a writ of error *coram nobis* and are provided for a review of a case, after final judgment, in the very court wherein it was rendered. The jurisdiction of all other courts of such proceeding is thereby excluded and a change of venue cannot be had: *Gilman v. Donovan*, 59–76.

While courts of equity have jurisdiction to grant relief against judgments obtained by fraud in cases where the fraud is not discovered until after the expiration of one year from the rendition of the judgment, yet this statute defines the remedy to which the party is entitled, whether action be brought during the year provided for by the statute or after its expiration, and a court of equity can only grant the relief provided by the statute. The question whether a party is entitled to the remedy must be determined with reference to the terms of the statute, and, *held*, that the promise of a person seeking to foreclose a mechanic's lien that he would pay the claim of another person holding a prior lien upon the premises if the latter would not appear and assert such prior lien, would not constitute fraud authorizing the setting aside of the judgment thus obtained on failure of the promisor to make such payment, even though the promise was made without intention of performance: *Lumpkin v. Snook*, 19 N. W. Rep., 333.

832.

SEC. 3155.

The fact that an appeal from the original judgment is taken and pending cannot be pleaded in bar of an action under this section: *Cook v. Smith*, 58–607.

The filing of a petition for a new trial under this section cannot have any greater force and effect than would a motion seeking the same thing when filed within the time prescribed by statute. The petition for a new trial is deemed denied by operation of law, and before there can be a new trial the court must

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make an order granting it, which should be entered of record among the proceedings of the court: *Brown v. Byam*, 59–52.

Newly discovered evidence set out in a particular case as ground for new trial in an action for divorce, *held* not sufficient: *Harnett v. Harnett*, 59–401.

833.

SEC. 3157.

A party who has knowledge of the error complained of before the expiration of the year and does not pursue his remedy as herein provided, cannot have equitable relief against the judgment: *Freeman v. Hart*, 61–525.

834.

SEC. 3158.

The proceeding here provided for is not in the nature of a new or independent action, but is supplementary and is intended to correct errors committed in the trial of the case and in the rendition of judgment. The very court rendering judgment is to review its own decision, and the case cannot therefore be transferred by a change of venue to another court: *Gilman v. Donovan*, 59–76.

SEC. 3159.

It is not the duty of the court, where a new trial is asked on the ground of fraud in procuring the judgment, to carefully weigh the evidence and determine upon which side there is a preponderance, but to examine the evidence produced and therefrom, in connection with the evidence introduced on the former trial, determine whether there is reasonable ground to believe a different result will be reached upon a re-trial; and it is not proper for the court to render another judgment without first having decided whether the original judgment should be set aside and a new trial ordered: *Brown v. Byam*, 59–52.

835.

SEC. 3163.

The supreme court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken. The judgment must be affirmatively shown, and the court will dismiss the case where it does not appear that such judgment has been rendered, even though the parties fail to present the objection; for, being jurisdictional in its nature, the parties can not waive it by silence or consent: *Green v. Ronen*, 59–83; *Pittman v. Pittman*, 56–69.

It will not amount to a waiver of an appeal that money paid in to the clerk by the opposite party is applied in part by the clerk in satisfaction of a claim for an attorney's lien, without the knowledge of appellant, where he, as soon as he becomes aware of the fact, repudiates the transaction, and pays back to the clerk the amount so paid in: *Jewell v. Reddington*, 57–92.

SEC. 3164.

An order recommitting a cause to arbitrators is a decision from which an appeal lies: *Brown v. Harper*, 54–546.

An order granting or refusing a change of place of trial is not such as can be appealed from, but upon an appeal properly taken upon some order from which an appeal is allowed, even though it be an intermediate ruling before final judgment, any error in ruling upon the motion for change may be reviewed: *Allerton v. Eldridge*, 56–709. By an appeal from an order granting change of venue, the supreme court acquires no jurisdiction, and will refuse to consider the case, though no objection on that ground is made by either party: *Groves v. Richmond*, 58–54.

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But where the motion for change of venue was treated as raising the question whether the action on an appeal bond was properly brought in the county where the suit was commenced, and by that county, for the use of the school fund, or whether it should not have been brought in and by another county, *held*, that the decision of that question would be treated in the same manner as though made upon a demurrer and an appeal therefrom would be entertained: *Lucas County v. Wilson*, 59–354.

Where final judgment is rendered in favor of a defendant, he cannot appeal from a finding of facts which is against him. But if defendant has properly objected to the correctness of such finding, it is not proper, in case of a reversal on plaintiff's appeal, to render judgment against defendant thereon without opportunity for a new trial: *Boyce v. Wabash R. Co.*, 18 N. W. Rep., 673.

An order of court substituting other defendants in a case and releasing the original defendants may be appealed from, and such appeal may be prosecuted even though after such substitution the new defendants have procured a transfer of the case to the circuit court of the United States: *Sunberg v. District Court of Linn Co.*, 61–597.

An order of court declaring a bail bond forfeited is a final order from which appeal may be taken: *State v. Conneham*, 57–351.

Where in an appeal to the circuit court from the judgment of a justice of the peace, a motion was made to dismiss the appeal for want of jurisdiction on the ground that the amount in controversy was not sufficient, *held*, the action of the court in overruling such motion and taking jurisdiction was a determination affecting the final result, and that an appeal therefrom might be taken: *Curran v. Excelsior Coal Co.*, 18 N. W. Rep., 698.

An appeal may be taken from a decree in a partition proceeding settling the rights and interests of the parties as provided in § 3289. In that respect such decree is to be deemed final: *Williams v. Wells*, 16 N. W. Rep., 513.

A plaintiff, to whose petition a demurrer has been sustained, has the right to appeal unless it appears that such right has been in some manner waived: *Hampton v. Jones*, 58–317.

An order of discharge in a *habeas corpus* proceeding cannot be suspended by *supersedeas* bond pending an appeal: *The State v. Kirkpatrick*, 54–373.

836.

SEC. 3168.

This section only applies to such errors as, without such motion, would not be called to the attention of the inferior court. The next section renders a motion for new trial unnecessary: *Brown v. Rose*, 55–734.

Section applied: *Keller v. Jackson*, 58–629.

SEC. 3169.

Where exceptions are duly preserved in the course of the trial, they may be brought up on appeal although motion for new trial is stricken from the files because filed too late: *Beems v. C., R. I. & P. R. Co.*, 58–150.

838.

SEC. 3173.

Where judgment is entered and afterward a motion for new trial is made and overruled, an appeal from the judgment must be within six months after the entry thereof, and an appeal from the overruling of the motion for a new trial will not raise any question not involved in the ruling upon such motion: *Patterson v. Jack*, 59–632.

The period for taking an appeal runs from the time the decision is in fact made, and not from the time to which it has relation by agreement, as in case the decision is to be entered in vacation as of the preceding term: *Carter v. Sherman*, 16 N. W. Rep., 707.

The fact that it is sought to establish a lien, special or general,

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upon real estate, does not make the case one involving an interest in real property, authorizing an appeal without regard to the amount in controversy: *Colyar v. Pettit*, 18 N.W. Rep., 694; therefore, *held*, that an action to foreclose a mechanic's lien was not within the exception: *Andrews v. Burdick*, 16 N. W. Rep., 275.

The provision of this section, requiring a certificate of the question upon which the decision of the supreme court is desired, when the amount in controversy is less than one hundred dollars, applies to chancery cases as well as actions at law, and as thus applied is not unconstitutional as depriving a party in such cases of a right to appeal and trial *de novo*. It amounts simply to a restriction or regulation of appeals in such cases: *Ibid.*

The statute does not contemplate that mere abstract questions of law shall be certified, but only such as are decisive of the case: *Eckert v. Pickel*, 59–545.

The certificate must point out the questions upon which it is desirable to have the opinion of the court in such a way as to be intelligible in and of themselves, without requiring the court to examine the whole case and determine what the questions are: *Hawkeye Ins. Co. v. Lewis*, 19 N. W. Rep., 311.

It is not the province of the supreme court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued where it is shown that they do not arise in the case: *Speisberger v. Thomas*, 59–606.

Where the question is certified by the trial judge, it will be presumed that it arises in the case unless it is shown affirmatively otherwise: *Noble v. Chase*, 60–261.

The court will sometimes look at the record for the purpose of determining whether the question certified properly arises in the case, but it will not consider a certificate sufficiently specific which requires examination of the record to determine what the question certified is: *Votaw v. Corvin*, 17 N. W. Rep., 142.

A certificate of the judge which fails to indicate the specific question or questions to be determined, but presents the whole case and every question involved therein, without showing what they are, or what one or more of them it is deemed desirable to present for determination, is not sufficient: *Dunn v. Zoller*, 61–227.

It is not proper to certify a general question which cannot be fully determined without a search of the entire record and a determination of two or more questions: *Wheaton v. Foster*, 58–661; and while it was not the intent that only a single question should be certified, the several questions must be so stated that the supreme court can readily ascertain the point to be determined, and that it is a question of law. Questions of law and fact cannot be mingled together under a guise of a question of law: *City of Centerville v. Drake*, 58–564.

Held, in a particular case, that the certificate of the judge did not sufficiently point out the question of law upon which the opinion of the supreme court was desired: *Fitch v. Flynn*, 58–159.

Where the appellant's abstract failed to show that the judge's certificate stated that it was desirable to have the opinion of the supreme court on the question certified, *held*, that the supreme court did not acquire any jurisdiction by the appeal: *Milliken v. Dougherty*, 59–294.

While the sufficiency of the evidence to support a verdict may, in a certain sense, be said to be a question of law, yet it is not such a question as can be certified: *Hudson v. C. & N. W. R. Co.*, 59–581.

The certificate must be given at the time of the trial, unless delayed upon order or for cause: *Callanan v. Smart*, 60–305.

Where the certificate was entitled of a proper term, but did not show when it was made, nor that it was made at the time of the trial, or even during the term of the trial, *held*, that it was not sufficient: *Babcock v. Chickasaw Co.*, 60–752.

The making and filing of a certificate during the same term but subsequent to the rendition of judgment is not sufficient; it must be made at the time the final judgment is rendered: *Foye v. Walker*, 17 N. W. Rep., 494.

Where defendant concedes a part of the claim, the amount in controversy is the part not admitted: *Thomson v. French*, 59–559.

It must appear from the pleadings that it was possible for the court,

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consistently therewith, to render judgment against one of the parties to the action for more than one hundred dollars. The amounts of the original claim and a counter claim cannot be added together in determining the amount in controversy under this section: *Madison v. Spitsnogle*, 58–369; *Fox v. Duncan*, 60–321.

A deceased party cannot appeal, nor can the right of his estate be adjudicated if an appeal in form is taken: *Tracy v. Roberts*, 59–624.

The court will take notice for itself of its want of jurisdiction, where the amount in controversy does not exceed one hundred dollars, although that question is not raised by either party: *Sperry v. Kretchmer*, 19 N. W. Rep., 807.

840.

SEC. 3178.

The court below may settle and sign a bill of exceptions after appeal is taken. if done within the time allowed for that purpose: *Tiffany v. Henderson*, 57–490.

The lower court retains jurisdiction after the taking of the appeal to perfect the record by giving the certificate as to the evidence introduced in an equitable case: *Goff v. Hawkeye Pump, etc., Co.*, 18 N. W. Rep., 307.

A notice of appeal from a judgment brings up all the objections properly saved on the trial of the cause, including the motion for a new trial: *Gulliher v. C., R. I. & P. R. Co.*, 59–416.

SEC. 3179.

The appeal is not perfected until the fees for transcript are paid or secured, and giving a *supersedeas* bond cannot be regarded as "securing" such fees; and *held*, that after service of notice of appeal and filing of *supersedeas* bond, but before paying or securing costs of transcript, appellant had the right to abandon his appeal, and that the trial court had authority to entertain application by such party for a new trial, and grant it: *Loomis v. McKenzie*, 57–77.

The time within which the appeal is to be perfected by paying or securing the fees for transcript, is not fixed. Filing an abstract and having the cause docketed is evidence of good faith, and the cause will not be dismissed for want of transcript. While one must be furnished, if insisted upon by appellee, time will be given to do so, unless appellant or his counsel have had notice that one would be required, and through negligence have failed to furnish it: *Fairburn v. Goldsmith*, 56–347.

It will not be a ground for striking the transcript from the files that it appears that it was delivered to the attorney of the party, where it is not shown that it was not afterward forwarded in the manner directed by the statute: *Dedric v. Hopson*, 17 N. W. Rep., 772.

As to the sufficiency of the abstract and how far it will take the place of the transcript, see notes to § 3184.

SEC. 3181.

Failure to file a transcript can only be taken advantage of by motion to dismiss the appeal or affirm the judgment, and cannot be urged on final hearing: *Holmes v. Hull*, 48–177.

The court will not dismiss the appeal on motion for failure to file a transcript, but order the transcript to be filed and continue the case until it can be done: *Town of Manson v. Ware*, 19 N. W. Rep., 275; *Aldrich v. Price*, 57–151.

841.

SEC. 3183.

If the assignment of errors is filed at the time here required, it cannot be stricken from the files, although not served or filed until appellee's argument is filed: *Conner v. Long*, 19 N. W. Rep., 221.

As to sufficiency of abstract, etc., see notes in supplement to next section.

The want of an assignment of errors must be taken advantage of prior to the final trial and submission,

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or it will be deemed waived, although the court may, notwithstanding such waiver, require an assignment: *Andrews v. Burdick*, 16 N. W. Rep., 275.

Where an amended assignment of errors is filed more than ten days before the term at which the cause is submitted, and duly served, it will be considered: *Kendig v. Overhulser*, 58–195.

As to assignments of error, see, also, § 3207 and notes.

SEC. 3184.

This section, so far as it authorizes a certificate by the clerk in equitable actions tried wholly upon depositions and papers on file, is not repealed by 17 G. A., ch. 145, amending § 2742 (which see), and such certificate of the clerk is still sufficient in such cases to enable the supreme court to consider the case, and the rule that the certificate of a judge must be given at the term has no application to such certificate of the clerk: *Cross v. B. & S. W. R. Co.*, 58–62.

An objection that papers of record in the court below are certified to the supreme court by copy instead of in their original form should be raised in time to permit the other party to correct the error, if it be one, by filing the original papers. Such an objection not made before the final submission of the case will not be regarded: *McDonald v. Farrell*, 60–335.

It is not competent to contradict the recitals in the bill of exceptions by affidavit or by certificate of the judge: *Pearson v. Maxfield*, 47–135; *Dedric v. Hopson*, 17 N. W. Rep., 772; *Conner v. Long*, 19 N. W. Rep., 221. But upon suggestion of diminution of the record a party may have the record in the lower court corrected or amended by proper proceedings therein, and present the record as thus amended to the supreme court by supplemental abstract: *Mahaffy v. Mahaffy*, 18 N. W. Rep., 685.

A motion to strike the evidence from the abstract because not preserved by the bill of exceptions, properly raises the question whether there was or not a bill of exceptions, and this can be settled only by the record of the court below. Lost records in the court below cannot be supplied by affidavits in the supreme court: *Morris v. Steele*, 17 N. W. Rep., 490.

The supreme court will not strike the evidence from the abstract upon motion, where it is in considerable doubt as to what ought to be done, or where the proper ruling would require a somewhat careful and extended investigation of the abstract; it will either overrule the motion or require it to be submitted with the cause, and where such a motion is overruled the court does not consider itself precluded from determining upon the submission whether the record is such that the case can properly be considered upon its merits, especially where appellee insists in his argument that it cannot: *Alexander v. McGrew*, 57–287.

If no question is made as to the filing of the bill of exceptions, the court presumes that the evidence has been properly preserved. If the appellee states in his abstract that no proper bill of exceptions has been filed and moves to strike out the evidence on that ground, the court does not take the statement as true, but refers to the transcript for a determination: *Wilson v. First Presbyterian Church of Mount Ayr*, 60–112.

Even if it appears that the transcript contains a paper not properly identified by the bill of exceptions, this fact will not warrant the striking the whole bill of exceptions from the record: *Hardy v. Moore*, 17 N. W. Rep., 200.

If an abstract is not denied by the appellee in an amended abstract, the record set out will be taken to be correct, as, for instance, it will be assumed that a bill of exceptions was filed. But if such facts are denied in an amended abstract, the denial will be taken to be true, in the absence of a transcript: *Brainard v. Simmons*, 58–464.

Where the abstract, although failing to show that a bill of exceptions was filed in the court below, contains matter which it could not properly contain unless made of record, the court will regard the appellant as claiming that it was made of record and a direct statement to that effect will not be necessary. If the appellee desires to claim that no bill of exceptions was filed he must do so in an additional abstract: *Thompson v. Silvers*, 59–670.

To secure a review of a law action

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it is not essential that the evidence and instructions should be certified by the judge. It is sufficient that the evidence is properly made part of the record by bill of exceptions, and the instructions are identified by the bill of exceptions or in other proper manner: *Wilson v. First Presbyterian Church of Mt. Ayr*, 60–112.

The court cannot consider an action triable *de novo* where the abstract does not purport to contain all the evidence. The statement in the abstract that "the testimony was all taken in writing, in substance as follows" *held*, not sufficient: *Britt v. Case*, 58–757. If the abstract does not show that it contains all the evidence, the appeal may be dismissed on motion: *Green v. Ronen*, 59–83.

An abstract which states that all the evidence in the case was reported and certified to by the reporter of the court and duly certified by the court as being all the evidence offered in said trial, will not be sufficient to enable the court to try the case *de novo* if it fails to state that it (the abstract) contains all the evidence, that is, an abstract of all the evidence upon which the case was tried: *Cassady v. Spofford*, 57–237; *Ward v. Snook*, 61–610; *Porter v. Stone*, 17 N. W. Rep., 654; *Hall v. Harris*, 61–500; *Phœnix Ins. Co. v. Findley*, 59–591; but this objection will not be regarded where appellee files an additional abstract setting out the evidence on which he relies: *Alexander v. McGrew*, 57–287.

The statement in the abstract to show that all the evidence is comprehended therein is sufficient, if the opposite party and the court are fairly apprised that the appellant claims that he has presented an abstract of all the evidence, and in such cases the court will presume that he has, unless appellee sets out additional evidence: *Miller v. Wolf*, 18 N. W. Rep., 889.

Where an abstract contains a statement that it is an abstract of all the evidence, it is assumed, not only that this statement is true, but that the evidence was made of record by due certification unless it is made to appear to the contrary; but where the certificate relied upon is set out, and appears to be insufficient, that presumption will not be entertained: *Alexander v. McGrew*, 57–287.

In the absence of an amended abstract denying the statements contained in appellant's abstract, the latter is deemed to be true, notwithstanding such a denial is made in the argument of counsel: *Farmer v. Sasseen*, 18 N. W. Rep., 714; *Weaver v. Kintzley*, 58–191; and this is the rule, even where the bill of exceptions containing the evidence has been stricken from the files: *Roberts v. Leon Loan & Abstract Co.*, 18 N. W. Rep., 702.

Where appellant's abstract purported to contain all the evidence in the case, and appellee in his abstract denied that the appellant's abstract contained all the evidence offered, and that the evidence therein was correctly abstracted, *held*, that appellant's abstract would be deemed correct, it appearing that all the evidence was by depositions which were before the court, and appellee's abstract not showing wherein appellant's abstract was insufficient or incorrect: *Cross v. B. & S. W. R. Co.*, 58–62.

Where appellant's abstract contains no averment that all the evidence is found therein, and appellee files an amended abstract setting out certain evidence alleged to have been omitted from the original abstract without the statement or claim that the two abstracts together do not contain and present all the evidence, appellee cannot afterwards urge that all the evidence is not before the court: *Van Sandt v. Cramer*, 60–424.

Where the abstract of the appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract omitted portions with the statement that with his additions the abstract does not contain all the evidence: *Cartwright v. Copess*, 60–195; *Hall v. Harris*, 61–500. But where the abstract of appellant purports to contain all the evidence, the appellee must supply what he claims has been omitted: *McArthur v. Linderman*, 17 N. W. Rep., 531.

Where appellee in an amended abstract states that the abstracts together do not present all the evidence, such statement will be deemed true unless denied, and the court cannot hear the case *de novo: Love v. Donaldson*, 19 N. W. Rep., 804.

Where the abstract shows upon its face that it does not contain all the testimony, and appellee files an

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amended abstract, and does not, until the argument, claim that the evidence is not all before the court, the court will presume that the amended abstract together with the original abstract presents all the evidence in the case: *O'Brien v. Harrison*, 59–686.

The appellee may, by an additional abstract, undertake to supply deficiencies in the appellee's abstract without thereby precluding himself from objecting that the evidence is not properly certified: *Alexander v. McGrew*, 57–287; and if such objection is made it will be deemed true, unless appellant shows by an amended abstract that the evidence was properly certified: *Roby v. Hall*, 57–213.

Unless an additional or amended abstract be denied it will be regarded as presenting the record correctly, and will prevail against the original abstract: *Hart v. Jackson*, 57–75; and this is true even though it seeks to eliminate something from appellant's abstract: *Richardson v. Hoyt*, 60–68; *Burkhart v. Ball*, 59–629; *Kearney v. Ferguson*, 50–72; *Lucas v. Jones*, 44–298.

It is not proper to set out in the abstract the entire testimony of witnesses, by question and answer, without excluding matter that is immaterial: *Vaughn v. Smith*, 58–553.

An amendment to appellant's abstract, filed by him without leave of court after the filing of appellee's argument, was stricken from the files on motion: *In re Caywood*, 56–301.

843.

SEC. 3186.

The giving of a supersedeas bond does not supersede or render void a delivery bond previously given to secure the release of attached property: *State v. McGlotghlin*, 16 N. W. Rep., 137.

A supersedeas bond given in an action by a party claiming a public office, and who has been adjudged entitled thereto, does not suspend his right to exercise such office in pursuance of the judgment, and to receive the salary incident thereto; and therefore in an action on such supersedeas bond the sureties are not liable for salary accruing pending the suit: *Jayne v. Drorbaugh*, 17 N. W. Rep., 433.

When an order has been determined to have been correctly made, it is then too late for a party to claim relief because he was not allowed to supersede it: *Yetzer v. Martin*, 58–612.

A supersedeas bond is not essential in perfecting the appeal; it does not secure the clerk's fees for transcript, so as to render unnecessary the payment or securing of the same in order to perfect the appeal as required in § 3179: *Loomis v. McKenzie*, 57–77.

The language at the end of the section in reference to rents and damages to property, specifies only the conditions of the bond and is not a portion of the clause just preceding it, stating the limitation on the amount which the obligee may recover. Where the bond did not contain this condition as to rents and damages, *held*, that there could be no recovery in an action on such bond for rents or profits accruing during the appeal: *Gill v. Sullivan*, 17 N. W. Rep., 758.

844.

SEC. 3190.

Where, in an action to foreclose a mechanic's lien, a personal judgment for the amount claimed is rendered against defendant, and the lien is declared established upon the property, and the property is ordered sold upon special execution to satisfy the judgment, and it is directed that a general execution issue for any sum remaining unpaid after exhausting said property, the penalty of the appeal bond should be twice the amount of the judgment rendered: *Flynn v. D. M. & St. L. R. Co.*, 17 N. W. Rep., 769.

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845.

SEC. 3194.

Where in a case triable *de novo*, the appellant fails to file any argument, it will be regarded as a failure to prosecute the appeal: *Scott v. Neises*, 61–62.

A party who has not appealed cannot have any relief: *Devoe v. Hall*, 60–749.

Where the court below made a finding of facts unfavorable to defendant, and to which he excepted, and rendered judgment for defendant upon another question, and upon appeal by plaintiff the judgment was reversed, *held*, that as the correctness of the finding of facts could not be inquired into, although defendant also appealed, for the reason that that there was no judgment against him, the court would not enter up judgment upon the finding of facts, but remand the case to the district court to retry the issues of law and fact: *Boyce v. Wabash R. Co.*, 18 N. W. Rep., 673.

The supreme court will not reverse a case in behalf of a party where the right which he seeks to protect, if it ever existed, has expired: *Culcomp v. Utt*, 60–156; nor to enable appellant to recover nominal damages when that is all the relief to which he is entitled: *Watson v. Moeller*, 18 N. W. Rep., 857; *Wire v. Foster*, 17 *Id.* 174.

Where a decree was reversed on the ground that the court below had erred in overruling a motion to strike certain depositions from the files, for the reason that they had been taken without authority, and the decree was reversed and the cause remanded, *held*, that the court below could not be required to dismiss the cause or enter decree for opposite party, but must proceed to try the case anew: *Kershman v. Swehla*, 17 N. W. Rep., 908.

Where an equity case is appealed and tried anew, and the action of the court below is determined to have been erroneous, the successful party is entitled to have such decree as is proper on the record as made in the court below, entered up in the supreme court: *First National Bank of Davenport v. Baker*, 60–132.

Where an ordinance provided for a fine for maintaining a nuisance and a person was under such ordinance fined, and the abatement of the nuisance ordered, and the supreme court held that the ordinance in so far as it provided for a fine was in excess of authority and void, *held*, that it would not sustain so much of the judgment as provided for the abatement of the nuisance, but would reverse the whole judgment: *Incorporated Town of Nevada v. Hutchins*, 59–506.

Where an appeal is taken on the ground of defects in the record, it is incompetent for the appellant, without obtaining a rehearing, to bring the case again before the court upon the same appeal, on a corrected record: *Green v. Ronen*, 17 N. W. Rep., 180.

Want of jurisdiction of the subject-matter in the court below, may be raised for the first time on appeal to the supreme court, or may be taken notice of by the court, although not raised: *Groves v. Richmond*, 53–570; therefore *held*, that where a change of place of trial had been granted to a court which could not entertain jurisdiction of the action, the judgment in such court would upon appeal be reversed, and the cause would be remanded to the court from which the change was improperly taken, and proceedings subsequent to the improper change of venue will be disregarded: *Cerro Gordo Co. v. Wright Co.*, 59–485; *Bennett v. Carey*, 57–221; and see notes to § 2590.

Where the judgment will affect the title to real estate, it should be entered in the district court, and the case will be remanded for that purpose: *Hait v. Ensign*, 17 N. W. Rep., 163.

846.

SEC. 3198.

Where at the time of sale an appeal was pending, and on a subsequent determination of such appeal, the judgment was reduced to an amount less than that for which the plaintiff bought in the property at the sale,

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held, that defendant was not entitled to an order upon plaintiff to repay the excess, but that the property should be restored to defendant: *Munson v. Plummer*, 58–736.

SEC. 3199.

Where the purchaser at a judicial sale, and the grantee holding under him, paid only the costs and not the whole amount bid, *held*, that not having paid value they could not be regarded as good faith purchasers and *held* further, that the attorney for the plaintiff in the lower court and on appeal, could not, upon purchase of the property, become entitled to protection as a good faith purchaser: *O'Brien v. Harrison*, 59–686.

847.

SEC's 3201 and 3202.

[19 G. A., ch. 144, repeals these two sections, and enacts in lieu thereof the following:]

SEC. 3201. If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section.

SEC. 3202. The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in support of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief either in writing or print, stating in substance that the petition[er] for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office.

Where a cause was reversed on appeal because the judgment for plaintiff included an item erroneously allowed, *held*, that appellee might, on rehearing, offer to remit the excess over the amount of the proper judgment, and judgment for the balance would be entered in the supreme court: *Hyde v. Minneapolis Lumber Co.*, 53–243.

The supreme court will not grant a rehearing upon the application of a party who failed to file or make an argument when the cause was submitted. But if it is satisfied that error has been committed, it will, on its own motion, order a rehearing for the purpose of correcting the error: *Wachendorf v. Lancaster*, 61–509.

After the opposite party has filed a reply to the petition for rehearing, he has no right to file any other argument: *Webster Co. v. Hutchinson*, 60–721.

848.

SEC. 3207.

Where a motion is made upon a statutory ground, and the overruling of the motion is assigned as error, such assignment will be sufficiently

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specific although the motion has specified more than one thing as constituting the irregularity complained of in the motion: *Thomas v. Hoffman*, 17 N. W. Rep., 431.

An assignment of error which specifies merely the overruling of a motion for a new trial, when such motion is based upon several grounds, is not sufficiently specific: *Stephens v. Brown*, 60–403; *Marsel v. Bowman*, 17 N. W. Rep., 176; *Terry v. Taylor*, 19 N. W. Rep., 841.

An assignment that "the court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant," *held* not sufficiently specific: *Hoefer v. City of Burlington*, 59–281.

An assignment not discussed or urged in argument is deemed to be waived: *Clark v. Incorporated Town of Epworth*, 61–750; *Wood v. Whitton*, 19 N. W. Rep., 907.

When an appeal is taken in an equity case from a ruling upon motion or demurrer, error must be assigned: *Powers v. O'Brien County*, 54–501; *Patterson v. Jack*, 59–632; and see notes to § 2742.

Assignment of error *held* sufficiently specific in a particular case: *Kendig v. Overhulser*, 58–195.

An assignment of error made at the end of appellant's argument, and not objected to by appellee until after the filing of his argument, and within two days of the submission of the cause, *held* sufficient: *University of Des Moines v. Livingstone*, 57–307.

SEC. 3212.

That plaintiff has caused transcript of the judgment to be filed in another county, so as to make it a lien upon property in such county, will not be considered as defeating his right to prosecute an appeal: *Tama Co. v. Melendy*, 55–395.

To justify a dismissal of the appeal under this section upon a showing by affidavits, it should clearly appear that the appellant has no further right to prosecute the appeal. Where there is any doubt as to the facts in question, the appeal will not be dismissed: *Lewis v. Tilton*, 17 N. W. Rep., 199.

Where the party appealed from a decree restraining his use of property for a certain purpose, and on motion it was made to appear that he had lost his interest in the property, *held* that the appeal would not be further entertained for the purpose of determining the question of costs: *Faucher v. Grass*, 60–505.

849.

SEC. 3216.

The decision of a board of supervisors as to the sufficiency of remonstrances against ordering an election for the removal of a county seat, is a judicial act, reviewable on certiorari: *Herrick v. Carpenter*, 54–340.

Certiorari will lie to control the action of a city council in improperly vacating streets: *Stubenrauch v. Keyenesch*, 54–567; but the action of the council in passing ordinances of a legislative nature cannot be controlled in such proceeding: *Iske v. City of Newton*, 54–586.

A tax-payer may, in this proceeding, question the action of a city council in remitting taxes assessed against another tax-payer, although such plaintiff have no greater interest in the matter than any other tax-payer: *Collins v. Davis*, 57–256.

The action of the council in such case in hearing the petition for reduction of tax and granting the same, *held*, to be judicial and properly brought in question by certiorari: *Ibid.*

If the tribunal, in determining the matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally; but when a discretion is conferred upon the tribunal, its exercise cannot be illegal. The statute does not contemplate that the decisions of inferior tribunals upon questions of fact, where the tribunal is clothed with authority to decide upon facts submitted to it, and the subject-matter and the parties are within its jurisdiction, may be reviewed by a writ of certiorari. Therefore, *held*, that in a proceeding by certiorari in the circuit court, the decision of the board

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of supervisors upon the question whether the public interests demand a proposed highway, and whether it is practicable and expedient to establish it, cannot be reviewed: *Tiedt v. Carstensen*, 61–334.

Certiorari will not lie where there is a remedy by appeal, or when the party fails to appeal within the time prescribed by law: *Sunberg v. District Court of Linn Co.*, 61–597.

Where taxes have been levied in different townships in aid of a railroad, the levy in each township is to be considered distinct, and tax-payers of different townships cannot join as plaintiffs in an action of certiorari to test the validity of such taxes: *Woodworth v. Gibbs*, 61–398.

In an action of certiorari, the object of which is to annul the action of an inferior tribunal, board, or officer, it is peculiarly the duty of the court to scrutinize the petition and interfere only in a case properly made, and even then the court may exercise a certain measure of discretion, and in general should exercise its power sparingly. It is not bound to grant a writ on merely technical grounds, and where no prejudice is shown: *Ibid.*

851.

SEC. 3222.

The provision allowing the circuit court to consider other evidence than that presented in the return of the writ is not intended to extend the remedy so that inquiry can be made into matters other than the jurisdiction and legality of the proceedings of the inferior court. It is not the purpose of the statute to change the office of certiorari so that it will operate as an appeal wherein causes may be tried *de novo*. The provision for the introduction of other evidence is for the purpose of permitting the consideration of all the facts involved in the case bearing upon the issues in the proceeding touching the jurisdiction and the compliance with law in the case reviewed: *Tiedt v. Carstensen*, 61–334.

Where certiorari was brought to determine the legality of the action of the board of supervisors in submitting to vote the question of changing the location of the county seat, *held*, that the return of the board showing upon what evidence the board proceeded, and in what manner they reached the result upon which the order was based, was proper: *Stone v. Miller*, 60–243.

Upon a return of the writ of certiorari, *held*, that it was the duty of the court to examine not only the statement of defendant made in the return, but also the evidence submitted: *Stone v. Miller*, 60–243.

852.

SEC. 3225.

An action of replevin must be brought in the county where defendant resides, or some portion of the property is situated, and § 3230 does not authorize the bringing of the action in the county from which the property has been wrongfully removed, unless such county is that of the defendant's residence: *Hibbs v. Dunham*, 54–559; *Parker v. Norris*, 56–295.

The venue in such actions is not limited to the county of the residence of the defendant, and if action is brought where the property is situated, the defendant must either disclaim any interest or claim to the property or defend the action in the county where the suit was brought; he is not entitled to a change in the place of trial to the county of his residence: *Porter v. Dalhoff*, 59–459.

This rule is applicable in actions where bond is not given, and the possession of the property before judgment is not sought. It is also applicable where, although possession of property is sought no property is actually seized, and that fact will not entitle defendant to have the venue changed to the county of his residence: *Laughlin v. Main*, 19 N. W. Rep., 673.

Replevin may be maintained by the owner of property, against an officer

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who has seized and holds it under a writ of replevin issued against another person, in an action to which the real owner was not a party: *Davis v. Gambert*, 57–239.

Replevin will not lie in favor of one who is already in possession of the property in controversy, nor can it be successfully maintained against one who does not detain possession of the property: *Hove v. McHenry*, 60–227.

Where a sheriff, in levying on personal property under an execution, simply made a list of the property and took a delivery bond from the execution defendant therefor, *held*, that such defendant could not maintain replevin against the officer for the property: *Ibid.*

853.

SEC. 3226.

Held, that an action for the possession of a note, on the ground that it had been paid, could properly be set up as counter-claim to an action on the note: *Sigler v. Hidy*, 56–504.

SEC. 3228.

The provisions of this section do not prevent such third person from bringing replevin against the sheriff to recover possession of the property: *Davis v. Gambert*, 57–239.

An assignee in bankruptcy acquires such an interest in the property of the bankrupt fraudulently conveyed, that he may maintain an independent action to recover the property: *Wetmore v. McMillan*, 57–344.

856.

SEC. 3239.

Where plaintiff sought to recover possession of property held by a sheriff, but did not allege service of notice of his ownership upon the sheriff, and, thereafter, upon demurrer being interposed on that ground, the court allowed him to dismiss his action upon payment of costs and, upon payment to the sheriff of the amount of the judgment for which the property was seized, to retain possession of the property, *held*, that under the facts appearing there was no error: *Reasner v. Currier*, 58–213.

SEC. 3241.

Whether the successful party must make his election as to whether he will take the property or its value, at the time of judgment, or may do so when execution issues, seems left in doubt. but where the judgment was that p'aintiff have immediate possession of the property, and, in default thereof, recover the value, *held*, that the judgment amounted to an election to take the property, and it should have been accepted when tendered, and the judgment satisfied: *Oskaloosa Steam Engine Works v. Nelson*, 54–519.

This section, allowing the successful party to have execution for the property, or its value, at his option, is intended to apply only to cases in which the court has jurisdiction to try and determine the merits of the controversy. Where the defendant becomes entitled to a return of the property on a demurrer to plaintiff 's petition on the ground that the court has not jurisdiction—for instance, where the action is in a state court against a U. S. marshal for property seized by him under process from a circuit court of the U. S.,—the state court can properly only render judgment ordering the return of the property, and awarding an execution for its value in the event of its not being returned: *Williams v. Chapman*, 60–57.

857.

SEC. 3246.

A person who is the agent of the owner of real property cannot maintain such action in his own name: *McHenry v. Paintar*, 58–365.

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860.

SEC. 3268.

This section does not seem to contemplate any notice to, or defense by the opposite party as to the application for a new trial: *County of Buena Vista v. I. F. & S. C. R. Co.*, 55–157.

861.

SEC. 3273.

Action to quiet title may be brought against a person in possession. In such a case plaintiff may unite a prayer to recover possession with a prayer that the cloud be removed: *Lees v. Wetmore*, 58–170.

862.

15 G. A., Ch. 8.

A proceeding under this chapter is a special proceeding triable on appeal like an ordinary action, and not *de novo: In matter of application of Harrington*, 54–33.

Where the commissioners have determined facts rendering the final location of the corner a mere matter of measurement, they may properly postpone the expense of such actual survey until the court acts upon their report: *Ibid.*

Where it was stated in a petition that certain persons named as defendants were the only persons that would be affected by the proceedings, and it appeared that but one of them had been served with a notice or had made appearance, *held*, that the court nevertheless acquired jurisdiction to appoint a commissioner as between the plaintiff and the defendant who appeared, unless it was shown that there were other persons who were necessary parties: *Nesselrode v. Parrish*, 59–570.

The proceeding contemplated in this statute is a summary proceeding designed to determine and locate the true division line between land holders without issue in court or trial by jury, and *held*, that where parties make a conditional claim to the property in dispute, depending upon the location of the premises in reference to the true section line, the question whether the unsuccessful party is deprived of property within the meaning of the constitution is so doubtful that it would not warrant the court in declaring the statute unconstitutional: *Gates v. Brooks*, 59–510.

Actions of this character not being triable *de novo* on appeal, the finding of the commissioner and court must have the force and effect of the verdict of a jury: *Vittoe v. Richardson*, 58–575.

863.

SEC. 3277.

An agreement by an heir, binding him to pay off a certain incumbrance on the property, *held*, not to create a lien which could be set up against him in a partition proceeding: *Rider v. Clark*, 54–292. But taxes which such heir has agreed to pay should be made a lien upon his share: *Ibid.*

865.

SEC. 3289.

An appeal may be taken from a decree settling the rights and interests of the parties. Such decree is in that respect final: *Williams v. Wells*, 16 N. W. Rep., 513.

A party who is, by the decree herein contemplated, adjudged to have no interest in the property, may appeal from such decree as a final judgment as to himself: *Ramsey v. Abrams*, 58–512.

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SEC. 3290.

Where a division, though practicable, would greatly depreciate the value of the property, the court may order a sale: *Branscomb v. Gillian*, 55–235.

SEC. 3297.

In determining whether there was a contest respecting the extent of the plaintiff's share, *held*, that the court will not be justified in taking a very critical view of the proceedings; the question is whether there was practically a contest, and if the parties actually engaged in such contest, whether regularly raised in the pleadings or not, that fact is sufficient to control the question of costs: *Duncan v. Duncan*, 18 N. W. Rep., 858.

ATTORNEYS' FEES IN PARTITION.

[Twentieth General Assembly, Chapter 184.]

SECTION 1. In all actions for partition of real estate where there is no defense made no greater attorney fee shall be allowed by the court to be taxed for and as attorney fees in such action for partition than provided in section two hereof.

SEC. 2. For the first two hundred dollars or less in value of the property to be partitioned ten per cent, for the excess of two hundred dollars to five hundred dollars five per cent, and for the excess over five hundred to one thousand dollars three per cent, for all excess over one thousand one per cent.

866.

SEC. 3300.

The approval of the sale is essential, and inadequacy of price alone is sufficient to justify the court in refusing its approval: *Loyd v. Loyd*, 61–243.

867.

SEC. 3317.

The injunction is not to issue as a matter of right, where it is not necessary to protect the rights of parties interested, and they have already adopted another proceeding affording a full and complete remedy: *Sweet v. Oliver*, 56–744.

This provision does not prevent one whose property is seized without shadow of right, upon the pretense that it is covered by the mortgage (as where it has been, by valid agreement, released from the mortgage at the time of its purchase from the mortgagor) from bringing an action at law to recover the property: *Black v. Howell*, 56–630.

868.

SEC. 3320.

After a general judgment upon the note secured by the mortgage, an action may be maintained to foreclose the mortgage; the mortgage is not merged in the judgment: *Matthews v. Davis*, 61–225.

SEC. 3321.

A sale of property under judgment of foreclosure for one installment of the debt, discharges the property sold from the lien of the mortgage for other installments. The grantee of the mortgagor, becoming such before judgment is rendered, may redeem from sale under judgment of foreclosure for part of the debt, and hold the property free of any lien

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under the mortgage, or under the judgment against his grantor, for the balance of the debt: *Escher v. Simmons*, 54–269; *Todd v. Davey*, 60–532; and this rule holds where some of the notes covered by the mortgage are transferred, and in such case the foreclosure and sale of the premises in an action by the assignee will exhaust the lien of the mortgagee as to notes still held by the mortgagee upon the land so sold: *Harms v. Palmer*, 61–483.

Where a mortgage is foreclosed for one installment of the debt, and during the period for redemption the mortgagor conveys the property to a third person agreeing to redeem, and afterward does redeem, such third person takes the property free from the lien of the mortgage for the balance: *Micklewait v. Raines*, 58–605.

Where a junior mortgage is assigned, and the assignment is not made of record, a foreclosure of the senior mortgage to which the junior mortgagee is made a party, is binding upon the assignee of such junior mortgage, and he can only make statutory redemption, although not made a party, where the fact of his interest is not known to the party foreclosing. And the fact that such assignee, pending foreclosure of the senior mortgage, brings an action upon such junior mortgage, will not make it incumbent upon the party foreclosing the senior mortgage to bring such assignee into such foreclosure: *Reel v. Wilson*, 19 N. W. Rep., 814.

This section simply declares that there may be statutory redemption from a sale under a foreclosure. The statutory redemption may be by one who is a party to the suit, but must be made within the time and in the manner prescribed by statute as to other execution sales: *Newell v. Pennick*, 17 N. W. Rep., 432.

It was not the purpose of the statute, in conferring a statutory right of redemption, to take away the equitable right of redemption, but to allow it instead of and independent of the right by statute, and it will be enforced by a court of chancery until it is taken away by express legislative enactment; therefore *held*, that a junior lien-holder, not having been made a party to the foreclosure, had an equitable right to redeem by action without taking advantage of the provision for statutory redemption: *Spurgin v. Adamson*, 18 N. W. Rep., 293.

869.

SEC. 3324.

Where a surplus was realized by the sheriff from the sale of a homestead under special execution, and the defendant permitted the sheriff without objection, to apply such surplus upon other executions, and turn the same over to such execution creditors, *held*, that the debtor was estopped from seeking to recover such surplus from the sheriff: *Brumbaugh v. Zollinger*, 59–384.

870.

SEC. 3327.

This penalty cannot be recovered from one who is assignee of the note secured by the mortgage, but has no written and recorded assignment of the mortgage. Whether it could be recovered from an assignee by such written and recorded assignment, *quære: Low v. Fox*, 56–221.

SEC. 3329.

Iowa R. Land Co. v. Mickel, 41–402, followed: *Johnson v. Thornton*, 54–144.

Where the vendor proceeds to foreclose the contract of sale, he loses his lien for any balance of the purchase money not paid by the foreclosure sale: *Todd v. Davey*, 60–532.

871.

SEC. 3331.

While the business of carrying on a slaughter house may be necessary and essential, it may be a nuisance in residence portions of a city, even

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though carried on in as careful a manner as possible. Individual property owners may have damages separate from the public, and may maintain a joint action for injunction, although owning separate property, and an action to enjoin the nuisance may be prosecuted in equity, as before the adoption of the Code, although such relief may now, under this section, be had in an action at law: *Bushnell v. Robeson*, 17 N. W. Rep., 888.

Where it is determined that premises are so occupied as to create a nuisance, but it is not found that they are a nuisance, that is, a nuisance *per se*, the court can only enjoin such use of the premises as will amount to a nuisance: *Richards v. Holt*, 61–529.

A blacksmith shop is not a nuisance *per se*, and a party cannot be enjoined from transacting the business of blacksmithing upon his premises. The decree in such cases should require the owner to so change his shop and so prosecute his business that no annoyance should result therefrom to others: *Faucher v. Grass*, 60–505.

Where smoke and soot from the smoke stack of a waterworks company came upon plaintiff's premises in such a manner as to deprive him of the comfortable enjoyment of his property, but the health of himself and family was not affected thereby, or his property destroyed, *held*, that while such injury constituted a nuisance for which the plaintiff might recover at law, yet he would not be entitled to have an abatement thereof in equity. The rule in equity is that where the damages sustained can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual convenience: *Daniels v. Keokuk Waterworks*, 61–549.

The fact that a party recovers damages for something on the ground that it has been injurious to him as a nuisance, does not necessarily show that it is a nuisance at the time of the trial, and that he is therefore entitled to have it abated: *Fuller v. C., R. I. & P. R. Co.*, 61–125.

In an action at law under this section, damages may be recovered for a nuisance, and the nuisance itself may be abated; therefore in an action for damages for a nuisance, the plaintiff is entitled to have his damages assessed by a jury, notwithstanding the fact that he may couple with his claim for damages a prayer that the defendants may be enjoined from continuing the nuisance: *Miller v. K. & D. M. R. Co.*, 16 N. W. Rep., 567.

872.

SEC. 3339.

For similar provisions see § 3127.

SEC. 3345.

An action may be brought upon relation of the auditor to close the business of an insurance company for failure to comply with provisions of chapter 5, title 9, of the Code, which would not fall under this section, and for the purposes of such action it would be assumed that the corporation was duly organized: *State of Iowa ex rel. Auditor v. Iowa Mutual Aid Association*, 59–125.

Where the office for the recovery of which the action is brought, is one to which no compensation attaches, it is not error for the court to dismiss the suit when, at time of trial, the term of office contested for has expired. So *held* in case of sub-director of school district: *State ex rel. McNulty v. Porter*, 58–19.

874.

SEC. 3353.

A supersedeas bond, given on appeal from the judgment of the court that plaintiff is entitled to the office sued for, does not suspend his right to such office, and to the salary incident thereto, to which he becomes entitled by the judgment, and therefore in an action upon such appeal bond, after affirmance of the judgment, the appellee cannot recover the salary accruing during the pendency of the appeal: *Jayne v. Drorbaugh*, 17 N. W. Rep., 433.

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875.

SEC. 3368.

For somewhat similar provisions | see § 2552.

876.

SEC. 3370.

The county in which the action upon the appeal bond is properly brought, is the county entitled to the money collected thereon: *Lucas Co. v. Wilson*, 61-141.

SEC. 3373.

Mandamus will lie to compel a railway company to construct and maintain a private crossing where such duty is imposed by law: *Boggs v. C., B. & Q. R. Co.*, 54-435.

Mandamus is not designed to enable a party to have a review of the action of officers when they are clothed with a discretion, or when their action depends upon facts to be ascertained by them: *Scripture v. Burns*, 59-70.

A court will not, upon an application for a writ of mandamus against a religious corporation, compel the reinstatement of a member expelled and inquire into the rightfulness of such action, it appearing that no property interest or other valuable civil right has been affected: *Sale v. First, etc., Church of Mason City*, 17 N. W. Rep., 143.

878.

SEC. 3376.

Where the board of directors of a school district refuses to act in a proper case, mandamus will lie: *Albin v. Board of Directors of Ind. Dist. of West Branch*, 58-77.

SEC. 3378.

A party cannot have relief without showing the demand herein provided: *Scripture v. Burns*, 59-70.

879.

SEC. 3386.

A district township may have an injunction to restrain another district township from removing a schoolhouse from the territory of the former. It is not limited to an action at law for the trespass: *Dist. T'p of Lodomillo v. Dist. T'p of Cass*, 54-115.

An action in equity to enjoin the continuance of a nuisance may be prosecuted as before the adoption of the Code provision found in § 3331, authorizing such relief in an action at law for damages. Different property owners, suffering damages distinct from the public, may join as plaintiffs in such action: *Bushnell v. Robeson*, 17 N. W. Rep., 888.

A citizen and tax-payer may maintain an action to enjoin the issuance by the county auditor of a warrant in payment of a refund of taxes illegally ordered by the board of supervisors. The determination by the board of the legality of such a refunding is not an adjudication which must be attacked only upon appeal or by *certiorari: Hospers v. Wyatt*, 19 N. W. Rep., 204.

Where defendant had sold to plaintiff the good will of a business and obligated himself under a penalty not to prosecute the same business in the same place for a limited time, *held* that the only remedy for a breach of the agreement not to prosecute the business was an action for the penalty, and that an injunction could not be had under this section to restrain defendant from violating his contract: *Stafford v. Shortreed*, 17 N. W. Rep., 756.

Where a road supervisor has served

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notice to have a road opened as an official act by virtue of proceedings in which it is claimed that a highway has been established, the owner of property which would be trespassed upon in opening the road, may maintain an action for injunction to restrain the contemplated trespass before any actual trespass upon his land is committed: *Morgan v. Miller*, 59 –481.

880.

SEC. 3388.

An affidavit to the petition to the effect that the contents thereof are true as the affiant believes, constitutes a sufficient verification: *Kelley v. Briggs*, 58–332.

882.

SEC. 3395.

Where an injunction is the only relief sought, and dissolution is procured only upon final hearing, attorney's fees should be allowed in an action on the bond for defending in the entire action: *Reece v. Northway*, 58–187; but when the injunction is not the main relief sought, and no effort is made to have it dissolved until final hearing, attorney's fees cannot be recovered: *Carroll Co. v. Iowa R. Land Co.*, 58–685.

An attorney's fee is allowable where the injunction is dissolved on motion; also, where the injunction is dissolved on final hearing if it is the only relief sought. An attorney's fee may also be allowable in case of partial dissolution or modification where such is the relief sought in the action, but not where the motion is to dissolve as an entirety, and is only partially sustained or a modification granted: *Ford v. Loomis*, 16 N. W. Rep., 193.

In an action on an injunction bond given to stay execution on a judgment where it was alleged that the action for the injunction had been dismissed, *held*, that the entry on the judge's calendar "dismissed as per stipulation," was not sufficient evidence to sustain the action in the absence of a showing as to what such stipulation was: *Towle v. Leacox*, 59 –42.

Where real estate depreciates in value during the time that sale thereof is prevented by injunction proceedings, there is no presumption that the owner, if not prevented, would have sold before depreciation and saved himself from loss, and damages are not recoverable for loss of sale unless it is made to appear that there was a *bona fide* application on the part of some person to buy, and that the sale was lost by reason of the injunction: *Reece v. Northway*, 58–187.

SEC. 3396.

Where the action is not to enjoin the enforcement of an execution under a judgment, but merely the sale under it of a particular piece of property, it is not necessary that the bond be in double the amount of the judgment: *Hardin v. White*, 16 N. W. Rep., 580.

883.

SEC. 3400.

An injunction should not be dissolved without proofs, upon an answer which seeks to avoid the allegations of the petition: *Huskins v. McIlvoy*, 17 N. W. Rep., 670.

When relief is sought by the injunction against fraud which is the gravamen of the bill, the court will continue the injunction, though the defendant has fully answered the equity set up: *Johnston v. C., M. & St. P. R. Co.*, 58–537.

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884.

SEC. 3409.

The requirement of this section is jurisdictional, and in the absence of compliance therewith a court is not allowed to take cognizance of the case: *Keeline v. City of Council Bluffs*, 17 N. W. Rep., 668.

885.

SEC. 3416.

The question whether or not an alleged nuisance should be abated may be submitted to arbitration without the submission of any claim for damages: *Richards v. Holt*, 61–529.

886.

SEC. 3425.

An arbitrator, so far as he acts within his jurisdiction, is not civilly liable, even though it be alleged he acted fraudulently and corruptly: *Jones v. Brown*, 54–74.

Unless the submission provides otherwise, or consent to a minority award is in a proper manner shown, all the arbiters must concur in the award: *Richards v. Holt*, 61–529.

887.

SEC. 3427.

A court of equity can entertain jurisdiction to set aside an award made by arbitrators chosen under § 1715, to make division of assets and liabilities in case of division of district township: *Dist. T'p of Algona v. Dist. T'p of Lott's Creek*, 54–286.

But a court cannot decrease the amount of the award in such case, or differently apportion costs: *Dist. T'p of Little Sioux v. Ind. Dist. of Little Sioux*, 60–141.

An appeal will lie from an order re-submitting a cause to arbitrators. Under particular facts indicating partiality of an arbitrator, *held*, error to re-submit the case to the same arbitrators: *Brown v. Harper*, 54–546.

890.

SEC. 3449.

Proceedings by *habeas corpus* for the custody of a child are not criminal in their nature. The action should be in the name of the person alleged to be illegally restrained, and not in that of the state, and in case of failure to secure the discharge the costs should not be taxed to the county: *The State v. Collins*, 54–441.

In a proceeding by *habeas corpus* for the custody of a child, the controlling consideration is the interest of the child itself: *Fonts v. Pearce*, 19 N. W. Rep., 854.

This is the rule when the parent seeking the custody has, either by abandonment or contract, surrendered his personal, legal right to such custody: *Barnett v. Barnett*, 61–199, and see notes to § 2241.

Habeas corpus is prosecuted by ordinary proceeding and the determination of the court upon the facts has the effect of a verdict of a jury: *Ibid.*

891.

SEC. 3452.

The person restrained is to be regarded as the petitioner, and if the proceeding is for the recovery of the custody of a child it may be brought in any county wherein the sworn petition states that the child is to be found: *Rivers v. Mitchell*, 57–193.

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893.

SEC. 3475.

Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57–193.

894.

SEC. 3483.

The supreme court cannot in a *habeas corpus* proceeding review an order of imprisonment for contempt and reverse it, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law that the act was not a contempt: *State ex rel. v. Seaton*, 61–563.

895.

SEC. 3491.

The visiting committee of an insane hospital has no authority under this or any other provision of the Code to punish a witness for contempt for refusing to testify when summoned before it: *Brown v. Davidson*, 59–461.

896.

SEC. 3496.

A party may show, as excuse for disobedience to order of court, that a compliance with such order was impossible. He is not confined to an attack upon the order on that ground, by way of appeal: *Hogue v. Hayes*, 53–377.

898.

SEC. 3507.

A resident of Buchanan Co. went with his family to Clayton Co., to reside there temporarily while building a school-house under a contract, with intention of returning to his former home when the work was completed. *Held*, that he did not become a resident of Clayton Co. so as to give a justice of the peace of that county jurisdiction in an action against him: *Bradley v. Fraser*, 54–289.

The fact that the defendant has a domicile in another county than that in which suit is brought does not prove that he is an actual resident of such other county; therefore, *held*, that a contractor upon a railroad who had resided in another county for seven years and was absent from that county only for the purpose of constructing such railroad and expected to return to that county as soon as the job upon which he was at work should be completed, was not an actual resident of such other county within the meaning of this section, it appearing that he was living and keeping house with his family during the time that he was performing his contract in the county where suit was brought: *Fitzgerald v. Arel*, 16–712, and on rehearing, 18 N. W. Rep., 713.

Where suit is brought before a justice of the peace against two persons jointly, as partners, and one of such partners is resident of another county, the justice of the peace acquires no jurisdiction as to such partner by service upon him in the county of his residence. The justice may acquire jurisdiction to render judgment against the firm upon service upon the resident partner, but not as to the non-resident, partner individually: *Ebersole v. More*, 59–663.

SEC. 3508.

A clause in a note giving a justice of the peace jurisdiction in an action thereon to the amount of three hundred dollars, will entitle plaintiff

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to bring action thereon before any justice who, but for the amount in controversy, would have had jurisdiction without such clause: *Marshalltown Bank v. Kennedy*, 53–357.

Where a note dated and payable at Des Moines recited that judgment might be taken thereon "before any justice in said county," the only county mentioned therein being that of the maker's residence, Dallas county, *held*, that the specification did not operate to give a justice of the peace in Polk county before whom action was properly brought, jurisdiction of the case to an amount in excess of the amount of one hundred dollars: *Brown v. Davis*, 59–641.

Where the amount claimed by the plaintiff is such as to bring the case within the jurisdiction of a justice of the peace, the fact that he erroneously renders judgment for an amount in excess of his jurisdiction will not render his judgment void and the excess may be remitted: *Reed v. Shum*, 19 N. W. Rep., 254.

The amount of the attorney's fee provided for in the note is not to be taken into consideration in determining the amount in controversy, the attorney's fee being part of the costs: *Spiesberger v. Thomas*, 59–606.

In determining the amount in controversy it is not proper to add together the amounts of the original claim and of a counter claim: *Madison v. Spitsnogle*, 58–369.

A justice has no equitable jurisdiction. Therefore, *held*, that where an action was brought before a justice upon a note, blank as to amount, the plaintiff could not, on appeal to the circuit court, ask a reformation of the note and judgment thereon as reformed, for the reason that he thereby sought to introduce an equitable cause of action which could not be tried before a justice: *Hollen v. Davis*, 59–444.

900.

SEC. 3516.

A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph M'f'g Co. v. Harrington*, 53–380.

The provisions of § 2877 for re-trial of actions where service is by publication, are, under this section, applicable to proceedings in justices' courts: *Taylor & Farley Organ Co. v. Plumb*, 57–33.

901.

SEC. 3518.

Where the notice of suit in the justice's court set out the cause of action as a claim for a certain sum with interest, etc., etc., and the petition filed on the return day claimed to recover the same sum with interest, etc., upon a bond signed by defendant as surety, *held*, that the petition was not based upon a different cause of action from that stated in the notice: *Winneshiek Co. v. Humpal*, 61–172.

903.

SEC. 3534.

Although the justice from whom the change is taken commit an error in sending the case to a justice who is not the nearest one in the county to whom it might be sent, yet the justice to whom the case is thus sent cannot review such decision, and will have jurisdiction, and his action cannot be collaterally attacked: *Tennis v. Anderson*, 55–625.

It is necessary that the justice granting a change shall designate by name the next justice to whom the case is sent. This is a judicial determination and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice the change of venue is not complete and no other justice can acquire jurisdiction: *Bremner v. Hallowell*, 59–433.

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904.

SEC. 3543.

This section applies only to cases where there has been personal service. In case of judgment upon service by publication, § 2877 is applicable: *Taylor & Farley Organ Co. v. Plumb*, 57-33.

907.

SEC. 3567.

The filing of the transcript in the circuit court does not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61-357.

SEC. 3568.

Execution on the judgment so filed may be issued at any time within twenty years: *McCoy v. Cox*, 54-595.

SEC. 3569.

This section, in so far as it extends the time within which an execution may issue upon a judgment of a justice of the peace beyond that allowed under the Revision, is applicable to cases in which the time allowed under the Revision had not expired when this Code was enacted, but not to cases where such time had expired: *Woods v. Haviland*, 59-476.

SEC. 3574.

A sale after the expiration of the execution under which levy is made, and without renewal as here contemplated, will be valid: *Walton v. Wray*, 54-531.

SEC. 3575.

Where the defendant makes a tender which is not accepted, the amount in controversy is the difference between the amount claimed and the amount tendered, and if that does not exceed twenty-five dollars, no appeal is allowed: *Young v. McWaid*, 57-101.

The amendment to this section limiting the right of appeal to cases in which the amount in controversy exceeds $25, is not unconstitutional as depriving the party of a trial before a common law jury in such cases. The constitution authorizes the legislature to provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal: *Higgins v. Farmers' Ins. Co.*, 60-50.

In determining the amount in controversy under this section the costs taxed up by the justice of the peace will not be taken into consideration: *Curran v. Excelsior Coal Co.*, 18 N. W. Rep., 698.

Where plaintiff claimed less than twenty-five dollars in his account, and defendant set up, not by way of counter claim, but as a defense, the payment of more than twenty-five dollars to plaintiff on the indebtedness, *held*, that the amount in controversy was what was claimed and not what defendant alleged that he had paid: *Boyle v. Wilcox*, 59-466.

A party cannot appeal from a judgment entered before a justice of the peace by his consent: *Stever v. Heald*, 17 N. W. Rep., 145.

908.

SEC. 3576.

An appeal taken after the lapse of twenty days is in effect no appeal, and the case should be stricken from the docket of the circuit court. In such case the court has no jurisdiction to render any judgment except for costs: *Martin v. Croker*, 17 N. W. Rep., 533.

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909.

SEC. 3587.

Failure of party appealing to appear and file any pleading in the circuit court, even when judgment went against him by default before the justice, will not entitle the court, in the absence of any general rule of court on the subject, to dispose of the case until regularly reached on the docket for trial: *Harty v. D. M. & M. R. Co.*, 54–327.

910.

SEC. 3591.

The circuit court may allow the defendant to file an amended answer setting up the defense of payment. Such matter does not constitute a new demand or a counter claim: *St. Louis Type Foundry v. Medes*, 60–525.

The claim made to the justice and the remedy sought cannot be changed, and issues involving other matters presented in the circuit court upon appeal. Therefore, *held*, that where an action before a justice was upon a note, blank as to amount, the plaintiff could not, on appeal, change his cause of action so as to ask for the reformation of the instrument and judgment thereon: *Hollen v. Davis*, 59–444.

911.

SEC. 3594.

Although it is error in the court to enter up judgment against the appellant for a greater sum than the penalty of the bond, yet such a judgment would not be void for want of jurisdiction: *Freeman v. Hart*, 61–525.

SEC. 3596.

Where, on appeal by defendant from a judgment by default against him before the justice, he makes no appearance, the judgment may be affirmed without again introducing the evidence: *Harty v. D. M. & M. R. Co.*, 54–327.

SEC. 3597.

The justice of the peace is only required to show in his return such matters as are rendered necessary by the affidavit for the writ: *Spiesberger v. Thomas*, 59–606.

912.

SEC. 3601.

A judgment from which writ of error has been sued out, without filing a *supersedeas* bond, may be enforced, notwithstanding the writ of error. The giving of a *supersedeas* bond on appeal from the judgment of the circuit court in the case will not stay proceedings under the judgment: *Thomas v. Nicklas*, 58–49.

Although no *supersedeas* bond is filed and the transcript of the judgment is taken to the circuit court, this will not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61–357.

913.

SEC. 3608.

The justice having jurisdiction of the subject-matter and the defendant, may render judgment against a garnishee who has answered, although he be a resident of another county: *Smith v. Dickson*, 58–444.

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SEC. 3611.

A tenant holding over after the expiration of his lease does not become a tenant at will, entitled to thirty days' notice to terminate such tenancy, but is entitled to only the three days' notice to quit, provided in § 3614: *Kellogg v. Groves*, 53–395.

Under particular facts, *held*, that defendant went into possession as assignee of an unexpired lease, and not by stealth, and was, therefore, at the expiration of the lease, entitled to notice to quit: *Gifford v. King*, 54–525.

914

SEC. 3614.

Under Code of 1851, *held*, that proof of service of such notice by affidavit of a person not an officer, in the manner provided for service of original notices by private persons, was not sufficient to entitle the notice to be received in evidence without further proof. The notice here contemplated is not one in an action, but one which forms the basis of a private right, and must be proved as any other matter *in pais*: *Hollingsworth v. Snyder*, 2–435.

917.

SEC. 3636.

A defendant in a criminal prosecution who becomes a witness in his own behalf may be subjected to the same tests of credibility, of memory and of intelligence, by cross-examination, as any other witness: *The State v. Red*, 53–69.

If the defendant requests to become a witness, the fact that he testifies to a part only of his defense may properly be made a subject of comment by the district attorney. The exemption from unfavorable comment extends only to such defendants as choose to avail themselves of the privilege of not testifying in their own behalf: *State v. Tatman*, 59–471.

There is nothing which the prosecuting attorney can say about the fact that defendant has not testified in his own behalf that would justify a reference to it, and courts should hold district attorneys to a strict observance of their duties in this respect: *State v. Graham*, 17 N. W. Rep., 192.

The fact that a witness does not believe in a God, and that He will reward or punish us according to our deserts, may be shown as affecting the credibility of the witness, but it is erroneous to confine the evidence to a belief in *future* rewards and punishments. The facts as to belief are not to be brought out by cross-examination, but by proof of declarations, etc., etc.: *Searcy v. Miller*, 57–613.

A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinions on matters of religious faith for the purpose of affecting his credibility by showing that he does not believe in a future conscious state of existence: *Dedric v. Hopson*, 17 N. W. Rep., 772.

918.

SEC. 3637.

The rules relating to the admissibility of evidence showing the interest of a witness, are the same at common law and under the statute. The difference is that at common law the court passes upon the evidence, and if the interest be established, excludes the testimony, while under the statute the evidence of interest goes to the jury to be weighed in determining the credibility. Evidence as to declarations of a witness to the effect that he is interested is not admissible at common law to affect his competency, nor under the statute to affect his credibilty: *Erickson v. Bell*, 53–627.

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SEC. 3639.

The only restriction placed by this section upon the right of a witness to testify, is as to personal transactions: *Haverly v. Alcott*, 57–171.

The exception at the end of the section, as to cases where the executor testifies in his own behalf, *held*, not to apply where such testimony was not as to a personal transaction, and was not adverse to the opposite party: *In re Edwards*, 58–431.

The disqualification provided for in this section is not limited to actions brought by an executor, assignee or guardian, but applies also in actions against such parties. It extends however only to cases where the witness is examined as against such executor, assignee or guardian, and not to cases where he is examined by such party: *Leasman v. Nicholson*, 59–259.

A party whose liabilities would not be affected by the result of the action, *held*, not incompetent to testify under this section: *Fuller v. Lendrum*, 58–353.

Where one of the parties defendant in an action by an administrator had entered into a stipulation for judgment against him to a particular amount, *held*, that he was no longer a party to the action in such sense as to be disqualified from testifying under this sec ion, although judgment had not yet been formally rendered: *Conger v. Bean*, 58–321.

In a particular case, *held*, that the facts testified to by witness did not involve a transaction between the witness and decedent within the meaning of the section: *Mayes v. Turley*, 60–407; *Miller v. Dayton*, 57–423.

That a party defendant in an action by an administrator, after stating that he signed the note sued on in his own house, was allowed to state who were in the house at that time, was held not error under this section: *Conger v. Bean*, 58–321.

The testimony of a party to an action brought by an heir or administrator and relating to a personal communication between himself and deceased is not competent, although such party has no interest in common with the other defendants against such heir or administrator: *Burton v. Baldwin*, 61–283.

If the testimony of such a witness is not competent when taken by deposition, it is not admissible, although at the time it is offered the status of such witness is changed, and he is no longer a party: *Ibid.*

An objection under this section is not to the competency of the witness, but to the competency of the testimony: *Ibid.*

Where plaintiff proposed to prove upon his own testimony, in an action against an administrator for services alleged to have been rendered decedent under contract, that he had never received payment for such services, *held*, that the evidence was properly rejected: *Van Sandt v. Cramer*, 60–424.

The statute contemplates that when the administrator or other representative of the deceased testifies as to a personal transaction and describes it, then a party may also testify in relation thereto and give his version of the transaction, but the fact that the administrator refers to a personal transaction as possible does not open the way for the admission of such testimony: *In re Estate of Edwards*, 58–431.

The fact that the executor or administrator testifies as to one transaction does not entitle the opposite party to testify in reference to other transactions with the decedent: *Luehrsmann v. Hoinge*, 60–708.

The prohibition prescribed in this section does not extend to any transaction as to which the administrator has been examined in his own behalf: *Ivers v. Ivers*, 17 N. W. Rep., 149.

This section is applicable to a controversy between the heirs of deceased: *Neas v. Neas*, 17 N. W. Rep., 30.

919.

SEC. 3641.

In a prosecution of the husband for bigamy, the lawful wife is a competent witness against him. The crime is one against the wife, within the meaning of the section: *The State v. Sloan*, 55–217; *The State v. Hughes*, 58–165.

A wife, summoned as garnishee in an action against her husband, is not exempt from answering interrogato-

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ries touching her indebtedness to him. The subjection of such indebtedness to the payment of claims against him cannot be regarded as against his interests: *Thomson v. Silvers*, 59–670.

920.

SEC. 3642.

A transfer of a claim from husband to wife is not a communication within the meaning of this section: *Hanks v. Van Garder*, 59–179.

Exclamations made by the wife upon the killing of her son by her husband, *held* not communications between husband and wife within the meaning of this section: *State v. Middleham*, 17 N. W. Rep., 446.

SEC. 3643.

As it may be lawful, under some circumstances, to produce a miscarriage, a communication by a woman to a physician, in relation to such matter, will be privileged, in the absence of a showing that it was not for an unlawful purpose: *Guptill v. Verback*, 58–98.

Statements by a person injured as to the cause of the injury, made to the physician called to treat him, in response to a question by the physician as to how the injury occurred, are privileged, and cannot be disclosed by the physician to whom they were made, or by his partner, who was present and heard them: *Raymond v. B., C. R. & N. R. Co.*, 17 N. W. Rep., 923.

An attorney is competent to testify where it appears that he is not the attorney of the party with reference to any matters about which he testifies, and that no information respecting such matters was obtained from him through the confidential relation of attorney and client: *Reinehart v. Johnson*, 17 N. W. Rep., 452.

921.

SEC. 3647.

Where a witness, who has taken advantage of his privilege, is afterward prosecuted, the fact that he so refused to testify cannot be given in evidence against him: *The State v. Bailey*, 54–414.

SEC. 3649.

Under the common law rule, the moral character of a witness could not be shown, but only his reputation for want of truth and veracity. The object of this section is to change this rule, and therefore the general *reputation* may be now shown, but not the witness's *character* as known to the witness, independent of his reputation: *State v. Egan*, 59–636.

It is competent for a witness, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character; and in a particular case, *held*, that certain language of the court indicating that evidence of this kind was the best evidence of good reputation, was erroneous, yet that such error was, under the circumstances, without prejudice: *State v. Nelson*, 58–208.

Held, not proper, under this section, to ask a witness who has admitted that he has been guilty of horse-stealing, how long he has been engaged therein; such fact would have no bearing upon the moral character of the witness: *State v. McIntire*, 58–572.

Where defendant in a criminal prosecution becomes a witness on his own behalf, evidence tending to show that his moral character is bad is admissible, as in the case of any other witness: *State v. Kirkpatrick*, 19 N. W. Rep., 660.

SEC. 3650.

Section applied: *Hess v. Wilcox*, 58–380.

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922.

SEC. 3655.

The party whose handwriting it is sought to prove, may, on his behalf, offer in evidence writings of his own proved to be genuine, and is not to be limited to such writings as were made before the issue as to genuineness of handwriting was raised. Therefore, *held*, that defendant might offer in evidence his signature to his answer in the case: *Singer M'f'g Co. v. McFarland*, 53–540.

923.

SEC. 3658.

Where it appeared that a certain book was used as a mere memorandum book, from which an entry up of charges against parties in what was called the sales-book was made, *held*, that the sales-book was the book which was receivable in evidence under this section, and not the memorandum or order book: *Hancock v. Hintrager*, 60–374.

925.

SEC. 3663.

If the party sought to be charged has in writing admitted the contract, this is sufficient to take the case out of the statute, no matter to whom the writing may have been addressed: *Warfield v. Wisconsin Cranberry Co.*, 19 N. W. Rep., 224.

Where the contract is such as is required to be in writing, the written evidence thereof cannot be aided or added to by parol testimony: *Vaughn v. Smith*, 58–553.

Although a promise by one party to be individually responsible for the debts of another would be within this statute, yet if such a promise has been performed, the objection of the statute cannot be enforced: *Putnam v. Swinney*, 19 N. W. Rep., 286.

926.

SEC. 3664.

A parol agreement to enter into a partnership for the purpose of dealing in real estate does not come within the provision as to contracts for the creation or transfer of an interest in land, and need not be evidenced in writing: *Richards v. Grinnell*, 18 N. W. Rep., 668.

Where an oral assignment of a judgment was made to an attorney, in pursuance of an agreement entered into with the attorney, in payment of services in obtaining such judgment, and before the services were all rendered, *held* that such assignment was valid: *Howe v. Jones*, 57–130.

Where goods were furnished one party and charged to him upon agreement of another to pay for them, *held* that the agreement of the latter must be regarded as collateral and within the statute of frauds: *Langdon v. Richardson*, 58–610.

An agreement by an incoming partner to become liable for the debts of the firm in consideration of the property acquired by the purchase, is not within the statute of frauds, and the creditors may recover thereon: *Poole v. Hintrager*, 60–180.

An express trust not evidenced in writing cannot be enforced against the trustee. The mere refusal of the trustee to perform the contract, and his denial of its existence, will not authorize a court of chancery to enforce the contract: *McClain v. McClain*, 57–167.

928.

SEC. 3667.

In a particular case, *held* that the contract sued upon was sufficiently established by the evidence of one of the defendants to entitle the plaintiff to recover against the defendants thereon, although it was within the statute of frauds and not in writing: *Dewey v. Life*, 60–361.

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929.

SEC. 3669.

A court of inferior jurisdiction can not acquire jurisdiction under this section over the subject-matter by simple declaration that it has such jurisdiction, and while it may be that the decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown, yet where the assumption upon which the decision is based appears, and the decision is thereby shown to be erroneous, the presumption in favor of the justice's jurisdiction is thereby rebutted: *Brown v. Davis*, 59–641.

Section applied: *Lees v. Wetmore*, 58–170.

932.

SEC. 3693.

A justice of the peace has full power to pass on the question of the legality or propriety of the affidavit sought and is not without jurisdiction to issue a subpœna to compel such affidavit, though as a matter of law it appears upon the face of the petition for an affidavit that it could not, when taken, have any legal use. Therefore, *held*, that the supreme court could not, in a *habeas corpus* proceeding, enquire into an order of imprisonment for contempt made by a justice for refusal of a witness to make such affidavit: *State ex rel. v. Seaton*, 61–563.

933.

SEC. 3702.

Parol evidence is not competent to correct a mistake in a duly certified copy of a record: *Monk v. Corbin*, 58–503.

935.

SEC. 3717.

The journals of the respective houses of the general assembly are competent evidence to show the proceedings of such houses: *Kœhler v. Hill*, 60–543.

936.

SEC. 3721.

Where a party to an action dies after notice is served to take depositions, but before they are taken, they are illegal and should be stricken from the files on motion: *Kershman v. Schela*, 59–93.

It is not essential that the notice and interrogatories be on file in the clerk's office on the day fixed for the commission to issue. The opposite party having been served with a copy of the interrogatories, the filing of the original interrogatories is not necessary to enable him to file his cross-interrogatories. A delay of seven days in issuing a commission after the date fixed in the notice, *held*, not such a defect as to warrant the exclusion of the deposition when taken: *Bonney v. Cocke*, 61–303.

SEC. 3722.

Where under an agreement to take the deposition of *S. M. Kim*, a deposition of *Sally E. McKim* was taken, *held*, that it was properly suppressed upon motion: *Glenn v. Gleason*, 61–28.

937.

SEC. 3725.

The person executing the commissions and making a return of his doings, should appear to be the person commissioned, and should so appear

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of record from the certificate appended to and returned with the commission, but where the commission was issued to *Fred. R—* and the certificate was signed *F. A. R—*, *held*, that the presumption that the commission was sent to the person named therein, and the certificate signed by a name which might be that of the person to whom it was sent, were sufficient to show that the commission was properly executed; also, *held*, that the re-issuance of the commission on an order of the court in order that the proper return might be made, was not error, no prejudice being shown: *Byington v. Moore*, 17 N. W. Rep., 644.

SEC. 3727.

If there is a material difference between the name given in the notice and that of the witness whose deposition is taken, the deposition may be suppressed on motion: *Strayer v. Wilson*, 54–565.

939.

SEC. 3737.

Where it appears from the caption of a deposition that it was taken before the proper officer, in the proper county, and that the witness was first duly sworn, and from the certificate that the deposition was read over by said witness, and subscribed and sworn to by said deponent therein, it sufficiently appears that the statute has been complied with: *Vaughn v. Smith*, 58–553.

SEC. 3741.

The fact that the commission is not issued until seven days after the date fixed in the notice is not sufficient to exclude the deposition: *Bonney v. Cocke*, 61–303.

941.

SEC. 3751.

An objection to testimony on the ground that it relates to a personal transaction between the witness and decedent in an action by or against an administrator within the provision of § 3639 is an objection to competency, and, therefore, not within the provisions of this section, as to the time when exception must be taken: *Burton v. Baldwin*, 61–283.

944.

SEC. 3762.

[20 G. A., ch. 191, § 4, provides as to salary of librarian as follows:]

Salary of librarian.

SEC. 4. The salary of the state librarian shall be twelve hundred dollars per annum payable as salaries of other state officers, and there is hereby appropriated out of any money in the treasury not otherwise appropriated, the sum of twelve hundred dollars annually, for the payment of said salary.

[Other sections of the act are referred to in supplement to page 536.]

SEC. 3764.

[19 G. A., ch. 153, amends this section by adding thereto the following:]

Printing of letter-heads, &c., to be done by contract.

Provided, that nothing contained in this section shall be construed as fixing the rate of compensation for printing letter-heads, envelopes, or postal cards; and it shall be the duty of the secretary of state to have such work done by contract with the office agreeing to do the same for the lowest price.

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946.

SEC. 3771.

[19 G. A., ch. 117, amends this substitute enacted by 17 G. A., ch. 74, by striking therefrom that portion commencing with "and there is allowed" in the second line of the section as it stands, and ending with "duties of his office" in the sixth line, and inserting in lieu thereof the words "*and the salary of the deputy clerk of the supreme court shall be twelve hundred dollars per annum.*" The same act also amends § 766, which see.]

947.

SEC. 3775.

To entitle the district attorney to the per cent. on "fines and forfeitures actually collected by him," it is not essential that the money collected shall actually pass through his hands: *Smith v. Linn Co.*, 55–232.

SEC. 3777.

The reporter cannot be required to transcribe and file his notes until his fees therefor are paid, even where he has by order of the court taken down in writing the evidence offered in an equitable action: *Godfrey v. McKean*, 54–127.

The stenographer's notes, when filed with the clerk as a part of the record of the case, may be amended or corrected by the court when it is ascertained in a proper proceeding that they do not fully or correctly embody the action or proceeding of which they were intended to be the record: *Mahaffy v. Mahaffy*, 18 N. W. Rep., 685.

The filing of the stenographer's original notes, and the subsequent incorporation of them into the bill of exceptions, and the insertion of a duly certified copy thereof in longhand in the transcript, constitute a substantial compliance with this section as amended: *McAnnulty v. Seick*, 59–586.

The stenographer's report of the evidence may be incorporated into the bill of exceptions by a reference thereto, and becomes a part of such bill of exceptions without being transcribed. A transcript of such notes will only be necessary where a transcript of the record is required: *Hampton v. Moorhead*, 17 N. W. Rep., 202.

It is the better practice to preserve evidence which is taken down in shorthand by a bill of exceptions. Whether it may be done by filing the original notes and making certified transcripts therefrom, *quære*. At any rate the record must be made up in the court below: *State v. Hessian*, 58–68.

950.

SEC. 3784.

The limitation contained in this section applies to the compensation of the clerk for all official services; he is not entitled to receive, in excess of the limit here imposed, the fees as commissioner of insanity specified in § 3825: *Moore v. Mahaska Co.*, 61–177.

951.

SEC. 3786.

[19 G. A., ch. 151, repeals this section, and enacts in lieu thereof the following:]

SEC. 3786. The clerk of the district and circuit courts shall, on the first Monday in January and July of each year, pay into the county treasury for the use of the county all fees of whatever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts thereof, giving the title of the cause and

Clerk to pay into county treasury unclaimed witness fees.

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style of the court in which the same was pending, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively.

[The remainder of this act is inserted in supplement to page 962, in connection with § 3815.]

952.

SEC's 3788, 3789 and the substitute, 18 G. A., Ch. 115.

COMPENSATION OF SHERIFFS.

[Nineteenth General Assembly, Chapter 94.]

Repeal.

SEC. 1. Chapter 115, laws of the Eighteenth General Assembly, re ating to compensation of sheriffs, is hereby repealed and the following enacted in lieu thereof:

Attending supreme court.

SEC. 2. The sheriff is entitled to charge and receive the following fees:—For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day.

Serving notice.

SEC. 3. For serving a notice and making a return thereof, for the first person served, fifty cents, and for each additional person twenty-five cents.

Serving warrant.

SEC. 4. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant as sworn to by the sheriff. If service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable.

Serving subpœna.

SEC. 5. For serving and returning a subpœna, for each person, twenty cents.

For service of subpœnas on the same witnesses in several state cases, made in one trip; *held*, that the sheriff was entitled to mileage but for one trip: *Redfield v. Shelby Co.*, 19 N. W. Rep., 828.

Summoning jury.

SEC. 6. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service.

Summoning jury to assess damages.

SEC. 7. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending to them, five dollars per day. There shall be nothing in this section so construed that will allow any sheriff to make separate charges for different assessments, provided they can be done by the same set of appraisers and completed in one day of ten hours.

Serving execution, attachment, order or injunction.

SEC. 8. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars.

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Collecting money.

SEC. 9. For collecting and paying over money: On the first five hundred dollars or fraction thereof, two per cent.; and on excess over five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.

Executing deed or bill of sale.

SEC. 10. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property, one dollar.

Inventory of property levied on.

SEC. 11. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour.

Making copies.

SEC. 12. For copy of paper required by law, made by him, for each one hundred words, ten cents.

Mileage.

SEC. 13. Mileage in all cases required by law, going and returning, per mile, five cents.

Taking bond.

SEC. 14. For taking each bond required by law, twenty-five cents.

Commitment or discharge.

SEC. 15. Each commitment to jail, twenty-five cents; discharge from same, twenty-five cents.

Receiving prisoner.

SEC. 16. For receiving a prisoner on surrender by bail, fifty cents.

Boarding prisoner.

SEC. 17. For boarding a prisoner, a compensation to be fixed by the board of supervisors, not less than fifty cents per day.

Waiting on prisoners.

SEC. 18. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors.

Attending with prisoner.

SEC. 19. For attending before any judge with a prisoner, one dollar per day.

Attending sale.

SEC. 20. For attending sale of property, for each day, one dollar.

Conveying convict, prisoner or insane person to penitentiary, jail, asylum or reform school.

SEC. 21. The sheriff, for conveying one or more convicts to either of the penitentiaries of this state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to the reform school in the state, shall be allowed, as full compensation therefor, his necessary traveling expenses, actually paid by him, including board and railroad fare for himself and such convicts, insane, or other prisoners, or any other necessary expenses, and in addition thereto forty cents per hour for the time necessarily employed in going to and returning from said prisons, asylums, or reform schools, to be certified by the oath or affidavit of such sheriff, accompanied by the proper vouchers to the board of supervisors of the county where the convictions took place. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors.

Dwelling for jailer.

SEC. 22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors.

Annual salary.

SEC. 23. The sheriff is also entitled, for attending district and circuit courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of supervisors, but in no case less than two hundred dollars nor

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more than four hundred dollars; and the sheriff shall make a full report to the board of supervisors at their January meeting of each year, showing the full amount of fees received by him for the previous year in pursuance of this act.

Repealing clause.

SEC. 24. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 3788.

As to fee under the original section for serving execution, see *Bell v. Weddington*, 54–561.

953.

SEC. 3789.

[This section is repealed by 19 G. A., ch. 94, inserted above.]

The board may properly fix the amount of the sheriff's annual salary, under this section, at the beginning of his term, and the rendering of the services on the faith of such action will constitute a contract binding upon the county: *Holmes v. Lucas Co.*, 53–211.

SEC. 3790.

This section applies only to sheriff's fees and does not render the county liable for cost of printing abstract and argument on appeal by defendant to the supreme court, although on such appeal the judgment against defendant be reversed: *Red v. Polk County*, 56–98.

954.

SEC. 3791.

[19 G. A., ch. 159, repeals this section, and enacts in lieu thereof, the following:]

Members of board of supervisors.

SEC. 3791. The members of the board of supervisors shall each receive four dollars for each day actually in session, and two dollars and fifty cents per day, exclusive of mileage, when not in session but employed on committee service, and six cents per mile for every mile traveled in going to and from the regular and adjourned sessions of the board and in going to and from the place of performing committee service: *Provided*, that in counties having a population, as shown by the last preceding census, of ten thousand or less, they shall not receive compensation for session service for more than twenty days in one year; and in counties having a population of more than ten thousand, but less than twenty-three thousand, for more than thirty-five days of such service in one year; and in counties having a population of twenty-three thousand or over, for more than forty days of such service in one year.

SEC. 3793.

An attempt of the board of supervisors to make an allowance to the treasurer greater than they are authorized to do, cannot be construed to be an allowance to the extent of $1,500, as herein authorized: *Griffin v. County of Clay*, 19 N. W. Rep., 327.

957.

SEC. 3804.

In default cases, where plaintiff is required to prove up his claim before getting judgment (under §§ 3541, 3542), the justice is entitled to both a trial fee and a fee for entering judgment: *Shaw v. Kendig*, 57–390.

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961.

SEC. 3814.

A witness is not entitled to fees for the time during which he is confined in jail on commitment by a magistrate for failure to give security to appear as a witness for the state in a criminal prosecution: *Markwell v. Warren Co.*, 53–422.

Where a justice of the peace dismisses a criminal prosecution for failure of the prosecuting witness to appear, the costs, including witness fees, may properly be taxed to the county: *Cassidy v. County of Palo Alto*, 58–125; unless the justice has ground for taxing them against the prosecuting witness, as provided in § 4691: *County of Palo Alto v. Moncrief*, 58–131.

Where the county fails to pay costs properly taxed against it, action may be brought against it therefor; *Cassidy v. County Palo Alto*, 58–125.

Since the amendment made in § 3818, the county is not liable for fees of defendant's witnesses in a criminal case before a justice of the peace, unless they have been subpœnaed upon order of the court as therein provided: *Kennedy v. Delaware County*, 59–123.

A witness for the prosecution who comes from another state at the request of the state, and testifies in a criminal prosecution where the defendant is adjudged not guilty, should be compensated by the county in accordance with this section for his mileage outside of as well as within the state: *Westfall v. Madison Co.*, 17 N. W. Rep., 614.

962.

SEC. 3815.

[19 G. A., ch. 151, repeals this section, and in lieu thereof enacts the following substitute, together with an additional section.]

SEC. 3815. Each justice of the peace shall, on the first Monday in January and July, each year, pay into the county treasury, for the use of the county, all fees of whatsoever kind in his hands at the date of preceding payment and still unclaimed, and at the time of so doing he shall take from the treasurer duplicate receipts therefor, giving the title of the cause, with the names of the witnesses, jurors, officers, or other persons, and the amount each one is entitled to receive, one of which receipts he shall file with the county auditor, who shall charge the amount thereof to the treasurer as so much county revenue, and shall enter the same upon the proper records as a claim allowed, and on demand by the persons entitled to said fees he shall issue county orders for the amount due each person respectively. Justices to pay unclaimed witness fees into county treasury.

SEC. 2. Each county treasurer shall make a certified statement of all unclaimed fees in his hands at the time of the taking effect of this act, showing the title of the cause, style of the court, name of the individual, and the amount to which each one is entitled, and file the same with the county auditor, who shall charge the treasurer in the county fund with the aggegate amount so certified, and place the same on the proper record as a claim allowed, and issue county orders therefor upon demand by the parties entitled thereto. County treasurer to make statement of unclaimed fees.

[The first part of this act is a substitute for § 3786, and is inserted in supplement to page 951.]

SEC. 3818.

This section applies to cases in all the courts of the state, including courts held by justices of the peace, and in the absence of such order by a

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justice of the peace, the county is not liable for fees of defendant's witnesses in a criminal proceeding, wherein the defendant is adjudged not guilty, notwithstanding the provisions of § 3814: *Kennedy v. Delaware County*, 59–123.

Held, not error for the court to refuse an order for all the witnesses asked for by defendant upon showing made in a particular case: *State v. Benge*, 17 N. W. Rep., 100.

964.

SEC. 3825.

A clerk is not entitled to the fees specified in this section in excess of the limit of the compensation specified in § 3784: *Moore v. Mahaska Co.*, 61–177.

965.

SEC. 3830.

No duty is hereby imposed upon an attorney appointed to defend a criminal, to present the case to the supreme court, but if, in the exercise of his discretion, he does appear there, the statute provides a compensation shall be paid him by the county. The amount of such compensation is not to be what his services would have been reasonably worth in case he had been employed by the county, but an enlarged compensation, graded on a scale corresponding to the prices fixed for a trial in the district court. Therefore, *held*, that an allowance of twenty-five dollars for arguing the case in the supreme court was proper: *Baylies v. Polk Co.*, 58–357.

967.

SEC. 3842.

The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require the successful party to pay such of the costs as accrued at his instance, as provided in § 2935. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *McConkey v. Chapman*, 58–281.

970.

SEC. 3848.

Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of the poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 17 N. W. Rep., 90.

971.

SEC. 3851.

Where defendant was charged with committing murder in the perpetration of robbery and burglary, and the verdict of the jury was "guilty as charged in the indictment," *held*, that this was a sufficient finding of the degree of the crime and was a conviction of murder in the first degree (distinguishing *The State v. Moran*, 7–236): *The State v. Weese*, 53–92.

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975.

SEC. 3856.

On a trial for manslaughter it is not necessary to define the crime of murder or any lesser crime than manslaughter, if from the evidence it appears that defendant admits the killing, but seeks to justify. Where there is any evidence sustaining the claim that the blow was accidental, the law in relation to accidental killing should be given to the jury: *State v. Hartzell*, 58–520.

SEC. 3858.

An indictment under this section need not in express terms charge an assault; if it charge putting in bodily fear and danger of life, it will be sufficient in this respect, the charge of an assault being thereby necessarily implied: *The State v. Brewer*, 53–735.

An indictment stating that defendant, with force, etc., and by putting in fear, etc., "did take, steal and carry away from the said, etc.," is not sufficient to charge this offense. It should charge a taking, etc., *from the person: The State v. Leighton*, 56–595.

An indictment charging that defendant made an assault upon the person named, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of" said person, etc., *held*, sufficient to charge robbery: *State v. Kegan*, 17 N. W. Rep., 179

SEC. 3861.

While a female over ten years of age is presumed capable of giving consent, yet the fact that a female over that age lacked puberal development may be considered in support of her claim that she did not understand the nature of the intended act: *State v. McCaffrey*, 19 N. W. Rep., 331.

977.

SEC. 3864.

[19 G. A., ch. 19, amends this section by striking out the words "one year" in the sixth line, and inserting in lieu thereof, the words "*five years.*"]

SEC. 3867.

Mere unlawful commerce for a consideration paid is not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person. But the allegations in the indictment in a particular case, of representations as to the innocence of the act and promises of presents, &c., *held* sufficient on demurrer: *State v. Fitzgerald*, 19 N. W. Rep., 202.

Proof of unchaste conduct on the part of prosecutrix just prior to the alleged seduction would entitle defendant to acquittal; therefore, an instruction that proof of such conduct should be considered against prosecutrix, *held* erroneous, in that it did not go far enough in stating the effect of such conduct: *State v. Carr*, 60–453.

Instruction as to effect of proof of improper liberties allowed to others than defendant, prior to the alleged crime, *held* misleading, in that the meaning of such term was left ambiguous: *Ibid.*

In a particular case, *held*, that it sufficiently appeared from the evidence that prosecutrix was an unmarried woman; also that the seductive arts were such as were sufficient to constitute the crime, being promises to marry, &c.; also, that the corroboration was sufficient: *State v. Heatherton*, 60–175.

An indictment charging that defendant "did unlawfully and feloniously seduce," &c., is sufficient, without stating the means employed: *State v. Conkright*, 58–338.

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979.

SEC. 3872.

Under indictment for assault with intent to commit murder, defendant may be convicted of assault with intent to commit manslaughter: *State v. White*, 45–325; *State v. Connor*, 59–357.

SEC. 3873.

If the jury find that the prisoner charged with the assault of this character was so drunk that he was incapable of forming an intent to ravish, they should find him not guilty: *State v. Donovan*, 61–369.

It does not follow as a legal presumption that any specific offense is intended by a man chasing a woman: *Ibid.*

983.

SEC. 3891.

An indictment charging that defendant did "with intent to commit, etc., feloniously and willfully break and enter in the night time, etc.," is sufficient. It is not necessary to charge that the breaking and entering were "burglarious:" *The State v. Short*, 54–392.

The possession of goods recently burglariously stolen is not of itself sufficient evidence upon which to find the defendant guilty of burglary: *State v. Shaffer*, 59–290.

As to whether an indictment will be bad for duplicity if it charges the breaking and entering, and also the larceny of goods from the building so entered, see notes to § 4300.

SEC. 3894.

While the offense defined by this section is similar to that of burglary, defined by § 3891, an indictment which describes the house as a place "in which goods were kept for use, sale, and deposit," sufficiently specifies that the offense charged is one under this section, and not under the other: *State v. Franks*, 19 N. W. Rep., 832.

The possession of burglars' tools may be shown as evidencing the intent of defendant in entering the house: *Ibid.*

985.

SEC. 3901.

[This section is repealed by 20 G. A., ch. 185, § 15, inserted in supplement to page 447.]

INTERFERENCE WITH RAILROAD PROPERTY.

[Nineteenth General Assembly, Chapter 112.]

SECTION 1. If any person shall willfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or shall in any manner aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, or both, at the discretion of the court.

Uncoupling locomotive or cars.

SEC. 2. If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage, or other car attached thereto, and run the same upon any railroad, or shall aid, abet, or procure the doing of the same, such person shall be punished by imprisonment in the state penitentiary not exceeding

Seizing or running locomotive.

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ten years, or by fine not exceeding two thousand dollars, or both, at the discretion of the court.

Wrongfully running hand car.

SEC. 3. If any person shall, without permission from the proper authority, wrongfully take or run any hand car upon any railroad in this state, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not more than one hundred dollars, or imprisoned not more than thirty days, at the discretion of the court: *Provided*, that if by such unlawful use of any hand car any locomotive or car is thrown from the track, or a collision produced, or any person injured thereby, he shall, on conviction, be imprisoned in the penitentiary for a term of not more than five years; and *provided further*, that if by reason of such unlawful use of any hand car any person is killed, such person offending shall be deemed guilty of manslaughter.

Interference with air-brake or bell-rope.

SEC. 4. If any person not an employe upon a railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, [he] shall be subject to the penalty provided in section three of this act for the unlawful running of a hand car on any railroad; and any conductor or brakeman on a railroad train shall have power to arrest such person so offending and deliver him to some peace officer on the line of the railroad.

Conductor or brakeman may arrest.

986.

SEC. 3902.

There are not two degrees in the crime of larceny, but only in the punishment; and a conviction for petit larceny bars a subsequent prosecution for grand larceny: *The State v. Murray*, 55–530.

So, also, a conviction for petit larceny bars a prosecution for larceny from the person, under § 3905: *The State v. Gleason*, 56–203.

Where the prosecution relies upon possession by defendant of recently stolen property, the defendant is not required to overthrow such presumption by preponderance of evidence of the honesty of such possession. Evidence sufficient to raise a reasonable doubt in his favor is sufficient: *The State v. Reichart*, 57–245.

A pledgee has such special property in the thing pledged that a taking from him by the pledgor may be larceny: *Bruley v. Rose*, 57–561.

In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods: *State v. Lillard*, 59–479.

Under an indictment for larceny of property of greater value than twenty dollars, defendant may be convicted upon proof of a larceny of part of the property less than twenty dollars in value. The offense is the same: *State v. Hessian*, 58–68.

It is not required that in an indictment for larceny of an instrument in writing the property shall be more particularly described than any other stolen property; therefore, *held*, that an indictment charging that defendant took, etc., a bill of exchange, to-wit: an order for the payment of money (describing it), and of the value of $20.97 was sufficient: *State v. Pierson*, 59–271.

In the case of larceny of property in the possession of a receiver the indictment may properly lay the ownership of the property in the receiver: *State v. Rivers*, 60–381.

A felonious taking is a taking without color of right or excuse for the act, and it may safely be said that there was no color of right or excuse if the defendant knew that he had no authority to take the property, and with this knowledge he knowingly carried it away and converted it to his own use: *Ibid.*

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988.

SEC. 3906.

Representations made by acts or declarations intended to induce the belief that the person making them is some one else, may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Goble*, 60–447.

SEC. 3908.

The fact that the officers of a municipal corporation loaned the public funds in violation of this section, does not prevent the same being recovered in an action by the corporation against the person to whom they were so loaned, or his surety: *Dist. T'p of Pleasant Valley v. Calvin*, 59–189.

A county treasurer prosecuted for embezzlement may show that the defalcation took place at such time that prosecution is barred by the statute of limitations, although by fraudulent statements to the board of supervisors he made it appear subsequent to such actual defalcation that he had on hand the necessary balance, and that his accounts were correct. The rule of estoppel applicable in a civil action against the treasurer cannot be enforced in a criminal prosecution: *State v. Hutchison*, 60–478.

990.

SEC. 3914.

Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *State v. Pierson*, 59–271.

991.

SEC. 3915.

A receiver does not hold property under what is denominated a legal process issuing out of any court, and he is not an officer within the meaning of this section. Therefore, it is proper to charge the wrongful taking of property from him as larceny, laying the ownership of the property in the receiver: *State v. Rivers*, 60–381.

SEC. 3917.

The alteration of an unsigned indorsement, on the back of a note, of money paid, will not constitute forgery, where it does not appear but that such indorsement was a mere private memorandum made by the holder and not intended as a receipt: *The State v. Davis*, 53–252.

Forgery, and uttering and publishing as true a forged instrument, are distinct offenses, and an indictment charging both is bad for duplicity (overruling *State v. Nichols*, 38–110): *The State v. McCormack*, 56–585.

An indictment alleging in substance that the defendant falsely and feloniously and with intent to defraud, made a negotiable promissory note for a certain amount to which, as maker, the name of a certain person was attached, a copy of which note is set out in full, sufficiently charges a crime and states the facts as distinguished from mere legal conclusions: *State v. Stuart*, 61–203.

998.

SEC. 3948.

[20 G. A., ch. 123, amends this section by inserting after the word "constable" in the first line thereof, the words, "*marshal, deputy marshal, policeman, or any police officer of any city or town.*"]

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SEC. 3951.

If a person corruptly exacts a consideration from another for an agreement not to prosecute, he is guilty under this section, although he took such consideration for the benefit of another: *State v. Ruthven*, 58–121.

The fact that a person guilty of a crime under this and the following section is an officer, coming within the provisions of § 3948, does not exempt him from the higher punishment prescribed in this section: *Ibid.*

1003.

SEC. 3977.

Actual malice against the owner is not an essential ingredient of the crime. If the act be done maliciously, for the purpose and with the intent of injuring the owner, although unknown, it is sufficient: *The State v. Linde*, 54–139.

1007.

SEC. 3993.

Dishon v. Smith, 10–212, followed, and distinguished from *Carrothers v. Russell*, 53–346: *Hawes v. Miller*, 56–395.

Giving or offering a bribe to an elector is a ground for contesting an election: See § 692 and note

1009.

SEC. 4008.

The act may constitute adultery as to the man, although, as to the woman, it is effected by force and against her will: *State v. Donovan*, 61–278.

Where two acts of intercourse a week apart were proved, and the prosecution, at the close of the argument, elected to rely upon one of them, *held*, that this removed the evidence as to the other from the jury and cured any error there might have been in its admission: *Ibid.*

It is essential that the state prove that the prosecution was commenced by the wife. The averment in the indictment that it was so commenced will not be presumptive proof of its truth: *State v. Henke*, 58–457. But the state is not required to prove the fact beyond a reasonable doubt: *State v. Donovan*, 61–278.

The appearance of the wife before the grand jury, in response to a subpœna, and the giving testimony against the husband without intending to prefer a charge, but supposing she was required to do so, would not constitute a complaint by the wife: *Ibid.*

The words "husband or wife" as used in this section, refer to and mean the spouse of the person charged with the offense: *Bush v. Workman*, 19 N. W. Rep., 910.

The provisions of § 4010, as to the presumption arising from absence, do not apply as against a defendant to establish the validity of his marriage with a wife who had previously been married: *State v. Henke*, 58–457.

1010.

SEC. 4009.

The continuing to cohabit, after a bigamous marriage, consummated within the state, is a crime in itself, in such sense that the parties may be tried therefor, although the lapse of time since the marriage is such as to bar prosecution for the marriage itself: *The State v. Sloan*, 55–217.

The lawful wife is a competent witness against the husband in a prosecution for bigamy: See notes to § 3641.

An indictment for this crime, stating that the date of the lawful marriage was to the grand jury unknown, that it took place in Illinois, and that

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at the time of the second marriage the former marriage relation still existed, *held*, sufficient as against the objections, first, that it did not state the date of the first marriage; second, that it did not state that such marriage was lawful and valid by the laws of Illinois; third, that it did not appear that the lawful wife was still living at the date of the second marriage: *State v. Hughes*, 58–165.

The guilty party may be prosecuted in any county where he unlawfully cohabits with a second wife, although the second marriage was consummated in another county; but evidence of the second marriage in such other county is proper, not to show a crime in that county, but to fix the nature of the subsequent cohabitation: *Ibid.*

The testimony of a witness as to the fact of marriage is sufficient without record evidence thereof: *Ibid.*

It seems that the fact that defendant in a second marriage acted under reputable legal advice would be no defense: *Ibid.*

SEC. 4010.

The provisions of this section are not applicable where, in a prosecution for adultery, it is attempted to show that defendant was married by proof of a marriage with a woman who had been previously married: *State v. Henke*, 58–457.

1011.

SEC. 4013.

[20 G. A., ch. 142, § 1, repeals this section and enacts in lieu thereof the following:]

Penalty for keeping house of ill-fame.

SEC. 4013. If any person keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness, such person shall be punished by imprisonment in the penitentiary not less than six months nor more than five years.

A previous conviction under an indictment charging only an offense under Code § 4091 will not warrant a sentence, on conviction under this section, as it stood before amendment, of imprisonment in the penitentiary: *The State v. Holmes*, 56–583.

SEC. 4016.

[20 G. A., ch. 142, § 2, repeals this section and enacts in lieu thereof the following:]

Penalty for enticing females to house of ill-fame.

SEC. 4016. If any person entice back into a life of shame any person who has heretofore been guilty of the crime of prostitution, or who shall inveigle or entice any female before reputed virtuous to a house of ill-fame, or knowingly conceal or assist or abet in concealing such female, so deluded or enticed for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not less than three nor more than ten years.

[The same act contains the following:]

Penalty for lewdness.

SEC. 3. If any person for the purpose of prostitution or lewdness resorts to, uses, occupies or inhabits any house of ill-fame or place kept for such purpose, or if any person be found at any hotel, boarding house, cigar store or other place leading a life of prostitution and lewdness, such person shall be punished by imprisonment in the penitentiary not more than five years.

Evidence on trial.

SEC. 4. The state, upon the trial of any person indicted for keeping a house of ill-fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evi-

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dence of the general reputation of such house as so kept, and such evidence shall be competent for such purpose.

1012.

SEC. 4018.

[20 G. A., ch. 195, repeals this section and enacts the following as a substitute therefor:]

SEC. 4018. Any coroner or undertaker, or the superintendent or managing officer of any public asylum, hospital, poor house or penitentiary shall deliver to any medical college or school or any physician in this state for the purpose of medical and surgical study, the body or remains of any deceased person except when such body has been interred, but no such body shall be so delivered without the consent of the relatives or friends of such deceased person if any such are known, nor when such deceased person expressed a desire during his last sickness that his body should be interred. If the body of any person is so delivered and the same shall be subsequently claimed by any relative or friend of such deceased person, such body shall be given up to such relative or friend. Any person who delivers or receives any body or remains having knowledge that any of the foregoing provisions have been violated shall upon conviction thereof be punished as provided in the foregoing section.

What bodies of deceased persons may be delivered to medical schools or physicians.

Penalty.

1014.

SEC. 4026.

An indictment substantially charging that defendant did keep a house, &c., in which he did permit divers persons to the jurors unknown to play at cards, &c., for money, cigars, beer and other things, *held*, sufficient: *State v. Kaufman*, 59-273.

1015.

SEC. 4028.

Playing billiards, with the understanding that the person losing the game shall pay for the use of the table, is gambling. Whether the game played is one of skill or one of chance is immaterial under this section: *The State v. Miller*, 53-154.

The offering by an agricultural society of a premium to the winner at a horse race held under its authority, does not constitute an offense under this section: *Delier v. Plymouth County Agricultural Society*, 57-481.

SEC. 4029.

Negotiable instruments of the character here described are void, even in the hands of an innocent holder before maturity: *Traders' Bank v. Alsop*, 19 N. W. Rep., 863.

AFTER SEC. 4029.

GAMBLING IN OPTIONS.

[Twentieth General Assembly, Chapter 93.]

SECTION 1. It shall be unlawful for any corporation, association or society, person, or persons to keep within this state any store, office or other place, wherein is conducted or permitted the

Unlawful to keep a place to deal in margins.

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pretended buying or selling of grain, pork, lard, or any mercantile or agricultural products on margins, without any intention of future delivery, whether such pretended contracts are to be performed within or without this state; and the keeping of all such places is hereby prohibited; and it shall be unlawful for any person, corporation, association or society, within this state, to make or enter into any contract, or pretended contract, such as is above stated and referred to, and all such contracts are hereby prohibited; the intention of this act being to prevent and prohibit within this state the business now engaged in and conducted in places commonly known and designated as bucket shops. *Provided*, however, that this act shall not apply to or in any way affect any contract for the actual buying or selling of any commodity whatever for present or future delivery, where the actual delivery or receipt of the thing sold is contemplated, and in good faith intended by either of the parties to the contract.

Unlawful to make such contracts.

Proviso.

SEC. 2. Any person whether acting individually or as a member of any copartnership, corporation, association or society, guilty of violating any of the provisions of this act shall upon conviction thereof be adjudged to pay a fine for each offense of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than one year, or be both fined and imprisoned at the discretion of the court.

Punishment.

SEC. 4030.

To constitute incest the parties must have carnal knowledge *of each other*. A woman who is ravished cannot be said to have carnal knowledge of the man. Connection between persons within the prohibited degrees, consummated by force, is rape and not incest: *The State v. Thomas*, 53-214.

1017.

SEC. 4039.

[20 G. A., ch. 102 amends this section by adding thereto the following:]

Or, if any person shall place, or put, or aid, or abet, in placing or putting any person upon any railroad car, steamboat, or other public conveyance knowing such persons to be infected with diphtheria, small-pox, or scarlet fever, he shall be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than thirty days.

Transportation of persons infected.

Penalty.

1018.

ADULTERATION OF FOOD, DRINK AND MEDICINE.

[Nineteenth General Assembly, Chapter 170.]

SECTION 1. No person shall mix, color, stain, or powder, or order or permit any other person to mix, color, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with the intent that the same may be sold, and no person shall sell or offer for sale any such article so mixed, colored, stained, or powdered.

Adulterating articles of food with injurious materials.

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Adulterating drugs or medicines with injurious materials.

SEC. 2. No person shall, except for the purpose of compounding in the necessary preparation of medicine, mix, color, stain, or powder, or permit any other person to mix, color, stain, or powder any drug or medicine with any ingredients or materials, so as to affect injuriously the quality or potency of such drug or medicine, with the intent to sell the same, or shall offer for sale any such drug or medicine so mixed, colored, stained, or powdered.

Adulterating food drink or medicine for profit, notice.

SEC. 3. No person shall mix, color, stain, or powder any article of food, drink, or medicine, or any article which enters into the composition of food, drink, or medicine, with any other ingredient or material, whether injurious to health or not, for the purpose of gain or profit, or sell or offer for sale the same, or order or permit any other person to sell or offer for sale any article so mixed, colored, stained, or powdered, unless the same be so manufactured, used or sold, or offered for sale, under its true and appropriate name, and notice that the same is mixed or impure is marked, printed, or stamped upon each package, roll, parcel, or vessel containing the same, so as to be and remain at all times readily visible, or unless the person purchasing the same is fully informed by the seller of the true names of ingredients (if other than such as are known by the common name thereof) of such articles of food, drink, or medicine, at the time of making the sale thereof or offering to sell the same: *Provided*, nothing in this section shall prevent the use of harmless coloring material used in coloring butter and cheese.

Coloring matter in butter and cheese.

Mixing glucose with syrup or sugar.

Skimmed milk cheese branded.

SEC. 4. No person shall mix any glucose or grape sugar with syrup or sugar intended for human food; and any cheese manufactured from skimmed milk, or from milk that is partly skimmed, shall be branded as skimmed-milk cheese, when the same is offered for sale; or any oleomargarine, suine, beef-fat, lard or any other foreign substance with any butter or cheese intended for human food; or shall mix or mingle any glucose, grape sugar, or oleomargarine with any article without distinctly marking, stamping, or labeling the article or the package containing the same with the true and appropriate name of such article, and the per centage in which glucose or grape sugar, oleomargarine, or suine enters into its composition. Nor shall any person sell, or offer for sale; or permit to be sold, or offered for sale, any such food, into the composition of which glucose or grape sugar, oleomargarine, or suine has entered, without at the same time informing the buyer of the fact and the proportion in which glucose or grape sugar, oleomargarine, or suine has entered into the composition.

Butter or cheese adulterated with oleomargarine, suine, etc., to be labeled.

Offering same for sale.

Penalty.

SEC. 5. Any person or persons convicted of violating any provisions of any of the foregoing sections of this act shall, for the first offense, be fined not less than ten dollars nor more than fifty dollars. For the second offense they shall be fined not less than twenty-five [dollars] nor more than one hundred dollars, or confined in the county jail not more than thirty days. And for the third and all subsequent offenses they shall be fined *not to exceed* [not less than] five hundred dollars, nor more than one thousand dollars, and imprisonment in the state prison not less than one year nor more than five years.

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Repealing clause.

SEC. 6. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

1019.

AFTER SEC. 4043.

SALE OF FIRE-ARMS TO MINORS.

[Twentieth General Assembly, Chapter 78.]

Unlawful to sell or give to minors fire arms or toy pistols.

SECTION 1. It shall be unlawful for any person to knowingly sell, present or give any pistol, revolver or toy pistol to any minor.

Fine or imprisonment.

SEC. 2. Any violation of this act shall be punishable by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail of not less than ten nor more than thirty days.

15 G. A., Ch. 59.

Under this act it is the duty of saloon keepers not only not to permit, but to prevent minors remaining in their saloons, and the same duty is imposed on their employes. If the keeper or employe fails to take proper measures to prevent, he is to be deemed to permit it, and the liability will not depend upon the knowledge of the keeper or his employe of the fact that the person is a minor: *State v. Probasco*, 17 N. W. Rep., 607.

1020.

DENIAL OF CIVIL RIGHTS.

[Twentieth General Assembly, Chapter 105.]

All citizens entitled to same civil rights.

SECTION 1. All persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theaters and other places of amusement; subject only to the conditions and limitations established by law, and applicable alike to every person.

Violation of Sec. 1, a misdemeanor.

SEC. 2. Any person who shall violate the foregoing section by denying to any person, except for reasons by law applicable to all persons, the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated in said section, or by aiding or inciting such denial, shall, for each offense, be deemed guilty of a misdemeanor.

1021.

17 G. A., Ch. 156, § 2.

[This section, as amended by 18 G. A., ch. 193, is further amended by 20 G. A., ch. 67, by striking out of the third line of said section the words "fifteenth day of August," and inserting in lieu thereof the words "*first day of September.*"]

PRESERVATION OF QUAIL.

[Twentieth General Assembly, Chapter 164.]

Unlawful to destroy quail for two years from October 1st, 1884.

SECTION 1. It shall be unlawful for any person or persons within this state, to shoot or kill, to catch or attempt to catch, in any snare, trap or net, any quail from and after the first day of

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October, 1884, for and during the period of two years from said date, except for the preservation of the same during the winter months.

SEC. 2. The same penalty, as it now exists, in section 7, chapter 156, of the laws of 1878 [17 G. A.] shall be held to apply to any violation of this act. Penalty.

1023.

AFTER SEC. 4054.

PRESERVATION OF FISH IN PERMANENT LAKES.

[Twentieth General Assembly, Chapter 9.]

SECTION 1. No person shall take by spearing with a gaff, spear or other device any fish from any of the permanent lakes or ponds or outlets or inlets thereto within the state of Iowa, between the first day of November and the thirty-first day of May next following. Spearing season.

SEC. 2. It shall be unlawful for any person, company, or corporation, knowingly to buy or sell, or offer for sale, or have in his or their possession, any fish which shall have been taken from any of the permanent lakes or ponds, or outlets or inlets thereto within this state by spearing with gaff, spear or other device between the first day of November and the thirty-first day of May next following. And any person who may draw from the water any game fish such as pike, bass, and the like when seining for minnows for bait, shall return the same without injury under the penalties of this act. Unlawful vending.

SEC. 3. Any person found guilty of a violation of any of the provisions of this act shall upon conviction before any magistrate be fined not less than five dollars nor more than twenty dollars for the first offense, and for the second or any subsequent offense not less than twenty dollars nor more than one hundred dollars, and shall stand committed until such fine be paid. Penalty.

SEC. 4. Prosecution for violations of this act may be brought and maintained in any county in which offense was committed or in any county where the person, company, or corporation against whom complaint is made, has or has had or has bought or sold or offered for sale any fish which were taken by spearing in violation of this act. Place of action.

SEC. 5. In all prosecutions under this act the court before whom the same is brought, or in which it shall be prosecuted, shall appoint an attorney for the prosecution of the case, and such attorney and the person filing the information under this act shall each be entitled to a fee of five dollars for each and every conviction, which fees of such attorney and informant shall be taxed as costs in the case against the person or persons so convicted, and any fish found in the possession of any person, company or corporation in violation of the provision of this act may be seized and sold for the purpose of paying the costs in the case, but in no case under this act shall any county be liable for the fees of such attorney or informant. Prosecutor appointed. Fees of prosecutor and informer. Fish seized and sold for costs.

SEC. 6. Nothing in this act shall prevent any person from tak-

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Spearing on one's own land.

ing fish of his own propagation or from waters wholly within his own land, to which there is no natural outlet through which the fish pass up or down.

1025.

AFTER SEC. 4064.

[By 20 G. A., ch. 104, it is required that a bell and a steam whistle shall be placed on each locomotive engine operated on any railway in the state, and signals are required to be given therewith at highway crossings; any officer or employe violating such provisions being subject to punishment by fine: See that act in supplement to page 357.

By 20 G. A., ch. 163, trains on any railway are required to be brought to a full stop at the crossing or intersection of its track with any other railway track, and for a violation of this provision a penalty is imposed upon the engineer and the corporation: See that act in supplement to page 357.]

1027.

SEC. 4072.

A vendee obtaining possession of property under a Sunday contract may maintain replevin for such property when subsequently taken from him by the vendor by force: *Kinney v. McDermot*, 55–674.

An action for damages for fraud in trading a horse affected with glanders, *held* not maintainable where it appeared that the trade was made on Sunday: *Gunderson v. Richardson*, 56–56.

The transferee, after maturity, without knowledge of the fact that the note bearing date on a secular day was actually executed on Sunday, may recover thereon. The defense to the note is not an equity which may be set up against one who purchases after maturity: *Leightman v. Kadetska*, 58–676.

The mere operation of a railway train in violation of the provisions of this statute, does not render the railway company liable for damages accidentally occurring without fault or negligence on its part other than the mere operation of the train in violation of statute: *Tingle v. C., B. & Q. R. Co.*, 60–333.

1028.

SEC. 4073.

An indictment charging the obtaining by false pretenses of certain notes, designating them as property, and in a second count charging the obtaining in the same manner of the same notes, but designating them as written instruments, the false making of which would be forgery, does not charge two offenses. Such charges might be contained in the same count without rendering the indictment bad for duplicity: *The State v. House*, 55–466.

That the false representations were made in another county will not prevent the offense being punishable in the county where the property was obtained. The latter county is the one where the offense was committed: *Ibid.*

False promises, coupled with false statements of fact, may amount to false pretenses: *The State v. Montgomery*, 56–195.

The question is for the jury whether the false representations actually misled the person claimed to have been defrauded, and in determining that question, they should take into account his age, experience, state of health, etc.: *Ibid.*

1033.

SEC. 4089.

Shade trees at the side of the highway, which would not interfere with the traveled track if confined to the center of the highway, should be permitted to stand: *Quinton v. Burton*, 61–71.

As to power of municipal corporation to abate nuisances, see section 471.

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1034.

SEC. 4092.

Held, that as the so called prohibitory amendment submitted to the people by the 19th G. A. was not properly submitted, the act of selling beer, which was therein prohibited, did not become a nuisance under this section: *State v. Johnson*, 61–504.

1036.

SEC. 4097.

A petition in a civil action for damages for what would be a libel under this section is sufficient, though the alleged libel does not charge plaintiff with a public offense. The plaintiff will be entitled to recover at least nominal damages, though no special damages be alleged. The publications which the law regards are actionable *per se: Call v. Larabee*, 60–212.

SEC. 4102.

Although the jury determine both the law and the facts, yet the court has the right to instruct the jury in this as well as other criminal cases, and the conclusive presumption is that the jury will follow the instructions of the court. Therefore, an erroneous instruction of the court in such case will be regarded as prejudicial and a ground for reversal, as in other cases: *The State v. Rice*, 56–431.

1039.

SEC. 4115.

[The proviso at the end of this section seems to be meaningless, as there is no provision for authentication of a warrant of arrest on preliminary information. See § 4190.]

SEC. 4118.

Whether or not there is any right of appeal from an order taxing the costs to complainant, *quære;* but a motion to retax the costs, made before a justice of the peace, the successor of the one by whom such taxation was made, not filed until three years after the order taxing the costs, *held* properly overruled: *State v. Rogers*, 58–644.

1044.

SEC. 4155.

The court will take judicial notice of the county in which an incorporated town is situated. Proof of the commission of the act in a certain town is sufficient proof of the commission within the county in which the town is located: *State v. Reader*, 60–527.

1046.

SEC. 4166.

A defendant in a prosecution for embezzlement is not estopped by subsequent fraudulent statements from showing that the defalcation actually took place at such time that the prosecution therefor is barred: *State v. Hutchinson*, 60–478.

SEC. 4169.

The clause of this section relating to non-residence of defendant, is not to be restricted to offenses committed when the defendant is out of the state, but applies equally to all cases: *State v. McIntire*, 58–572.

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1053.

SEC. 4212.

A sheriff is justified in searching the person arrested and taking from him all money or property in any way connected with the crime charged, or which might serve to identify the prisoner, or be used by the prisoner in effecting an escape. When it is ascertained that money or property so taken cannot be held on these grounds, the same should be returned, and while held, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and such money should be no more liable to attachment than if it were in the prisoner's pocket: *Commercial Exchange Bank v. McLeod*, 19 N. W. Rep., 329.

1057.

SEC. 4241.

The testimony given upon the preliminary examination by a witness who dies before the trial, may be provided upon such trial: *State v. Fitzgerald*, 19 N. W. Rep., 202.

1060.

SEC. 4254.

The appeal by the prosecuting witness must be taken at the time judgment is rendered, and cannot be taken afterward: *State v. Knapf*, 61-522.

SEC. 4256.

Where a part of the grand jury fails to appear, the court may orally direct the sheriff to summon a sufficient number to complete the panel, such order being entered of record. The written precept provided for in § 244 is only required where the entire panel fails to appear: *The State v. Miller*, 53-84.

If a court, whether correctly or not, should discharge a grand jury and cause another one to be impaneled, to which there were no objection except the erroneous discharge of the first, it would be no ground for quashing an indictment found by the second: *State v. Hughes*, 58-165.

1061.

SEC. 4258.

A party under arrest in a preliminary proceeding but not yet bound over is not entitled to challenge grand jurors, although it is possible that his case may afterward come before them: *State v. Fitzgerald*, 19 N. W. Rep., 202.

Where a person was in court to answer an indictment, and, on motion, such indictment was quashed, and the court then referred the matter to the grand jury for further consideration, and they returned an indictment charging defendant with a different crime, *held*, that an objection to the panel should have been then raised and could not be raised afterward: *State v. Ruthven*, 58-121.

1062.

SEC. 4261.

The time within which the right of challenge to grand jurors shall be exercised is not prescribed, and the prisoner ought to be permitted to exercise such right at any time before the grand jury considers the case, upon information gained that they are liable to challenge, even though the ground therefor be matter arising after a prior challenge has been made. Therefore, *held*, that where a case is resubmitted to the same grand jury under 18 G. A., ch. 130, § 5 (see page 1067), the prisoner should have

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been allowed an opportunity to challenge the members of such grand jury on the ground that they had previously formed and expressed an opinion in returning the first indictment: *State v. Osborne*, 61–330.

1065.

SEC. 4289.

Where an indictment is found by a grand jury upon the minutes of the testimony before the magistrate, the names of the witnesses examined before the magistrate may be endorsed on the back of the indictment and they may then be examined for the prosecution, without their having testified before the grand jury: *State v. Rodman*, 17 N. W. Rep., 663.

1066.

SEC. 4293.

Where an indictment is set aside and the case recommitted to the same grand jury, there is no objection to their considering the evidence of witnesses who have already been before them without calling them the second time: *State v. Clapper*, 59–79.

1067.

18 G. A., Ch. 130.

When a case is sent back to the same grand jury, the prisoner should be allowed to challenge the member of such grand jury on the ground of having formed and expressed an opinion by the finding of the first indictment: *State v. Osborne*, 61–330.

SEC. 4294.

Failure of the clerk to file the indictment will not invalidate the proceedings. If the indictment is lost or abstracted after the arraignment of defendant, the court may, upon motion, substitute a copy and proceed upon the record thus made, the same as upon the original indictment: *State v. Rivers*, 58–102; *State v. Stevisiger*, 61–623.

In the absence of an affirmative showing to the contrary, it will be presumed that the requirements of the statute as to the presentation were complied with: *State v. McIntire*, 59–267.

Where defendant moved to strike the indictment from the files because it had been altered by erasure and insertion of other words, *held*, that the affidavits introduced disproved the defendant's allegation: *State v. Hughes*, 58–165.

1068.

SEC. 4297.

The fact that on the face of the indictment there is no title to the action, in accordance with this form, where the body of the indictment sets forth the names of the parties, does not constitute a valid objection thereto on motion or demurrer: *State v. McIntire*, 59–264. *Same v. Same*, 59–267.

It is not essential that the indictment be signed by the district attorney: *State v. Ruby*, 61–86: *State v. Wilmoth*, 19 N. W. Rep., 249.

An indictment for larceny corresponding in form to this section, charging the offense as committed "in the county aforesaid," *held*, sufficiently specific as to the venue of the crime: *State v. Lillard*, 59–479.

1069.

SEC. 4300.

Rape committed by a man upon a woman who is related within the prohibited degrees specified in § 4030, does not constitute incest under that section, and an indictment charging both offenses is bad for du-

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plicity: *The State v. Thomas*, 53–214.

An indictment charging in one count forgery, and in a second the uttering of the forged instrument, charges two offenses, and is bad (overruling *State v. Nichols*, 33–110): *The State v. McCormack*, 56–585; but objection to the indictment on the ground of duplicity cannot be raised for the first time in the supreme court: *State v. Henry*, 59–391; and *held*, that where one of the counts was dismissed before the introduction of any evidence, and the plea of guilty entered as to the remaining count, the defect in the indictment was cured and the defendant properly convicted: *State v. Buck*, 59–382.

Where an indictment charges breaking and entering with felonious intent and the felonious taking, stealing and carrying away of personal property, the charge of stealing may be regarded as a mere pleading of evidence, or surplusage, and if the case is tried as upon the indictment for the breaking and entering with the criminal intent, a conviction thereunder will not be erroneous on the ground of duplicity in the indictment. It is otherwise where under such indictment the defendant is convicted of larceny: *State v. Shaffer*, 59–290.

The parties who enter into a conspiracy are by that act guilty of but one offense, whether their agreement is to commit one crime or many crimes, and the fact that an indictment alleges that the parties conspired to commit more than one crime is not bad for duplicity; but an indictment charging a conspiracy to commit, and also facts constituting the commission of the crime, charges two offenses and cannot be sustained: *State v. Kennedy*, 18 N. W. Rep., 885.

1071.

SEC. 4305.

Where an indictment charged the larceny of goods from a railroad company, naming it, belonging to parties to the grand jurors unknown, *held*, that the indictment was sufficient under this section: *State v. McIntire*, 59–264; *Same v. Same*, 59–267.

1073.

SEC. 4314.

Under an ordinary indictment as principal, defendant may be found guilty of aiding and abetting the crime: *State v. Hessian*, 58–68.

1079.

SEC. 4350.

A defendant cannot waive jury trial and consent to a trial by the court: *State v. Carman*, 18 N. W. Rep., 691.

1080.

SEC. 4357.

[It is evident by an examination of the sections referred to in this section, as well as by reference to the corresponding section in the Revision, and to the section as it appears in the Code Commissioners' Report, that § 4342 and § 4343 are intended to be referred to, instead of § 4341 and § 4342 respectively.]

1081.

SEC. 4362.

Where judgment was entered upon a plea of guilty and a motion for leave to withdraw such plea and for new trial was filed, based on the ground that defendant was surprised by the punishment inflicted being greater than expected, *held* that the alleged ground of surprise was not sufficiently established to entitle the defendant to relief: *State v. Buck*, 59–382.

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1082.

SEC. 4374.

To justify a reversal of the case for the action of the judge in overruling a motion for a change of venue, the record must show affirmatively that there was an abuse of the discretion reposed in the court in determining the same: *State v. Williams*, 18 N. W. Rep., 682.

1086.

SEC. 4405.

Where, in a prosecution for nuisance in using a building for illegal sale of intoxicating liquors, the juror testified that he was opposed to the business of saloon-keeping and to the law regulating the sale of intoxicating liquors, but that as long as the law stood, he was not prejudiced against a man for selling beer or wine, *held*, that he was a competent juror: *State v. Nelson*, 58–208.

A judgment rendered by a disqualified jury is erroneous, but not void. It might be reversed upon appeal but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59–550.

1089.

SEC. 4420.

The court cannot, under the guise of determining some questions which are legitimate, make remarks in the presence and hearing of the jury wh ch would constitute error if contained in an instruction, and thus deprive the defendant of the opportunity of having such error reviewed: *State v. Stowell*, 60–535.

Statements by the district attorney in opening the case to the jury, of facts which he expects to prove and which if proved would be material and competent, may be made by him if in good faith, believing and having good reason to believe he will be able to sustain them, by evidence, although he is afterward unable to obtain evidence to sustain some of them: *State v. Meshek*, 61–316.

In a particular case, a lengthy statement was made by prosecuting attorney of the evidence which it was expected would be introduced, and followed by an unfair argument of the case based to a considerable extent upon facts which were wholly unsubstantiated by the evidence afterward introduced, was held sufficient misconduct to require a reversal, the defendant having objected to the remarks of the prosecuting attorney at the time; and further, *held*, that the fact that attorney for defendant replied to this opening argument in the same manner did not render the action of the prosecuting attorney error without prejudice: *State v. Williams*, 18 N. W. Rep., 682.

1090.

SEC. 4421.

Where an indictment is found upon the minutes of testimony taken before a magistrate, as provided by § 4239 as amended by 18 G.A.ch. 130, § 5, the names of the witnesses examined before the magistrate may be endorsed on the back of the indictment and they may then be called to testify on the part of the prosecution without having been examined by the grand jury: *State v. Rodman*,, 17 N. W. Rep., 663.

The state may, in rebuttal, call witnesses whose names are not endorsed upon the back of the indictment: *State v. Ruthven*, 58–121.

1092.

SEC. 4427.

Under facts of a particular case, *held*, that the *corpus delicti* was not proven, aside from defendant's confessions not in open court, and the conviction was reversed: *The State v. Dubois*, 54–363.

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SEC. 4428.

Where defendant seeks to establish an *alibi*, the burden of proof is upon him, and it cannot be established except by a preponderance of evidence. This rule does not abrogate the doctrine of reasonable doubt. There may be a preponderance of evidence against defendant, and yet a reasonable doubt of his guilt. This reasonable doubt may be based upon the whole evidence, or upon the evidence establishing certain essential facts necessary to be established, or upon evidence of facts inconsistent with the prisoner's guilt. If upon the consideration of the whole evidence, or any part of it, the reasonable doubt arises as to any essential fact, the jury must acquit: *The State v. Red*, 53-69.

The defense of an *alibi* must be established by defendant by a preponderance of evidence: *The State v. Hamilton*, 57-596.

It is error to charge that "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the *whole* jury." Each juror must, under his oath, vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind: *The State v. Sloan*, 55-217.

Where the prosecution relies upon the presumption of defendant's possession of recently stolen property to establish his guilt, the defendant is only required to introduce sufficient evidence as to having honestly come into possession of the goods, to raise a reasonable doubt of guilt: *The State v. Richart*, 57-245.

The doctrine of *Barton v. Thompson*, 46-30, that in a civil action for damages for a criminal act, the commission of the act must be proven beyond a reasonable doubt, is overruled, and it is held that a preponderance of evidence in such case is sufficient to entitle plaintiff to recover. Whether slander and libel constitute an exception, *quære: Welch v. Jugenheimer*, 56-11; *Barton v. Thompson*, 56-571; *Behrens v. Germania Ins. Co.*, 58-26; *Kendig v. Overhulser*, 58-195.

The mere preponderance of evidence is all that is required to establish a fraudulent alteration of an instrument in writing: *Coit v. Churchill*, 61-296.

An instruction that "previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and which might be able to turn the scale in favor of the defendant, but its value as defensive evidence in any given case is to be determined by the jury" *held* correct: *State v. Donovan*, 61-278.

1093.

SEC. 4429.

Where a person is charged with a crime which in its nature includes inferior offenses, and the evidence is such that the jury might find defendant guilty of one of the inferior offenses, the court should instruct in regard to such inferior offenses and allow the jury to find according to the evidence: *State v. Kegan*, 17 N. W. Rep., 179. But failure to instruct as to lower degrees will not be error where there is no evidence which would support a conviction of a lower degree: *State v. Cole*, 17 N. W. Rep., 183.

Failure of the court to instruct the jury in accordance with the provisions of this section, is error sufficient to work a reversal: *State v. Jay*, 57-164.

SEC. 4431.

[By a reference to the corresponding section in the Revision it is evident that the word "submitted" in this section should be "dismissed." The sections are otherwise identical, and the Code Commissioners' Report does not indicate that any change was intended.]

1097.

SEC. 4455.

Where, after all the evidence in a case had been produced, the judge, on receipt of a telegram from his home to the effect that his wife was

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sick, adjourned court for a few days and went to his home, and on the day to which court was adjourned, by telegram adjourned court over the term, *held* that there was sufficient cause to warrant adjournment in the discretion of the judge, and that the defendant could not on the subsequent trial plead a previous jeopardy: *State v. Tatman*, 59–471.

1098.

SEC. 4460.

Where the jury, without consent of defendant, sealed up their verdict and separated, *held*, that it was error for the court to receive and record such verdict against defendant's objection: *The State v. Callahan*, 55–364.

1102.

SEC. 4481.

While a certificate of the judge sufficiently setting out or identifying the testimony, may take the place of a bill of exceptions for the purpose of making the evidence a part of the record, such certificate, equally with a bill of exceptions, must be made at the time of the trial, or at such time as the court may fix; otherwise the evidence may be stricken out on appeal: *The State v. Newcomb*, 56–335.

1103.

SEC. 4489.

For the prosecuting attorney to refer in his argument to the fact that defendant has not testified in his own behalf is misconduct sufficient to entitle defendant to a new trial (see § 3636 and notes): *State v. Graham*, 17 N. W. Rep., 192; but where the evidence as to whether he made such statement or not is conflicting, the supreme court will abide by the action of the lower court: *State v. Maynes*, 61–119; and in a particular case, *held* that the fact was not sufficiently shown to require a reversal: *State v. Black*, 59–390.

In criminal cases, and especially in cases involving the life of the defendant, the incompetence of the attorney may constitute a ground for a new trial, but to justify a reversal upon such ground, there should be a strong showing both of incompetence and prejudice: *State v. Benge*, 17 N. W. Rep., 100.

1106.

SEC. 4509.

The provision that the judgment shall specify the extent of the imprisonment, is directory only. The extent of the imprisonment is fixed by statute, and a judgment that defendant be imprisoned until the fine is paid will not be void: *Jackson v. Boyd*, 53–536.

1107.

SEC. 4511.

Failure of the court to make the order as to bail here contemplated, will not entitle defendant to a discharge upon *habeas corpus*, but his only relief will be in such a proceeding to have the amount of bail properly fixed: *Murphy v. McMillan*, 59–515.

1110.

SEC. 4538.

The court may make reasonable rules relating to practice upon appeals and provide that upon a sufficient showing they may be waived or mod-

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ified, and it having provided that the evidence on an appeal must be abstracted and the abstract printed, it will not consider a case not presented in accordance with these rules, unless application for the waiver of such rules has been duly made: *State v. Day*, 58–678.

In the absence of assignment of error and of argument in criminal cases, the appellate court is required to examine the record and render such judgment upon it as the law demands, but the court will not enter into a discussion of imaginary errors: *State v. Quinn*, 19 N. W. Rep., 256.

A purely technical objection, as, for instance, the erroneous discharge of one grand jury and the summoning of another, by which the indictment was found, in the absence of any objection to the second except the discharge of the first, will not be ground for a reversal: *State v. Hughes* 58–165.

Where a defendant was convicted upon an indictment which charged in two counts forgery and the uttering of forged paper, and did not object to the indictment on the ground of duplicity, in view of a decision of the supreme court on that point which was afterward overruled, *held*, on appeal, that although the court would not raise the question of duplicity, it would reduce the sentence to what would have been proper on the first count alone: *State v. Henry*, 59–391.

The supreme court will not interfere to reduce a sentence claimed to be excessive where all the evidence in the lower court is not before it: *State v. Buck*, 59–382.

1111.

SEC. 4539.

In case of appeal by the state, and reversal, it is improper to tax costs to defendant: *The State v. Vail*, 57–103.

1113.

SEC. 4559.

It is not necessary that the accomplice be corroborated in every material fact. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which he is confirmed by unimpeachable evidence, this may be ground for them to believe that he also speaks the truth in other parts as to which there may be no corroboration: *The State v. Allen*, 57–431.

SEC. 4560.

The court is to determine whether evidence is corroborative, that is, whether it is competent, and the jury is to pass upon the credibility of the corroborating witnesses, and the weight of their testimony. Instruction to the effect that the jury were to determine whether the testimony of the prosecutrix was sufficiently corroborated, etc., *held*, correct: *The State v. Bell*, 49–440.

Mere opportunity to have sexual intercourse does not amount to sufficient corroboration: *The State v. Araah*, 55–258; *The State v. Smith*, 54–743.

In a bastardy proceeding, the doctrine of *State v. Danforth*, 48–43, was not held applicable in case of a child two years old, and it was held that a child of that age might be shown to the jury and its family resemblance, if any, to defendant, considered by them as tending to prove that defendant was its father: *The State v. Smith*, 54–104.

Evidence that prosecutrix was bruised, &c., and made complaint, would not tend to connect defendant with the commission of the offense, and therefore should not be considered as tending to corroborate the testimony of prosecutrix: *State v. Stowell*, 60–535

1114.

SEC. 4571.

That a defendant held to answer for one crime is indicted for a higher crime does not release the surety on his bail bond: *The State v. Bryant*, 55–451.

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1120.

SEC. 4596.

Failure of a defendant indicted for misdemeanor to appear in person at the trial or at the rendition of verdict or at the sentence, will not constitute forfeiture of his bond if he makes appearance by counsel and thereby waives his personal presence: *State v. Conneham*, 57–351.

1121.

SEC. 4599.

Where a bond is given for the appearance of the defendant to answer an indictment, and afterward a change of venue is granted, on his application, to another county, and he fails to appear in the action in the county to which the change is granted, action on the bond for such failure to appear should be brought in the latter county: *Lucas Co. v. Wilson*, 59–354.

1130.

SEC. 4657.

Where the defendant is acquitted of the crime of larceny, money which was seized under a search warrant as the subject of the larceny should be surrendered to the defendant; the court has no authority to retain the case upon the docket for the purpose of determining the ownership of the property: *State v. Williams*, 61–517.

1132.

SEC. 4670.

That the justice is prejudiced against the defendant must be taken advantage of by motion for a change of venue. That fact will not render the conviction void: *Foreman v. Hunter*, 59–550.

1133.

SEC. 4673.

A judgment rendered by a disqualified jury is erroneous, but not void; it might be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59–550.

1134.

SEC. 4691.

An appeal by a prosecuting witness from the action of a justice of the peace in taxing to him the costs of the prosecution when the defendant is acquitted (see § 4254), must be taken at the time judgment is rendered, and cannot be taken afterward: *State v. Knapf*, 61–522.

Where a criminal prosecution is dismissed by a justice of the peace for failure of prosecuting witness to appear, the costs should be taxed to the county, unless there is ground for taxing them to the prosecuting witness under this section: *County of Palo Alto v. Moncrief*, 58–131; *Cassidy v. County of Palo Alto*, 58–125.

1135.

SEC. 4697.

In order to secure an appeal, notice thereof must be given at once: *State v. Knapf*, 61–522.

If defendant gives proper notice of appeal, nothing which the justice can do or say about it by way of refusing the appeal, can deprive the party of his right, and unless the party takes proper steps to perfect his appeal, by giving bond, the jus-

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tice will not be liable in damages for commitment, although his motives may be malicious: *Anderson v. Park*, 57–69.

The fact that the justice fails to inform the defendant of his right to an appeal, or fails to make such an entry of the fact on his docket, does not render the conviction void. The person may have the amount of his bail fixed in a *habeas corpus* proceeding, but he is not entitled to a discharge without bail: *Jacoby v. Waddell*, 61–247.

1139.

SEC. 4715.

A proceeding under this chapter is a civil action of a summary nature, intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Therefore, where another person was chargeable for the maintenance of the bastard, by virtue of having married the mother while *enciente*, knowing the fact, and therefore standing to the child *in loco parentis; held*, that the proceeding could not be maintained: *State v. Shoemaker*, 17 N. W. Rep., 589.

The provisions of Code §§ 4559 and 4560, requiring corroboration of the testimony of an accomplice, or of that of the prosecutrix in case of rape, seduction, etc., to warrant a conviction in a criminal prosecution, are not applicable in this proceeding. Neither need the case against defendant be made out beyond a reasonable doubt; a preponderance of evidence is sufficient: *The State v. McGlothlen*, 56–544. But this rule applies to the question of guilt or innocence which arises upon the whole case. It does not dispense with the force and effect which are to be given to presumptions arising from certain facts disclosed in evidence, as for instance, the presumption (which can only be overcome by distinct, strong, satisfactory and conclusive evidence), that a child born in wedlock was begotten by the husband, even though begotten before marriage: *The State v. Romaine*, 58–46. If, after giving due consideration to this presumption and properly considering the rule that to rebut such presumption the evidence must be clear, satisfactory and conclusive, there is a preponderance of evidence for the state, the defendant should be found guilty: *Ibid.*

In a particular case, *held* that under the evidence the instructions were not as favorable to the defendant as they should have been: *State v. Smith*, 61–538.

1140.

SEC. 4721.

If the child is not born alive, an action, if already commenced, abates and no judgment can be rendered for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61–397.

1143.

SEC. 4735.

A person furnishing clothing to prisoners on the sheriff's request may maintain an action against the county therefor, and while only necessary clothing can be procured at the expense of the county, the discretion of the sheriff, acting in good faith, cannot be controlled by the board of supervisors. The person furnishing clothing upon the sheriff's request is only bound to know that it is for prisoners, and suitable, and, perhaps, necessary: *Feldenheimer v. County of Woodbury*, 56–379.

1145.

SEC. 4746.

[20th G. A., ch. 17, amends this section by striking out the words "from the date of his election," in the third line, and inserting in lieu thereof the words "*from the first day of April following his election.*"]

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1146.

SEC. 4750.

[19 G. A., ch. 175, § 1, provides that the reports to the governor shall be made biennially, on or before the 15th of August, preceding the general sessions of the general assembly: See that act, in supplement to page 28.]

1152.

SEC. 4785.

[19 G. A., ch. 91, amends this section and the amendment thereto made by 17 G. A., ch. 83, by striking out the word "seven" in the second line, and inserting the word "*nine*" in lieu thereof.]

1157.

[Twentieth General Assembly, Chapter 187.]

SECTION 1. The name of the additional penitentiary at Anamosa is hereby changed to penitentiary at Anamosa. Name changed

SEC. 2. The warden is hereby authorized to appoint and remove at his discretion a matron for the women's department at a salary of seventy-five dollars per month. Said matron shall have exclusive charge of the women's department under the general direction of the warden. She shall keep a regular time table of the female convict labor and record the same in a book to be kept for that purpose, and shall moreover keep a record of all the business under her control, and return an account thereof, together with an account of the female convict labor, to the clerk at the close of each day. Warden authorized to appoint a matron: salary. Power and duty of matron.

SEC. 3. There is hereby allowed the sum of ten dollars per month as house rent for the deputy warden until the residence for the warden is completed in accordance with plans and specifications adopted for the penitentiary, when he shall occupy the present residence of the warden. $10 per month house rent for deputy.

SEC. 4. The warden is hereby authorized to purchase, with the approval of the executive council, a strip of land south of the penitentiary and lying between the penitentiary wall and the track of the C. N. W. R. W'y for the use and benefit of said penitentiary at a sum not to exceed $3,000.00. Warden to purchase land.

SEC. 5. The warden is hereby authorized to sell with the approval of the executive council the land known as the Old State Quarry, and the proceeds of said sale shall go into the general construction fund of said penitentiary. Warden authorized to sell old quarry.

1158.

16 G. A., Ch. 137, § 5; 17 G. A., Ch. 81.

[19 G. A., ch. 165, amends the latter of these acts so as to change the word "eight," in the second line of the section which it amends, back to "*ten.*"]

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1163.

M'CLAIN'S ANNOTATED STATUTES RECEIVABLE AS EVIDENCE.

[Nineteenth General Assembly, Chapter 3.]

AN ACT authorizing McClain's Annotated Statutes of the State of Iowa to be received as evidence of the laws of the State:

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That the compilation of the general laws of this state now in force known as McClain's Annotated Statutes of the state of Iowa, prepared by Emlin McClain and published by Callaghan and Company, shall be received in all courts and proceedings, and by all officers in this state, as evidence of the existing laws thereof, with like effect as if published under the authority of the state.

SEC. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the *Iowa State Register* and *State Journal*, newspapers published at Des Moines, Iowa.

Approved Feb. 4, 1882.

1166.

JUDICIAL DISTRICTS.

By chapter 98, acts of 10th General Assembly, the state was divided into twelve judicial districts. By chapter 61, Public Acts of the 14th General Assembly (amended by chapter 90 of the same), some of these districts were changed, and the thirteenth created; and by chapter 56, Acts of 16th General Assembly, the fourth district was divided and the fourteenth created. The fourteen districts are constituted of counties as follows:

1st. Lee, Henry, Des Moines and Louisa.
2nd. Van Buren, Davis, Wapello, Monroe, Appanoose, Lucas and Wayne.
3rd. Montgomery, Page, Taylor, Ringgold, Decatur, Clarke, Union and Adams.
4th. Harrison, Monona, Woodbury, Plymouth, Cherokee, O'Brien, Sioux, Lyon and Osceola.
5th. Polk, Warren, Madison, Adair, Guthrie and Dallas.
6th. Jasper, Marion, Poweshiek, Mahaska, Keokuk, Washington and Jefferson.
7th. Muscatine, Scott, Clinton and Jackson.
8th. Johnson, Tama, Iowa, Benton, Linn, Cedar and Jones.
9th. Dubuque, Delaware, Buchanan, Blackhawk and Grundy.
10th. Clayton, Allamakee, Fayette, Winneshiek, Howard and Chickasaw.
11th. Marshall, Story, Boone, Webster, Hamilton, Hardin, Wright and Franklin.
12th. Mitchell, Floyd, Bremer, Butler, Cerro Gordo, Worth, Winnebago and Hancock.
13th. Freemont, Mills, Audubon, Pottawattamie, Cass, Crawford, Shelby, Carroll and Greene.
14th. Calhoun, Sac, Ida, Buena Vista, Pocahontas, Humboldt, Kossuth, Palo Alto, Clay, Dickinson and Emmett.

JUDICIAL DISTRICTS DIVIDED INTO TWO CIRCUITS.

By 17 G. A., ch. 51, the first, fifth and seventh judicial districts are di-

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vided into two circuits each, and provision made for the election of a circuit judge in each circuit, and by 20 G. A., ch's 19 and 181, the sixth and fourth districts, respectively, are similarly subdivided. By 19 G. A., ch. 56, it is further provided that in judicial circuits wherein a city is situated, containing a population in excess of twenty-two thousand and three hundred, by the U. S. census of 1830, an additional circuit judge shall be elected, and by 20 G. A., ch. 18, a similar provision is made as to the second judicial district. In other cases, a circuit judge is elected in each judicial district. (See Code, § 586, and above acts in connection therewith, in supplement to page 156.) The new circuits created are constituted as follows:

1ST DISTRICT: *1st Circuit*, Lee and Henry counties.
2nd Circuit, Des Moines and Louisa counties.

4TH DISTRICT: *1st Circuit*, Lyon, O'Brien, Sioux, Osceola and Plymouth.
2nd Circuit, Woodbury, Monona, Harrison and Cheroke.

5TH DISTRICT: *1st Circuit*, Polk and Warren counties.
2nd Circuit, Madison, Adair, Guthrie and Dallas counties.

6TH DISTRICT: *1st Circuit*, Poweshiek, Keokuk, Washington and Jefferson.
2nd Circuit, Jasper, Marion and Mahaska.

7TH DISTRICT: *1st Circuit*, Clinton and Jackson counties.
2nd Circuit, Scott and Muscatine counties.

CONGRESSIONAL DISTRICTS.

19 G. A., ch. 163, divides the state into eleven congressional districts, constituted of counties as follows:

1st. Lee, Des Moines, Henry, Van Buren, Jefferson, Washington and Louisa.

2nd. Jones, Jackson, Clinton, Cedar, Scott and Muscatine.

3rd. Dubuque, Delaware, Buchanan, Black Hawk, Bremer, Butler and Grundy.

4th. Clayton, Fayette, Winneshiek, Allamakee, Howard, Mitchell, Floyd and Chickasaw.

5th. Marshall, Tama, Benton, Linn, Johnson and Iowa.

6th. Jasper, Poweshiek, Mahaska, Monroe, Wapello, Keokuk and Davis.

7th. Guthrie, Dallas, Polk, Adair, Madison, Warren and Marion.

8th. Clark, Lucas, Ringgold, Decatur, Wayne, Appanoose, Union, Adams, Page and Taylor.

9th. Pottawattamie, Cass, Mills, Audubon, Crawford, Montgomery, Shelby, Fremont and Harrison.

10th. Boone, Story, Hardin, Hamilton, Webster, Franklin, Wright, Humboldt, Hancock, Cerro Gordo, Worth, Winnebago and Kossuth.

11th. Lyon, Osceola, Dickinson, Emmet, Sioux, O'Brien, Clay, Palo Alto, Plymouth, Cherokee, Buena Vista, Pocahontas, Woodbury, Ida, Sac, Calhoun, Monroe, [Monona], Carroll and Greene.

[Secs. 13 and 14 of the act in relation to election of representatives in Congress, are inserted in supplement to page 169.]

STATE SENATORIAL DISTRICTS.

[Nineteenth General Assembly, Chapter 162.]

SEC. 1. One senator for forty-six thousand inhabitants is hereby constituted the ratio of apportionment.

SEC. 2. Each senatorial district shall be entitled to one senator, and every county and district which shall have a number of inhabitants equal to one-half the ratio fixed in the first section hereof, shall be entitled to one senator.

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[The act then divides the state into senatorial districts, each entitled to one senator, and gives the counties and number of inhabitants in each, as follows:]

1st.	Lee	34,859	30th.	Polk	42,395
2nd.	Van Buren and Davis.	33,510	31st.	Boone and Story	37,744
3rd.	Appanoose and Monroe	30,355	32nd.	Hardin and Grundy	30,448
4th.	Wayne and Lucas	30,657	33rd.	Buchanan and Delaware	36,499
5th.	Clarke and Decatur	26,848	34th.	Harrison and Shelby	29,345
6th.	Ringgold, Taylor and Union	42,700	35th.	Dubuque	42,997
7th.	Fremont and Page	37,3?0	36th.	Clayton	28,829
8th.	Mills and Montgomery.	30,030	37th.	Hamilton, Webster and Wright	32,264
9th.	Des Moines	33,099	38th.	Blackhawk	23,913
10th.	Jefferson and Henry	38,304	39th.	Butler and Bremer	38,374
11th.	Louisa and Washington	33,521	40th.	Allamakee and Fayette	42,049
12th.	Keokuk and Iowa	40,480	41st.	Howard, Mitchell and Worth	33,151
13th.	Wapello	25,282	42nd.	Winneshiek	23,937
14th.	Mahaska	25,201	43rd.	Cerro Gordo, Franklin, Hancock and Winnebago	20,079
15th.	Marion	25,111	44th.	Chickasaw and Floyd	29,211
16th.	Madison and Warren.	36,803	45th.	Poweshiek and Tama.	40,521
17th.	Audubon, Guthrie and Dallas	41,057	46th.	Woodbury, Monona and Crawford	35,965
18th.	Adams, Adair and Cass	40,030	47th.	Humboldt, Pocahontas, Palo Alto, Emmett, Kossuth and Clay	25,162
19th.	Pottawattamie	39,846	48th.	Greene, Carroll and Calhoun	31,071
20th.	Muscatine	23,168	49th.	Plymouth, Sioux, Lyon, O'Brien, Osceola and Dickinson	24,236
21st.	Scott	41,270	50th.	Buena Vista, Cherokee, Sac and Ida	28,933
22nd.	Clinton	36,764			
23rd.	Jackson	23,771			
24th.	Cedar and Jones	39,989			
25th.	Johnson	25,429			
26th.	Linn	37 235			
27th.	Benton	24,888			
28th.	Marshall	23,752			
29th.	Jasper	25,962			

SEC. 53. The change of any district shall not affect any senator during the term of office for which he has been elected.

REPRESENTATIVE DISTRICTS.

[Twentieth General Assembly, Chapter 180.]

SECTION 1. One representative for every sixteen thousand eight hundred and fifty inhabitants is hereby constituted the ratio of apportionments and each representative district shall be as hereinafter described. Ratio.

[The act then designates the counties constituting the respective districts, and the number of representatives to which each is entitled, as follows:]

1st.	Lee	2	13th.	Decatur	1
2nd.	Des Moines	2	14th.	Union	1
3rd.	Henry	1	15th.	Ringgold	1
4th.	Jefferson	1	16th.	Adams	1
5th.	Van Buren	1	17th.	Taylor	1
6th.	Wapello	2	18th.	Montgomery	1
7th.	Davis	1	19th.	Page	1
8th.	Monroe	1	20th.	Mills	1
9th.	Appanoose	1	21st.	Fremont	1
10th.	Lucas	1	22nd.	Pottawattamie	2
11th.	Wayne	1	23rd.	Cass	1
12th.	Clarke	1	24th.	Adair	1

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25th.	Madison	1	58th.	Hamilton	1
26th.	Warren	1	59th.	Webster	1
27th.	Marion	1	60th.	Woodbury	1
28th.	Mahaska	1	61st.	Butler	1
29th.	Keokuk	1	62nd.	Bremer	1
30th.	Washington	1	63rd.	Fayette	1
31st.	Louisa	1	64th.	Clayton	2
32nd.	Muscatine	1	65th.	Allamakee	1
33rd.	Scott	2	66th.	Winneshiek	1
34th.	Cedar	1	67th.	Howard	1
35th.	Johnson	2	68th.	Chickasaw	1
36th.	Iowa	1	69th.	Mitchell	1
37th.	Poweshiek	1	70th.	Floyd	1
38th.	Jasper	2	71st.	Plymouth	1
39th.	Polk	2	72nd.	Sioux, Lyon and Osceola	1
40th.	Dallas	1	73rd.	Monona	1
41st.	Guthrie	1	74th.	Crawford	1
42nd.	Harrison	1	75th.	Ida and Buena Vista	1
43rd.	Boone	1	76th.	Cherokee and Clay	1
44th.	Story	1	77th.	Sac	1
45th.	Marshall	1	78th.	Calhoun and Pocahontas	1
46th.	Tama	1	79th.	Greene	1
47th.	Benton	1	80th.	Carroll	1
48th.	Linn	2	81st.	Shelby	1
49th.	Jones	1	82nd.	Audubon	1
50th.	Clinton	2	83rd.	O'Brien and Dickinson	1
51st.	Jackson	1	84th.	Palo Alto, Emmett and Kossuth	1
52nd.	Dubuque	2	85th.	Humboldt and Wright	1
53rd.	Delaware	1	86th.	Winnebago, Hancock and Worth	1
54th.	Buchanan	1	87th.	Cerro Gordo	1
55th.	Blackhawk	1	88th.	Franklin	1
56th.	Grundy	1			
57th.	Hardin	1			

ART. 1, SEC. 4.

It is not inconsistent with this section to provide that the credibility of the evidence of a witness may be affected by the fact as to his sensibility to the obligation of an oath: *Searcy v. Miller*, 57–613, and see notes to § 3636.

1216.

ART. I, SEC. 9.

The right of trial by jury cannot be waived by the defendant in a criminal prosecution. The court has no jurisdiction without the jury to try such a case: *State v. Carman*, 18 N. W. Rep., 691.

It is herein contemplated that the legislature may provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal to a higher court in which a trial before a jury of twelve may be had. The admission of the state with a constitution containing this provision was an abrogation of the unlimited right of trial by common law jury found in the ordinance of 1787: *Higgins v. Farmers' Ins. Co.*, 60–50.

1218.

ART. I, SEC. 10.

The provisions of § 1401 as to method of determining the question of sanity by commissioners are not in violation of this section: *County of Blackhawk v. Springer*, 58–417.

The admission in evidence upon a criminal trial of testimony of witnesses given in a preliminary examination, which witnesses have since died, is not in violation of the right to be confronted by witnesses under this section: *State v. Fitzgerald*, 19 N. W. Rep., 202.

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1220.

ART. I, SEC. 18.

Advantages to the land resulting from its better drainage will not be taken into account in estimating the deterioration in value: *Britton v. D. M., O. & S. R. Co.*, 59-540.

1223.

ART. I, SEC. 26.

[By the Nineteenth General Assembly (Joint Resolution No. 8) the following proposed amendment was agreed to, as having already been in due form agreed to by the previous general assembly (18 G. A., Joint Resolution, No. 8). By 19 G. A., ch. 172, (in pursuance of a previous statute authorizing submissions of constitutional amendments at special elections, 19 G. A., ch. 7, inserted in supplement to page 1247) this proposed amendment was submitted to the people at a special election to be held June 27, 1882. By proclamation of the governor, dated July 29, 1882, this proposed amendment was declared adopted.]

SEC. 26. No person shall manufacture for sale, or sell, or keep for sale, as a beverage any intoxicating liquors whatever, including ale, wine and beer. The general assembly shall by law prescribe regulations for the enforcement of the prohibition herein contained, and shall thereby provide suitable penalties for the violation of the provisions hereof.

For irregularities in entering this amendment upon the journals of the Eighteenth General Assembly, and a want of agreement between the amendment as there entered and as subsequently agreed to by the Nineteenth General Assembly, this amendment, as submitted to and adopted by the people, did not become a part of the constitution: *Koehler v. Hill*, 60-543; *State v. Johnson*, 61-504.

ART. II, SEC. 1.

A student, whose home had been with his father in Mitchell County while still a minor, entered the State University at Iowa City, making his father's home still his residence or "headquarters" during vacations, and receiving support from his father. Not having any definite intention to make Iowa City his home after graduation, *held*, that he was not a resident of the county where he was attending college, so as to be entitled to vote there on becoming of age: *Vanderpoel v. O'Hanlon*, 53-246.

1225.

ART. III, SEC. 4.

[By an amendment to the constitution proposed by the Seventeenth General Assembly (Joint Resolution, No. 5), and agreed to by the Eighteenth General Assembly (Joint Resolution, No. 6), and adopted by vote of the electors at the general election in 1880, the words "free white" were stricken from the third line of this section.]

1228.

ART. III, SEC. 29.

For similar provisions as to ordinances of a city, see § 489.

ART. III, SEC. 30.

A legalizing statute purporting to make valid the act of a city which it had no lawful power to do, *held* unconstitutional: *Ind. School Dist. of Burlington v. City of Burlington*, 60-500.

As the legislature cannot, in view of this section, pass a special law for the amendment of the charter of a city, it follows that it cannot, after the passage of an ordinance not authorized by such charter, legalize it by special act: *Stange v. City of Dubuque*, 17 N. W. Rep., 518.

A curative act legalizing the action of a county superintendent in attaching territory of one district township to another, without circumstances

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which by statute are necessary to authorize such action, is constitutional, as no general law could be made applicable: *Ind. Dist. of Union v. Ind. Dist. of Cedar Rapids*, 17 N. W. Rep., 895.

1233.

ART. V, SEC. 4.

Section 3173, prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, unless the judge shall certify the question on which the decision of the supreme court is desired, is not unconstitutional as taking away the right of appeal and trial *de novo* in equity cases as provided by this section. Such statutory provision is a mere restriction or regulation upon the right of trial *de novo*: *Andrews v. Burdick*, 16 N. W. Rep., 275.

1238.

ART. VIII, SEC. 9.

The words "banking corporation," used in this section, mean a bank of issue, and not one of discount and deposit: *Allen v. Clayton*, 18 N. W. Rep., 663.

1241.

ART. X, SEC. 1.

It is the design and intention of this provision that the proposed amendment should be so entered upon the journals that it can be known from an examination of such journals what it is that has been agreed to by the houses of the General Assembly; and such entry is the highest evidence of what the amendment is which is agreed to by each house. Therefore, where it appeared from the journal of the Senate of one General Assembly that the proposed amendment, as passed by it, was different from the same amendment as concurred in by the subsequent General Assembly, and submitted to and voted upon by the people, *held*, that it was not legally adopted and did not become a part of the constitution although the joint resolution of the General Assembly first acting upon the amendment, which was signed by the presiding officers of the two houses and by the governor, and preserved in the office of the secretary of state, showed such amendment to be the same as that subsequently concurred in and submitted; also, *held*, that the recital in the joint resolution of the General Assembly which submitted said amendment to vote of the people that it had been agreed to by the previous General Assembly was not conclusive upon the court: *Koehler v. Hill*, 60–543.

The provisions as to the amendment of the constitution are not simply directory, and the legislative department is not the sole judge as to whether or not they have been complied with, but the courts have jurisdiction to inquire into the question whether these requirements have been observed, and if not to declare the amendment invalid: *Ibid.*

1242.

ART. XI, SEC. 3.

Bonds issued in payment of a valid judgment indebtedness which does not exceed the constitutional limitation at the time the judgment was rendered will not be invalid merely by reason of the indebtedness exceeding the limitation at the time they are issued. The issue of such bonds does not increase the indebtedness: *City of Sioux City v. Weare*, 59–95.

1244.

ART. XI, SEC. 6.

Where there was a failure to elect a county officer at a general election at which such office should have been filled, and the incumbent held over,

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qualifying anew as required by statute, *held*, that he filled a vacancy only, and his successor should be elected at the next general election: *Dyer v. Bagwell*, 54-487; *Boone Co. v. Jones*, 58-373.

1247.

16 G. A., Ch. 114.

[19 G. A., ch. 7, § 1, amends § 2 of this act by adding, after "Constitution," in the fourth line, the words, "*When no other time is fixed by such general assembly for its submission to the people.*"

19 G. A., ch. 7, § 2, further amends this act by adding thereto the following:]

Submission at special election.

SEC. 5. The general assembly to which a proposition to amend the constitution has been referred by the last preceding general assembly, and which has agreed to such proposed amendment, may provide for its submission to the people at a special election for that purpose, at such time as the general assembly may prescribe, proclamation for which election shall be made by the governor, and the same shall in all respects be governed and conducted as prescribed in this act for submission of a constitutional amendment at a general election so far as applicable.

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1279.

NINETEENTH GENERAL ASSEMBLY (1882).

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
3	An act authorizing McClain's Annotated Statutes of the State of Iowa to be received as evidence of the laws of this State.... Took effect by publication, February 7, 1882.	1162
7	An act to amend chapter 114 of the acts of the Sixteenth General Assembly, relating to the submission of amendments to the constitution to a vote of the people.... Took effect by publication, February 14, 1882.	1247
8	An act to repeal section 2155 of the Code, relating to limited partnerships, and enacting a substitute therefor.... Took effect by publication, February 17, 1882.	604
13	An act to amend chapter 194, laws of the Eighteenth General Assembly, relative to making appropriations for the Iowa State Library.... Took effect by publication, February 18, 1882.	536
16	An act to authorize cities of the first and second class and incorporated towns to change their corporate names, and to prescribe the manner in which such change may be made.... Took effect by publication, February 23, 1882.	106
17	An act to repeal chapter 123, acts of the Eighteenth General Assembly, relative to fishways.... Took effect by publication, March 3, 1882.	412
19	An act to amend section 3864 of the Code of 1873, in relation to the penalty for attempts to produce a miscarriage.... Took effect July 4, 1882.	977
23	An act requiring Boards of Directors to set out trees on school grounds..... Took effect by publication, March 1, 1882.	494 498
24	An act to amend chapter 143, of the acts of the Sixteenth General Assembly, entitled, "an act to provide for establishing Superior Courts in cities of a certain grade, relating to cities and incorporated towns".... Took effect by publication, March 4, 1882.	140
25	An act to repeal part of section 521, title IV, chapter 10, of the Code, and enact a substitute therefor, relating to the election of alderman in cities of the first class.... Took effect by publication, March 3, 1882.	131
27	An act to amend chapter 159, section 3, acts of 1876, in relation to the printing and distribution of public documents.... Took effect, July 4, 1882.	28
32	An act to repeal section 487 of the Code, and enact a substitute in lieu thereof, in relation to Poll Tax.... Took effect by publication, March 7, 1882.	120
35	An act relating to the trial of equitable actions, amending section 2742, chapter 9, title 17, of the Code of Iowa, as amended by chapter 145 of the laws of the Seventeenth General Assembly.... Took effect by publication, March 10, 1882.	733
36	An act to insure the better education of practitioners of dentistry in the State of Iowa.... Took effect July 4, 1882.	450
38	An act requiring the cost of paving street and alley intersections in certain cities, to be paid out of a general paving fund, and authorizing the levy of a special tax therefor.... Took effect by publication, March 10, 1882.	111

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NINETEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
40	An act to repeal chapter 152 of the acts of the Sixteenth General Assembly, and chapter 164 of the acts of the Eighteenth General Assembly, and to provide for the establishment and maintenance of the Institution for Feeble-Minded Children at Glenwood Took effect by publication, March 11, 1882.	475
44	An act to provide for the construction of levees by amending sections 1207, 1208, 1209, 1210 and 1211 of chapter 2, title X of the Code of 1873, and chapter 140 of the laws of the Sixteenth General Assembly, and chapter 121 of the laws of the Seventeenth General Assembly, and chapter 85 of the laws of the Eighteenth General Assembly, relating to drains, ditches, and water-courses Took effect by publication, March 14, 1882.	324 325 326
45	An act to amend section 890 of the Code, relating to the redemption of Tax Sales Took effect July 4, 1882.	220.
46	An act to repeal section 1739 of the Code of 1873, and to enact a substitute therefor, in relation to the duties of the President of the Board of School Directors Took effect July 4, 1882.	496
49	An act to amend section 3072, chapter 2, title XVIII of the Code, relating to exemptions Took effect July 4, 1882.	815
51	An act to amend section 1717 of chapter 9, title XII, of the Code of Iowa, so as to enable the board of directors of district townships to procure highways to school-house sites Took effect by publication, March 12, 1882.	490
52	An act to repeal section 2, of chapter 38, of the laws of the Eighteenth General Assembly, in relation to compensation of officers and employes of the general assembly and to enact a substitute therefor Took effect by publication, March 14, 1882.	2
54	An act authorizing boards of supervisors to appropriate amounts received as insurance thereon in reconstructing public buildings destroyed by fire, wind, or lightning Took effect by publication, March 14, 1882.	73
56	An act to increase the number of circuit judges in each circuit of this state containing a city having a population in excess of twenty-two thousand and three hundred, and to provide for the election of said judges Took effect July 4, 1882.	157 38
62	An act in relation to the exemption of sewing machines from execution and attachment Took effect July 4, 1882.	816
63	An act to enable townships, incorporated towns and cities, including cities acting under special charters, to aid in the construction of county bridges, in certain cases Took effect March 15, 1882.	73
80	An act to amend section 934 of the Code of 1873 Took effect July 4, 1882.	238
89	An act granting additional powers to cities organized under the general incorporation laws of the state Took effect by publication, March 22, 1882.	106

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NINETEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE
91	An act to amend chapter 83 of the acts of the Seventeenth General Assembly, amendatory of section 4785 of the Code, in relation to the support of convicts, Took effect by publication, March 22, 1882.	1152
92	An act to increase the support fund of the girls' department of the Iowa reform school..... Took effect by publication, March 17, 1882.	480
94	An act to repeal chapter 115, laws of the Eighteenth General Assembly, relating to compensation of sheriffs, and to enact a substitute in lieu thereof..... Took effect by publication, March 21, 1882.	952
100	An act to amend sections 2253 and 2266 of the Code, in relation to the appointment and powers of guardians of non-resident idiots, lunatics, and persons of unsound minds..... Took effect by publication, March 21, 1882.	624 626
102	An act providing for the cancellation of taxes voted to aid in the construction of railroads..... Took effect by publication, March 22, 1882.	372
103	An act enabling county treasurers to pay outstanding warrants..... Took effect by publication, March 22, 1882.	80
104	An act to amend section 1324, chapter 6, title 10, of the Code of 1873, relating to telegraphs..... Took effect by publication, March 22, 1882.	374
105	An act to amend section 1, chapter 203, laws of the Eighteenth General Assembly, relating to the Institution for the Deaf and Dumb..... Took effect by publication, March 22, 1882.	483
109	An act to amend section 936 of the Code of 1873, relating to road notices..... Took effect July 4, 1882.	238
110	An act to repeal section 390 of the Code, chapter 6 of the laws of the Sixteenth General Assembly, chapter 201 of the laws of the Eighteenth General Assembly, and to enact a substitute therefor, in relation to the election of assessors..... Took effect July 4, 1882.	89
112	An act to further diminish liability to railroad accidents, and to punish interference with, and injury to, railroad property..... Took effect July 4, 1882.	985
113	An act to amend section 1, chapter 194, of the laws of the Eighteenth General Assembly, entitled An act making appropriations for the Iowa State Library. Took effect by publication, March 23, 1882.	536
115	An act to repeal section 573 of the Code, and enact a substitute therefor, in relation to the time of holding general elections..... Took effect July 4, 1882.	156
117	An act to provide for the appointment and salary of a deputy clerk of the supreme court. Took effect by publication, March 23, 1882.	183 946
118	An act to include all the territory of an incorporated city or town within the independent school district, or districts, now existing or hereafter to be formed. Took effect by publication, March 23, 1882.	509

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NINETEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
122	An act to amend section one, chapter forty-seven of the acts of the Fifteenth General Assembly, in relation to crossing highways..... Took effect by publication, March 23, 1882.	341
123	An act to repeal chapter 153 of the laws of the Ninth General Assembly, and to amend section 1, of chapter 167, of the laws of the Eighteenth General Assembly Took effect July 4, 1882.	20
124	An act to provide for filling vacancies in offices of incorporated towns..... Took effect by publication, March 23, 1882.	130
128	An act to provide for the publication of city and town ordinances in book or pamphlet form, and for the taking effect thereof..... Took effect by publication, March 23, 1882.	120
133	An act to authorize incorporated towns and cities to procure and donate to railway companies sites for depots, machine shops and other buildings..... Took effect by publication, March 23, 1882.	114
136	An act to amend section 463 of the Code of 1873, relating to sales of liquors in cities and incorporated towns..... Took effect July 4, 1882.	108
137	An act to amend sections 4, 10, 11 and 12, of chapter 75, of the acts of the Eighteenth General Assembly, in relation to the practice of pharmacy and the sale of medicine and poisons..... Took effect by publication, March 18, 1882.	449 450
140	An act amending section 3 of chapter 151, acts of the Eighteenth General Assembly, relating to fees of clerks of District and Circuit Courts..... Took effect by publication, March 23, 1882.	452
144	An act to repeal sections 3201 and 3202 of the Code of 1873, and to provide a substitute therefor in relation to petitions and arguments for rehearing in the Supreme Courts..... Took effect by publication, March 23, 1882.	847
146	An act to amend section 8, of chapter 77, acts of the Seventeenth General Assembly, making the railroad commissioners' tax payable directly into the state treasury..... Took effect by publication March 23, 1882.	366
147	An act to amend chapter 183 of the acts of the Eighteenth General Assembly, relating to the bonding of county indebtedness..... Took effect by publication, March 23, 1882.	63 64
149	An act to enable boards of directors of independent school districts to insure school property..... Took effect by publication, March 23, 1882.	494
150	An act to amend certain sections of chapter 5, title 12, Code of 1873, relating to the time of holding pupils in the girls' department of the Iowa Reform School..... Took effect by publication, May 2, 1882.	479
151	An act to repeal sections 3786 and 3815 of the Code of Iowa relating to the payment of fees into the county treasury, and to enact a substitute therefor.. Took effect by publication, March 23, 1882.	951 962
153	An act to amend section 3764 of the Code, relative to compensation of state printer..... Took effect by publication, March 23, 1882.	944

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NINETEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT to PAGE.
154	An act authorizing cities of the second class to erect and maintain city jails.... Took effect by publication, March 23, 1882.	136
158	An act providing for the taxation of certain property for road purposes..... Took effect July 4, 1882.	124
159	An act to repeal section 3791 of the Code of 1873, and to enact a substitute therefor, relating to the compensation of members of boards of supervisors.. Took effect July 4, 1882.	954
160	An act to amend chapter 111 of the laws of the Eighteenth General Assembly, in relation to the restoration of territory in school districts..... Took effect July 4, 1882.	509
161	An act to amend sections 1774 and 1776 of the Code, in relation to the duties and compensation of county superintendents of schools..... Took effect July 4, 1882.	503
162	An act apportioning the state of Iowa into senatorial districts..... Took effect July 4, 1882.	1166
163	An act to divide the state into eleven congressional districts, and to provide for the election of congressmen thereunder..... Took effect July 4, 1882.	1166 169
164	An act to amend section 438, title 4, chapter 10, of the Code, relating to the abandonment of the charters of cities *and* acting under special charters, providing for the term of office of its officers, and the validity of certain ordinances thereof after such abandonment..... Took effect by publication, March 29, 1882.	103
165	An act to repeal chapter 81, laws of the Seventeenth General Assembly, and to enact a substitute therefor, relating to support of convicts in the additional penitentiary..... Took effect by publication, March 25, 1882.	1158
166	An act to amend section 1675 of the Code, and to repeal section 1676 of the Code as amended by chapter 72 of the acts of the Seventeenth General Assembly and chapter 165 of the acts of the Eighteenth General Assembly, and to enact a substitute therefor..... Took effect by publication, March 25, 1882.	481
167	An act to create a state educational board of examiners, and to encourage training in the science and art of teaching..... Took effect July 4, 1882.	460
169	An act to provide for the taxation of leasehold estates in Agricultural College lands..... Took effect, by publication, March 28, 1882.	469
170	An act to prevent and punish the adulteration of articles of food, drink and medicine, and the sale thereof when adulterated..... Took effect July 4, 1882.	1013
173	An act apportioning the state into representative districts, and declaring the ratio of representation..... Took effect July 4, 1882.	1166
174	An act to amend section 1862 and to repeal section 1865 of the Code..... Took effect by publication, April 4, 1882.	528

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NINETEENTH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
175	An act in relation to the reports of public officers and institutions, and to provide for printing and distributing public documents. Took effect July 4, 1882.	28
—	An act to amend section 8, chapter 75, of the laws of Eighteenth General Assembly; also for an act to repeal section 1527, and to amend section 1529 and section 1537, of the Code of 1873, in relation to the sale of intoxicating liquors.	450 424 426
	Sent to the governor during the last three days of the session, and on April 15, 1882 (within 30 days after adjournment of the General Assembly) deposited by him in the office of the secretary of state, without approval, or objection filed thereto.	
	TWENTIETH GENERAL ASSEMBLY (1884).	
7	An act to provide for the appointment of marshals in cities of the first class. Took effect by publication Feb. 28, 1884.	137
8	An act to repeal section 1555, chapter 6, title XI, of the Code, and to enact a substitute therefor, relating to intoxicating liquors. Took effect July 4, 1884.	437
9	An act to protect and preserve the fish in the permanent lakes and ponds within the state of Iowa. Took effect by publication, March 8, 1884.	1023
11	An act to amend section one of chapter 104 of the laws of the Seventeenth General Assembly relating to mutual insurance companies. Took effect by publication, March 11, 1884.	297
13	An act authorizing Boards of Supervisors to purchase, keep up and maintain bridges over streams dividing their respective counties. Took effect by publication, March 19, 1884.	255
17	An act to amend section 4746 of the Code, relative to term of office of the warden of the penitentiary at Fort Madison. Took effect by publication, March 19, 1884.	1145
18	An act increasing the number of Circuit Judges in the Second Judicial District of the state. Took effect July 4, 1884.	38 157
19	An act in relation to the Sixth Judicial Circuit of the state, subdividing the same, providing for the appointment and election of judges of the Circuit Courts therein, and defining the powers and duties thereof. Took effect by publication, March 19, 1884.	38 157 1166
20	An act granting additional powers to certain cities of the first class, with reference to the improvements of streets, highways, avenues or alleys, and to provide a system for payment therefor. Took effect by publication, March 18, 1884.	111
21	An act to regulate mines and mining, and to repeal chapter 202 of the Acts of the Eighteenth General Assembly. Took effect by publication, March 20, 1884.	443
22	An act to amend section 1061, title IX, chapter 1, of the Code of 1873. Took effect by publication, April 2, 1884.	270
23	An act to exempt from judicial sale the pension money paid to any person by the United States government, and certain of the proceeds and accumulations thereof. Took effect by publication, March 28, 1884.	816

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TWENTIETH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
24	An act to provide for the erection and maintaining of station houses and connections at the points of intersections or crossing of two or more railroads.... Took effect by publication, March 28, 1884.	374
25	An act granting additional powers to certain cities of the first class, with reference to the construction of sewers, and to provide for the payment of the cost of the same, and to amend chapter 162 of the Acts of the Seventeenth General Assembly ..... Took effect by publication, March 28, 1884.	119
27	An act to repeal section 1621 of the Code of 1873 (chapter 4, title XII), and to enact a substitute therefor, relating to a course of study for the State Agricultural College ..... Took effect July 4, 1884.	470
28	An act to provide for the assessment and taxation of lands within the State of Iowa, granted to railroad companies or corporations which have become earned but not patented..... ..... Took effect July 4, 1884.	194
45	An act to indemnify sheriffs in the service of writs of attachment. Amendatory of Code, chapter 1, title XVIII..... Took effect July 4, 1884.	792
64	An act to amend section 368, chapter VII, title IV, Code of 1873, relating to the compensation of surgeons or physicians in coroner's inquests..... Took effect July 4, 1884.	86
65	An act to amend chapter 74, laws of the 18th General Asssembly..... Took effect by publication, March 28, 1884.	261 262 264 267 268
66	An act to amend section 1384 (chapter 2, title XI) of the Code of Iowa in relation to care for the insane..... Took effect July 4, 1884.	386
67	An act to amend section 2 of chapter 156 of the laws of the Seventeenth General Assembly, as amended by chapter 193 of the laws of the Eighteenth General Assembly in relation to the protection of game..... Took effect July 4, 1884.	1021
70	An act to provide a fund from which to pay for sheep or other domestic animals, killed or injured by dogs..... Took effect July 4, 1884.	409
72	An act to provide for selling, leasing and patenting the lands belonging to the Iowa State Agricultural College and Farm. [Amends ch. 117, acts 10th G. A., and repeals ch. 71, acts 15th G. A.]..... Took effect by publication, April 2, 1884.	468
73	An act to amend section one, chapter one hundred and five, laws of the Nineteenth General Assembly, relating to the Institution for the Deaf and Dumb Took effect by publication, March 29, 1884.	483
76	An act to amend section 1604, and to repeal and provide a substitute for section 1605, of chapter 3, title 12, of the Code, in relation to the trustees of the State Agricultural College ..... Took effect by publication, April 2, 1884.	465

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TWENTIETH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
77	An act to amend section 2609 (chapter 6, title XVII) of the Code of 1873, in relation to the truth of return of notices served on patients in hospitals for the insane.... Took effect by publication, April 3, 1884.	699
78	An act to prohibit the selling or giving of fire arms to minors.... Took effect by publication, April 3, 1884.	1019
79	An act to amend chapter ninety-five (95) of laws of Sixteenth General Assembly.... Took effect by publication, April 3, 1884.	126
80	An act to amend chapter 147 of the acts of the 19th General Assembly, relating to the bonding of county indebtedness.... Took effect by publication, April 3, 1884.	63 64
93	An act to prevent gambling by means of fictitious contracts for the buying or selling of grain or other produce on margins, and to provide a punishment therefor.... Took effect July 4, 1884.	1015
94	An act relating to a change of the place of trial of civil actions, amending section 2590 of the Code of Iowa.... Took effect July 4, 1884.	691
102	An act to amend section 4039 of the Code of 1873 relating to the spread of small-pox.... Took effect July 4, 1884.	1017
103	An act to prohibit the use of barb wire in enclosing public school grounds. [Additional to chapter 9, title XII, of the Code].... Took effect July 4, 1884.	439
104	An act concerning bells and steam whistles on locomotives. [Additional to ch. 5, title X, of the Code].... Took effect July 4, 1884.	357
105	An act to protect all citizens in their civil and legal rights.... Took effect July 4, 1884.	1020
106	An act to amend section 382, chapter 9, title IV, Code of Iowa, relative to the division of townships.... Took effect by publication, April 3, 1884.	88
115	An act making appropriation for the better support of the State University in the several departments and chairs, and in aid of the income fund and for the development of the institution.... Took effect by publication, April 4, 1884.	464
119	An act to amend section 120 of chapter 8, title 2, Code of 1873 (in reference to the Executive Council), relating to the providing of supplies for State officers Took effect by publication, April 4, 1884.	25
120	An act to authorize township trustees to employ attorneys in certain cases.... Took effect by publication, April 4, 1884.	89
123	An act to amend section 3948 of the Code, to punish the acceptance of bribes by marshals, deputy marshals, policemen and other police officers of cities and towns.... Took effect July 4, 1884.	998

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TWENTIETH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
124	An act to provide for the distribution of funds by the assignees of insolvents .. Took effect July 4, 1884.	594
125	An act to repeal section one of chapter sixty of the acts of the Eighteenth General Assembly, in relation to the publication of the Supreme Court reports, and to enact a substitute therefor..... Took effect July 4, 1884.	35
126	An act to amend section 2578, of the Code of 1873, relating to the foreclosure of mortgages and other liens on real estate..... Took effect July 4, 1884.	687
128	An act to amend section 1121, chapter 3, title IX, of the Code of 1873, relative to the annual appropriation to the State Horticultural Society..... Took effect July 4, 1884.	282
132	An act to create a Bureau of Labor Statistics, and to provide for the appointment of a commissioner of said bureau, and to define his duties and term of office..... Took effect by publication, April 5, 1884.	442
133	An act authorizing actions against railroad companies, to be brought in the name of the State, upon recommendation of the Board of Railroad Commissioners. [Additional to Code, ch. X, title 5]..... Took effect by publication, April 8, 1884.	364
134	An act to provide for the publication of the annual proceedings of the Iowa Improved Stock Breeders' Association ..... Took effect by publication, April 8, 1884.	282
139	An act for Union Railway Depot. [Additional to Code, ch. X, title 5]..... Took effect by publication, April 9, 1884.	373
142	An act to repeal sections 4013 and 4016 of the Code and to enact substitutes therefor relating to houses of ill-fame and to prostitution, and to enact an additional provision relating to houses of ill-fame and prostitution and lewdness..... Took effect July 4, 1884.	1011
143	An act to amend chapter 6, title XI of the Code relating to intoxicating liquors, and to provide additional penalties for violations of the provisions of said chapter and the amendments thereto..... Took effect July 4, 1884.	423–429 and 436
144	An act for an appropriation for the state fish commission..... Took effect by publication, April 10, 1884.	411
147	An act relating to sidewalks on highways. [Additional to Code, ch. 7, title 7.] Took effect by publication, April 9, 1884.	245
151	An act relating to parks in cities and towns and to authorize the election of commissioners, and levy of special tax therefor. [Additional to Code, ch. 10, title IV.]..... Took effect by publication, April 11, 1884.	114
153	An act to change the name of the reform schools to industrial schools. [Amendment of Code, ch. 5, title XII.]..... Took effect by publication, April 10, 1884.	475
158	An act to amend section 4, chapter 47, of the acts of the Sixteenth General Assembly, relating to extension of city limits..... Took effect by publication, April 11, 1884.	102

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TWENTIETH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE.
159	An act to repeal chapter 123 of the laws of the Sixteenth General Assembly and chapter 87 and 173 of the laws of the Seventeenth General Assembly, and chapter 192 of the laws of the Eighteenth General Assembly, and chapter 102 of the laws of the Nineteenth General Assembly, in relation to taxes in aid of railroads, and to enact a substitute therefor.... Took effect by publication, April 9, 1884.	369
162	An act to provide for the erection of monuments to deceased soldiers of the late war.... Took effect July 4, 1884.	73
163	An act to prevent accidents at railroad crossings.... Took effect July 4, 1884.	357
164	An act for the protection and preservation of quail.... Took effect July 4, 1884.	1021
168	An act to regulate admission to practice as attorneys and counselors in the courts of this state. [Repealing sections 208, 209 and 210 of the Code.].... Took effect July 4, 1884.	
173	An act to amend sections ten and twelve of chapter 151, laws of the Eighteenth General Assembly.... Took effect by publication, April 10, 1884.	453
175	An act to amend chapter 58, acts of the Seventeenth General Assembly.... Took effect by publication, April 11, 1884.	65
178	An act to provide for the burial of honorably discharged soldiers, sailors or marines, who may hereafter die without leaving means sufficient to defray funeral expenses, and to provide head-stones to mark their graves.... Took effect July 4, 1884.	73
179	An act to protect subcontractors for labor performed, and material furnished for public buildings and improvements. [Additional to ch. 100 of the acts of the 16th General Assembly.].... Took effect July 4, 1884.	603
180	An act to apportion the state into representative districts and declaring the ratio of representation.... Took effect July 4, 1884.	1166
181	An act in relation to the fourth judicial circuit of the state; subdividing the same; providing for the election of circuit judges therein, and defining their powers and duties. [Additional to ch. 56, of the acts of the 16th General Assembly.].... Took effect July 4, 1884.	38 157 1166
182	An act to amend chapter 28 of the acts of the 15th General Assembly amending section 796 of the Code of 1873.... Took effect July 4, 1884.	189
183	An act amending sections 2086 and 2087 of the Code of 1873, relating to the assignment of non-negotiable instruments and accounts.... Took effect July 4, 1884.	586
184	An act in relation to attorney's fees in partition cases of real estate. [Additional to Code, ch. 3, title XX.].... Took effect July 4, 1884.	865
185	An act to provide for the inspection and to regulate the sale of petroleum and its products, and to repeal chapter 172 of the acts of the Seventeenth General Assembly and section 3901 of the Code.... Took effect by publication, April 18, 1884.	447

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TWENTIETH GENERAL ASSEMBLY.—*Continued.*

CHAP.	TITLE; TIME OF TAKING EFFECT.	SUPPLEMENT TO PAGE
186	An act in relation to ditches, drains, levees, embankments and changes in water courses, and amendatory to chapter 2, title X, of the Code. Took effect by publication, April 19, 1884.	328
187	An act to change the name of the additional penitentiary at Anamosa; provide for a matron for the female convicts thereof; to authorize the purchase of certain lands; to provide for the house rent of the deputy warden and to sell a piece of land known as the Old State Quarry. [Additional to ch. 2, title XXVI, of the Code.] Took effect by publication, April 17, 1884.	1157
188	An act to regulate and provide for the construction of tile and other underground drains through the lands of another. [Amendatory of ch. 2, title X, of the Code.] Took effect by publication, April 18, 1884.	328
189	An act for the appointment of a state veterinary surgeon and defining his duties. Took effect by publication, April 19, 1884.	409
190	An act to authorize railway corporations to condemn lands for additional depot grounds. [Additional to Code, ch. 5, title X, of railways.] Took effect by publication, April 18, 1884.	333
191	An act making an appropriation for the state library and providing assistants for the librarian and for the compensation of the librarian and assistants. [Amendatory of section 1899 of the Code, and sec. 1, ch. 138, of acts of the 19th G. A.] Took effect by publication, April 18, 1884.	536 944
192	An act in relation to powers and duties of mayors of cities of first and second class. [Additional to Code, ch. 10, title IV.] Took effect by publication, April 18, 1884.	130
193	An act to provide for the investment of the endowment fund of the Iowa State Agricultural College and Farm. [Amendatory of Code, ch. 3, title XII.] Took effect by publication, April 18, 1884.	469
194	An act to repeal sections 857, 865, and 866 of the Code, and enact substitutes therefor providing for semi-annual collection of taxes; also to amend sections 871, 873, 883 and 914 of the Code, and section 1, of chapter 79, of the acts of the Sixteenth General Assembly Takes effect, by special provision of § 8 thereof, the second Monday in November, A. D. 1884.	209 211 213 214 216 218 234
195	An act to repeal section 4018, chapter 9, title 24, of the Code, and to enact a substitute therefor Took effect July 4, 1884.	1012
197	An act repealing section 304, and amending section 307, of chapter 2, title IV, of Code, on publishing proceedings of county boards of supervisors Took effect July 4, 1884.	74
200	An act to promote the improvement of highways. [Additional to Code, title VII, ch. 2; and superseding sec. 986.] Took effect July 4, 1884.	246 250
201	An act to make further provision for the care of insane persons. [Additional to Code, title XI, ch. 2.] Took effect by publication, April 23, 1884.	385
203	An act legalizing conveyances Took effect July 4, 1884.	555

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INDEX.

The references are to the pages of the Supplement, not to the pages of the original work under which the supplemental matter is placed.

Abandonment.
Of special charters by cities, 17.
Of homestead, n. 139.

Absconding Debtor.
Exemption of pension money to wife of, 207.

Abstracts in Supreme Court.
What sufficient, n. 216.

Action in Equity.
To enjoin illegal manufacture or sale of liquors, 96.

Adjutant General.
Report of, 2.

Administrators.
Removal of, from state, n. 156.

Adulteration.
Of coal or kerosene oil, punishment for, 110.
Of food, drink or medicine, prohibited, 254.

Affidavit.
To petition, what sufficient, n. 229.
Sufficiency of jurat to, n. 181, 196.

Affidavits.
When filed become part of record, n. 191.
For change of venue, examination in court upon statements in, 174.

Agency.
Of wife when abandoned by husband, n. 150.

Agricultural College.
See State Agricultural College.

Amendment.
To constitution. See Constitution.
Of demurrer, 179.
Changing nature of action not to be stricken, n. 167.

Amount.
In controversy, what is, n. 232, 233.

Anamosa.
Penitentiary at, 269.

Animals.
Recovery of damages for injury to, by dogs, 89.
Diseased, regulations as to, 90.

Appeal.
From action of board of equalization, n. 43.
From action as to drains across right of way of railroads, 66.
From fence viewers, not allowed, n. 92.

Argument.
On appeal, failure to file, n. 219.
Of petition for rehearing, 220.

Assignee.
In bankruptcy may sue to set aside conveyance, n. 223.

Assessment.
Of sewerage tax, notice of, n. 29.

Assessors.
In townships containing city or town, 16.
In cities and towns, election, number and duties of, 16.
To list dogs, 88.

Assignment of Mortgage.
Recording of, n. 135.
Foreclosure after, n. 226.

Assignment of Judgment.
Recording of, n. 133.

Assignment for Benefit of Creditors.
Distribution of unclaimed dividends, 144.
Preferred claim for personal services, 144.

Asylum for Feeble-minded Children.
Change of name of, 123.

Attachment.
Levy, notice to officer of ownership, indemnifying bond, 199.
Care of property seized under, n. 199.
Exemption of sewing machine from, 207.
Exemption of pension money from, 207.

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Attorney's Fee.
In cases to enforce orders of railroad commissioners, 76.
Part of cost, n. 198.
In partition, 225.
Attorneys and Counselors.
Admission of, 8.
Attorneys.
Employment of, by county, n. 8.
Employment of, by township trustees, 15.
Attorney-General.
To institute actions to enforce orders of railroad commissioners, 76.
Ballot.
How construed, 10.
Banks.
Liability of stockholders in, n. 60.
Bar Docket.
Not part of record, n. 186.
Barb Wire Fences.
About school houses, prohibited, 129.
Bigamy.
Husband or wife witness against the other in, n. 236.
Bills and Notes.
Negotiation of, by endorsement, does not waive landlord's lien, n. 141.
Endorsement of, does not waive mechanic's lien, n. 145.
Sale of, on execution, n. 171.
Board of Directors of School Districts.
Setting out of shade trees by, 129.
To remove barb wire fence, 129.
Insurance of school property by, 129.
Board of Health.
May adopt oil-tester, 108.
Fees of clerk in connection with, 115.
Printing and distribution of reports of, 2.
Board of Examiners.
Of teachers, 116.
Board of Supervisors.
May appropriate insurance money to rebuild public buildings, 11.
Levy of tax by, to aid in construction of bridges, 12.
Provisions by, for burial of soldiers and sailors, 13.
Publication of proceedings of, 14.
Levy of taxes for drainage by, 64.
May make appropriation for soldiers' monument, 13.
May levy road taxes, 54.
Notice to railway of taxes in aid of, 80.
To levy tax on dogs, 88.
To hear claims for damages by dogs, 89.
Compensation of, 244.
Boards of Trustees, etc.
Reports of, 2.
Bodies.
What may be delivered for dissection, 253.
Bond.
Indemnifying, in attachment, 199.
Bonds.
Of city for improvement of streets, 24.
Of county for drainage, 64.
Boundaries.
Of independent districts, 132.
Boys.
Employment of, in mines, 105.
Branding.
Of coal oil, 107–111.
Bridges.
Cities, towns and townships may assist in construction of, 12.
Liability of county for, n. 11.
Purchase of, by county, 57.
Liens of sub-contractors on, 148.
Bucket Shops.
Business of, prohibited, 253.
Bureau of Labor Statistics.
General provisions, 100.
Burial.
Of soldiers and sailors at expense of county, 13.
Burden of Proof.
In criminal cases, n. 264.
Of criminal act in civil cases, n. 264.
In bastardy cases, n. 268.
Butter.
Adulteration of, prohibited, 255.
Calendar.
Of judge, not a record, n. 7.
Certificate.
Of lands under land grant, n. 2.
Of acknowledgment, amendment of, n. 136.
Granted to teachers by state board of examiners, 116.
Of judge to evidence in equitable action, 185.
Change of Venue.
From superior court of city, 35.
On appeal in condemnation proceedings, 69.
Counter affidavits on application for, 174.
In garnishment, n. 202.
In action of replevin, n. 222.
Character.
Of witness, impeachment by proof of, n. 237.
Cheese.
Of skimmed milk branded, 255.
Adulteration of, prohibited, 255.

Digitized by Google

Chief of Police.
Marshal to act as, 34.
Children.
Custody of, as affected by foreign divorce, n. 152.
Feeble-minded, institution for, 123.
Chimneys.
Powers of city as to, 19.
Churches.
Action of, not reviewable by courts, n. 60.
Circuit Courts.
In districts having two circuits, 4.
Election of judges of, in districts having two circuits, 37.
Election of additional judges of, 38.
Circuit Judge.
Additional, election of, 38.
Cities.
Under special charter, provisions for extension of limits of, 17.
Abandoning special charters, officers and ordinances of, 17.
Additional powers given to, 19.
Fund to be raised by, for paving, 21.
Power of in improvement of streets, 22.
Bonds of, for improvement of streets, 24.
Not liable for failure to furnish water to extinguish fire, n. 28.
Levy and collection of sewer tax in, 29.
Mayor of, to sign ordinances, 33.
Election of alderman at large in, 33.
May erect jails, 34.
Appointment of marshals in, 34.
Cities and Towns.
May assist in construction of bridges, 12.
Assessors in, election, number and duties of, 16.
Changing names of, 17.
Judicial notice of county in which situated, n. 17.
Liability of, for damage from surface water, n. 21.
May procure and donate depot grounds, 26.
Management and improvement of parks in, 27.
Publication of ordinance of, 30.
Labor on highways in, 31.
Taxes in, for road purposes, 32.
Taxes by, in aid of railways, 77.
Laying railway tracks in streets of, to connect with union depot, 83.
Civil Rights.
Guaranteed, 256.
Clerks of the House.
Compensation of, 1.
Clerks of Committees.
Of Senate or House, compensation of, 1.
Clerks of Courts.
To pay unclaimed fees into treasury, 241.
Fees for services in connection with board of health, 115.
Clerk of Supreme Court.
Deputy, salary of, 241.
Club Houses.
For sale of liquors prohibited, 97.
Coal Oil.
Inspection of, 107.
Coal Mines.
Inspection of, 101-107.
Collateral Security.
Waives mechanic's lien, when, n. 145.
Commissioner of Bureau of Labor Statistics, 100.
Commissioners of Pharmacy.
Report of, 2.
Committee to visit Hospital for Insane.
Report of, 2.
Common Carriers.
Penalty against, for unlawfully transporting liquors, 97.
Compensation.
Of officers and employes of General Assembly, 1.
Of physician attending inquest, 15.
Of public officer, offer to refund if elected, bribery, n. 40.
Of township trustees and clerks for services as to highways, 56.
Of state veterinary surgeon, 90.
Of county clerk for services with the board of health, 115.
Of state librarian, 240.
Of deputy clerk of supreme court, 241.
Of sheriff, 242.
Of board of supervisors, 244.
Congress.
Election of representatives in, 39.
Connections.
With water and gas pipes and sewers, 19.
Constitution.
Submission of amendments to, 276.
Prohibitory amendment to, 274.
Striking "free white" from, 274.
Amendment of, entry of, on journals, as evidence, n. 1.
Contempt.
Punishment of in violating decree enforcing orders of railroad commissioners, 76.
In violation of injunction restraining illegal manufacture or sale of liquors, 96.
Contract.
For printing, 240.
For buying or selling on margin, 253.
Coronor.
May deliver dead body for dissection, when, 253.

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Coroner's Inquest.
Fees of physician or surgeon at, 15.
Corporations.
Railway, limit of indebtedness of, 58.
Ecclesiastical, action of, not reviewable by courts, n. 60.
To build union depots, 83.
Counsel.
Employment of, by county, n. 8.
County.
Rebuilding public buildings of, with insurance money, 11.
Liability of, for negligence, n. 11.
Purchase by, of toll bridges over streams dividing, 57.
Bonds for drainage, 64.
County Superintendent.
To report number of feeble-minded children, 124.
To require planting of shade trees, 129.
County Treasurer.
Calls by, for payment of warrants to stop interest, 15.
Estopped from showing embezzlement, 39.
Compensation of, for collecting highway taxes, 56.
To keep dog tax as separate fund, 89.
To certify unclaimed fees, 245.
Course of Study.
At State Agricultural College, 123.
Crossings of Railways.
Stopping of trains at, 75.
Curative Acts.
Validity of, n. 274.
Curators of Historical Society.
Report of, 2.
Damages.
For location of underground drain, 66.
From injuries by dogs, payment of, 89.
For diseased stock destroyed, 91.
Demand.
When necessary, n. 168.
Demurrer.
Amendment of, n. 179.
Dentistry.
Regulations of practice of, 113, 114.
Depot Grounds.
For railways, donation of by city or town, 26.
Condemnation of lands for, 67.
Depots.
Union, 83.
At intersections of railways, 84.
Deputy Clerk of Supreme Court.
Salary of, 241.
Deputy Oil Inspector.
Appointment and duties of, 108-111.
Diphtheria.
Transportation of person infected with, prohibited, 254.
Diseases.
Among animals, duties of veterinary surgeon as to, 90.
Dissection.
Dead bodies for, 253.
Districts, Judicial.
Division of, into circuits, 4.
Additional circuit judges in, 38.
List of, 270.
Districts, Congressional.
List of, 271.
Districts, Senatorial.
List of, 272.
Dirtricts, Representative.
List of, 272.
Ditches.
Statute of limitations against injury from, n. 168.
Location of, upon highways, 63.
Division Line.
Adverse possession to, n. 170.
Dogs.
Listing and taxation of, 88.
Liability of owners of, 89.
Doorkeepers.
Of senate or house, compensation of, 1.
Dower.
Release of, not sufficient conveyance of homestead, n. 137.
Drainage.
Underground, 65.
Taxes and bonds for, 64.
Drains.
Levees, and changes in watercourses, 63.
Underground, construction of, 65.
Election.
Special, to vote upon amendments to constitution, 276.
Construction of ballot at, n. 10.
Vote at, as to taxes to construct bridges, 12.
Payment of expense for polling places, n. 17.
In cities abandoning special charter, 17.
To vote upon proposed change of name of city or town, 18.
To determine question of donating depot grounds by city or town, 26.
To fill vacancy in offices of incorporated town, 32.
Of circuit judges, 37, 38.
Of representatives in congress, 39.
Submission of question as to rate of county tax at, 40.
As to taxes in aid of railways, 77.

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Endorsement.
Of payment as removal of bar, n. 171.
Engines.
Signals to be given at crossings, 75.
Error without prejudice.
In exclusion of evidence, n. 184.
Examples of, n. 192.
Estates of Decedents.
Claim against, for mechanic's lien, n. 146.
Estoppel.
Does not apply in criminal prosecutions, n. 250.
Evidence.
Reputation of house of ill fame, as, 253.
Examination.
For license to practice dentistry, 113.
Of teachers, state board of, 116.
Execution.
Exemption of pension money, 207.
Of sewing machines, 207.
Sale after expiration of, n. 233.
Executive Council.
Levy of railroad taxes by, 76.
Exemption.
Of pension money, 207.
Of sewing machine, 207.
Expenditures.
Of public money, reports of, 2.
Express Company.
Penalty against, for unlawfully transporting liquors, 97.
Fee Bill.
Issuance of, n. 198.
Fees.
Of physician attending inquest, 15.
Unclaimed, to be paid into treasury, 241, 245.
Attorneys, see attorneys' fees.
Feeble-minded Children.
Institution for, 123.
Fences.
About school houses not to be of barb wire, 129.
Fence Viewers.
Appeal from not allowed, n. 92.
Finding of Fact.
Judgment upon, on appeal, n. 219.
Fire Arms.
Sale of, to minors prohibited, 256.
Fire Escapes.
Cities may require, 19.
Fireworks.
Power of cities to prohibit, 19.
Fires.
Power of cities to prevent, 19.
Fiscal Term.
Ends when, 2.
Fish.
Preservation of, in lakes, 257.
Fish Commission.
Appropriation for, 91.
Food.
Adulteration of, punished, 254.
Forfeiture.
Of taxes in aid of railway, 80.
Fraudulent Conveyances.
When transfer to wife, deemed, n. 149.
Funeral Expenses.
Of soldiers and sailors, 13.
Homestead not liable for, n. 140.
Purchase of tombstone as part of, n. 159.
Gambling.
In options or margins, punished, 253.
Game.
Preservation of quail, 256.
General Assembly.
Compensation of officers and employes of, 1.
Journals of, as evidence, n. 1, 3.
Girls' Department.
Of state reform school, 126, 127.
Glucose.
Adulteration of syrup or sugar with, prohibited, 255.
Governor.
Reports of officers, boards, etc., to, 2.
Publication of message and address of, 3.
Appointment of veterinary surgeon by, 89.
Appointment of commissioner of labor statistics by, 100.
Appointment of inspector of mines by, 101.
Grants of Lands.
Lists of lands under, 1.
Guardian.
Of property of non-resident idiot or lunatic, appointment of, 153.
Of non-resident idiot or lunatic, foreign, appointment of, 154.
Head of a Family.
Who deemed, n. 157.
Highways.
Construction of sidewalks upon, 53.
Taxes for, 55.
Weeds in, destruction of, 55.
Labor upon, 56.
Location of public ditches, 63.
Outlet of drains upon, 66.
To school houses, appropriation of contingent fund for, n. 130.
Injunction against opening of, n. 228.
Historical Society.
Report of, 2.

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Homestead.
Not exempt from attachment for alimony, n. 151.
Purchased with pension money, exemption of, 207.
Horse Racing.
At agricultural fairs not illegal, n. 60.
Hospital for the Insane.
Report of visiting committee, 2.
Additional, 87.
Service of notice upon patient in, 177.
House.
Compensation of officers of, 1.
House of Ill Fame.
Keeping of, punished, 252.
Resorting to, punished, 252.
Imprisonment.
For violation of liquor laws, extent of, 95.
Improvement.
Of streets in cities, 22.
Incorporated Towns.
Vacancy in office in, how filled, 32.
Indemnifying Bond.
In cases of attachment, 199.
Independent Districts.
Boundaries of, 132.
Industrial Schools.
Reform schools designated as, 126.
Infected Person.
Transportation of, prohibited, 254.
Injunction.
To enforce obedience to orders of railroad commissioners, 76.
To restrain illegal manufacture of liquors, and violation of, 96.
Inns.
Equal privileges in, 256.
Inquest.
Fees of physician or surgeon at, 15.
Insolvents.
Assignment of, preferred claim for services, 144.
Inspection.
Of coal oil, 107.
Inspector of Mines.
Report of, 2.
Appointment, duties, etc. of, 101-107.
Inspector of Oils.
Appointment, duties, etc., of, 107-111.
Institution for Feeble-minded Children.
General provisions, 123.
Instructions.
Justice of the peace cannot give, n. 232.
Insurance.
Annual Report on, still required, 2.
Insurance.—*Continued.*
On public buildings, use of, in rebuilding, 11.
Against lightning, hail, etc., 61.
Life, distribution of proceeds of, n. 62.
Interest.
On county warrants, to stop after call, 15.
Intoxicating Liquors.
Manufacture of, prohibited, 93.
Sale of, without permit, 95.
Owning or keeping with intent to sell, punished, 95.
Defined, 98.
Prohibition of sale of, 274.
Jails.
In cities, 34.
Jailer.
Dwelling for, 243.
Janitors.
Of senate or house, compensation of, 1.
Journals.
Of general assembly as evidence, n. 1, 3.
Judge.
Calendar of, not a record, n. 7.
Judges of Circuit Courts.
In districts having two circuits, duties, etc., election, 4, 37.
Additional, 5, 38.
Judgments.
In superior courts of cities, 36.
Against city or county, penalty on taxes levied for, 45.
Recording of, assignment of, n. 133.
In supreme court upon trial *de novo*, n. 219.
Judicial Sale.
Sale by assignee of insolvent deemed, n. 145.
Juries.
In justices' courts, justice cannot instruct, n. 232.
Jurisdiction.
Want of, may be first raised on appeal, n. 219.
Jurors.
In superior court of city, 36.
Unclaimed fees of, paid into treasury, 241, 245.
Jury Trial.
In proceedings to contest will, n. 156.
Justices of the Peace.
Indemnifying bond in attachments before, 199.
To pay unclaimed fees into treasury, 245.
Cannot instruct jury, n. 232.
Kerosene.
Inspection of, 107-111.
Labor Statistics.
Bureau of, 100.

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Land Grants.
Lists of lands under, 1.
Taxation of, 41.
Law Department.
Of State University, examination of graduates of, 8.
Law School.
Admission of students of, 8.
Lease of Agricultural College Lands.
Provisions for, 118.
Taxation of, 122.
Legalizing Acts.
validity of, n. 274.
Levees.
Provisions as to, 62, 63.
Levy.
Of tax to aid in construction of bridge, 12.
Of road taxes, 54.
Levy of Attachment.
Notice to officer of ownership, bond, 199.
What constitutes, n. 199.
License.
Required by city of foreign merchants, unconstitutional, n. 19.
To sell liquor, not a contract, n. 20.
McClain's Annotated Statutes.
As evidence, 270.
Mail Carriers.
Of senate or house, compensation of, 1.
Manufacture.
Of intoxicating liquors, regulations as to, 93, 94.
Manufactories.
Regulation of, by cities, 19.
Margins.
Gambling in, punished, 253.
Marshal.
Of cities, appointment of, 34.
Matron.
Of woman's department at penitentiary, 269.
Mayors.
Of cities to sign ordinances, 33.
Of cities, appointment of marshal by, 34.
Mechanic's Lien.
Of sub-contractors on public buildings or bridges, 148.
Medicine.
Adulteration of, punished, 254.
Message.
Of governor, printing and distribution of, 3.
Messengers.
Of general assembly, compensation of, 1.
Mileage.
Of supervisors, 244.
Militia.
Appropriation for, 58.
Mine Inspector.
Report of, 2.
Mines and Mining.
General provisions, 101–107.
Minors.
Employment of in mines, 105.
Judgment for costs against, n. 197.
Sale of fire arms to, prohibited, 256.
Misdemeanor.
Injuring trees or shrubs in park, deemed, 27.
Injury to sidewalks upon highways, deemed, 54.
Resisting veterinary surgeon, deemed, 90.
Manufacture of intoxicating liquors, deemed, 93.
Mischief to, or negligence in connection with mines, deemed, 105–107.
Selling uninspected oil, deemed, 109.
In use of uninspected oil, 109.
In failing to prosecute violations of law for inspections of coal oil, 110.
Interference with railroad property, deemed, 249.
Denial of civil rights, deemed, 256.
Mortgage.
Chattel, description in, n. 134.
Chattel, sale of equity of redemption in, n. 134.
Vendor's lien, merged in, n. 135.
Assignment of, recording, n. 135.
When constitutes part of assignment, n. 144.
Subjection of widow's dower to, n. 160.
Appointment of receiver under, n. 197.
Money.
Paid for use of another, interest on, n. 142.
Month.
How computed, n. 1.
Monument.
To soldiers, erection of by county, 13.
Mutual Aid Associations.
Nature of, n. 61.
Names.
Of cities and towns, change of, 17.
National Banks.
Taxation of, n. 42.
Negligence.
In construction of works of public improvement, county not liable for, n. 11.
Notary Public.
Amendment of certificate of acknowledgment by, n. 136.
Nuisance.
Building and contents used for illegal manufacture or sale of liquors, deemed, 96.

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Officer.
Levying attachment, may require indemnifying bond, when, 199.
Public, offer of, to refund compensation if elected, bribery, n. 40.
Officers.
Of cities abandoning special charters, 17.
In incorporated towns, appointment of to fill vacancies, 32.
Of general assembly, compensation of, 1.
Oil.
Inspection of, 107–111.
Oleomargarine.
Adulteration with, prohibited, 255.
Options.
Gambling in, punished, 253.
Ordinances.
Of city which abandons special charter, 17.
And resolutions of city to be signed by mayor, 33.
Of city or town, publication of, 30.
Original Notice.
Service of, upon patient in hospital for insane, 177.
Overflowed Lands.
Drainage of, 64.
Paper Folders.
Of general assembly, compensation of, 1.
Park Commissioners.
Powers and duties of, 27.
Parks.
Management of and taxation for, 27.
Partition.
Attorney's fees in, 225.
Partner.
Promise by, to assume former debts, not within statute of frauds, n. 238.
Partnership.
Action against, before justice of the peace, n. 231.
Patent.
To Agricultural College lands, 119.
Paving Fund.
Provisions for raising, 21.
Pawnbrokers.
Cities may license and tax, 19.
Peace Officer.
Duty of, to give evidence as to violation of liquor laws, 97.
Duty of, to assist veterinary surgeon, 90.
Penitentiary.
At Anamosa, 269.
Pension Money.
Exemption of, 207.
Pensioner.
Exemption of pension and homestead to, 207.
Permits.
For manufacture or sale of liquors, regulations as to, 94–97.
Petition.
For rehearing, presentation and argument of, 220.
Pharmacists.
Renewal of certificates of, 111.
Forfeiture of registration of, 111.
Violation of liquor law by, punished, 112.
Pharmacy.
Report of commissioners of, 2.
Physicians.
Fees of, when attending inquest, 15.
Cities may license and tax, 19.
Pistols.
Sale of to minors, prohibited, 256.
Pledge.
Larceny of, n. 249.
Polls.
Payment of expense for, n. 17.
Poor Convict.
Liberation of, from imprisonment for violation of liquor laws, 95.
Postmaster.
Of senate or house, compensation of, 1.
Practice of Dentistry.
Regulation of, 113, 114.
Printing.
And distribution of reports of officers, boards, etc., 3.
Proceedings.
Of board of supervisors, publication of, 14.
Of Stockbreeder's Association, publication of, 61.
Prohibitory Amendment.
To constitution, 274.
Prosecutions.
For violation of fish laws, 257.
Public Buildings.
Of county, rebuilding of, with insurance money, 11.
Liens of sub-contractors on, 148.
Public Lands.
Entry of, for homestead, n. 137.
Public Printing.
Of letter-heads, etc., by contract, 240.
Publication.
Of reports of officers, boards, etc., 3.
Of reports of supreme court, 3.
Of proceedings of board of supervisors. 14.

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Publication.—*Continued.*
Of proceedings of Stockbreeders' Association, 61.
Quail.
Preservation of, 256.
Quarantine.
Against diseased animals, 90.
Quitclaim Deed.
Gives color of title, n. 169.
Railway Corporation.
Limit of indebtedness of, 58.
Railway Crossings.
Stopping trains at, 75.
Depots at, 84.
Railway Property.
Interference with, punished, 248.
Railway Commissioners.
Proceedings of, as to taking land for depot grounds, 67.
Enforcement of orders and regulations of, 76.
May order depots at railway intersections, 84.
Railways.
Tracks of, on streets of city, n. 20.
Tracks of, in city streets, paving, etc., 25.
Donation of depot grounds to, by city or town, 26.
Taxation of lands granted to, 41.
Right of way over levee, 63.
Drains across rights of way of, 66.
Signals by, at crossings, 75.
Stopping of trains of, at railway crossings, 75.
Levy of taxes on, 76.
Taxes in aid of, 77.
Cancellation of taxes in aid of, 82.
Building of union depots by, 83.
Depots at intersections of, 84.
Using union depot, liability of, 84.
Penalty for unlawfully transporting liquors, 97.
Records.
Lost, substitution of, n. 7.
Redemption.
Who may make, n. 47.
Of agricultural college lands from tax sale, 122.
Reform Schools.
Change of name of, 126.
Girls' department of, 126.
Registration.
Of pharmacists, forfeiture of, 111.
Rehearing.
Petition for, 220.
Remonstrance.
Against division of township, 15.
Replevin.
For property acquired under Sunday contract, 258.
Report.
Of stockbreeders' association, publication and distribution of, 61.
Of veterinary surgeon, 90.
Of commissioner of labor statistics, 100.
Of testimony considered a part of record, n. 191.
Reports.
Of various officers, boards, commissioners and institutions, publication and distribution of, 2.
Reports of Supreme Court.
Publication of, 3.
Reporter of Supreme Court.
Supplies for office of, 2.
Publication of reports by, 3.
Representatives in Congress.
Election of, 39.
Reputation.
Of witness, impeachment by proof of, n. 237.
Residence.
County of, in actions before justice of the peace, n. 231.
What sufficient to entitle to vote, n. 274.
Return.
Of writ, evidence of, n. 204.
Revolvers.
Sale of, to minors, prohibited, 256.
Road Districts.
Consolidation of, 55.
Road Supervisor.
Compensation of, 57.
Road Taxes.
Liability of property in cities and towns for, 32.
Levy of, 54.
Rules of Court.
As to time of pleading, n. 195.
Salary.
Of state librarian, 240.
Of deputy clerk of supreme court, 241.
Of sheriff, 243.
Sale.
Of agricultural college lands, 119.
After expiration of execution, n. 233.
Of adulterations, prohibited, 254.
Scarlet Fever.
Transportation of person infected with, prohibited, 254.
School Houses.
Setting out of shade trees near, 129.
Barb wire fences around, prohibited, 129.
Insurance of, 129.
Seamstress.
Exemption of sewing machine to, 207.
Secretary of Senate.
Compensation of, 1.

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Secretary of State.
Distribution of reports by, 3.
To let printing of letter heads, etc., by contract, 240.
Secretary of School District.
To report number of shade trees, 130.
Senate.
Compensation of officers of, 1.
Sergeant-at-Arms.
Of senate or house, compensation of, 1.
Service of Notice.
Upon patient in hospital for insane, 177.
Sewer.
Tax, levy and enforcement of, 29.
Sewing Machines.
Exemption of, 207.
Shade Trees.
Setting out of, by school directors, 129.
Sheep.
Recovery of damages for injury to by dogs, 89.
Sheriff.
Compensation of, 242.
Shorthand Report.
A part of record, n. 191.
Sidewalks.
Upon highways, construction of, 53.
Signals.
At railway crossings, 75.
Slander.
Exemplary damages for, n. 168.
Slaughter-houses.
Power of city to regulate, 19.
Small-pox.
Transportation of person infected with, 24.
Soldiers.
Erection by county of monument to, 13.
Funeral expenses of, 13.
Spearing Fish.
In lakes, prohibited when, 257.
State Agricultural College.
Report of trustees of, 2.
Trustees of, 118.
Sale or lease of land of, 118.
Funds of, how managed, 120.
Lands, taxation of lease in, 122.
Course of study at, 123.
State Board of Examiners.
General provisions, 116.
State Board of Health.
Printing and distribution of reports of, 2.
Veterinary surgeon to be a member of, 90.
To make rules for inspection of oil, 111.
State Certificate.
To teach, 116.
State Historical Society.
Entitled to reports, 3.
Report of, 2.
State Librarian.
Salary of, 240.
Report of, 2.
State Oil Inspector.
Appointment, duties, etc., 107–111.
State Reform School.
Appropriation for support of girls in, 127.
Change of name of, 126.
State University.
Additional annual appropriation to, 117.
State Veterinary Surgeon.
Appointment, duties and compensation of, 89.
Station Houses.
At intersections of railways, 84.
Stationery.
For use of general assembly, 1.
Statistics.
Bureau of labor, 100.
Statute of Limitations.
Does not run against right of dower not yet vested, n. 160.
Steam Boilers.
Inspection of, 19.
Stenographer's Report.
Of testimony, a part of record, n. 191.
Stock.
Diseased, power of veterinary surgeon as to, 90.
Stock of Railways.
Issued for taxes in aid of, 79.
Stockbreeders' Association.
Publication of proceedings of, 61.
Stockholders.
Liability of, for debts of bank, n. 60.
Street Railways.
Track of, paving, etc., 25.
Streets.
Vacation of, for depot grounds, 26.
Labor upon, 31.
Sub-contractors.
Liens of, on public buildings or bridges, 148.
Sugar.
Adulteration of, prohibited, 255.
Submission.
Of constitutional amendments, 276.
Superintendent of Public Instruction.
Report of, 2.
Superintendent of Weather Service.
Report of, 2.

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Superintendent of Highways.
Employment of, 55, 56.
Superintendent of Institution for Feeble-minded Children.
Appointment, etc., 124.
Superior Courts.
In cities, 35.
Supervisors.
County, compensation of, 244.
Supreme Court.
Admission of attorneys by, 8.
Surface Water.
Liability of city for damages from, n. 21.
Surgeon.
Veterinary, appointment, duties and compensation of, 89.
Syrup.
Adulteration of, prohibited, 255.
Taxation.
In cities and towns for road purposes, 32.
Of lands granted to railroads, 41.
Of agricultural college lands, 119.
Of lease in agricultural college lands, 122.
Taxes.
To aid in construction of bridges, 12.
In aid of railroads, township trustees may employ attorney in litigation about, 15.
By city for paving fund, 21.
For improvement of streets in cities, 22.
For parks in cities and towns, 27.
For sewers, 29.
Sewer, sale for, 29.
For county revenue, limit as to rate of, 40.
Semi-annual payment of, 44.
To pay judgments on city or county, penalty on, 45.
Recovery of, from party recovering land, n. 45.
For county road fund, 54.
On railways, levy and payment of, 76.
In aid of railways, 77.
In aid of railways, cancellation of, 82.
Telephone Line.
Construction of, over private property, 85.
Tenant in Common.
Redemption from tax sale by, n. 47.
Homestead interest of, n. 139.
Has not adverse possession, n. 169.
Theaters.
Equal privileges in, 256.
Toll Bridges.
Over streams dividing counties, 57.
Tombstones.
Purchase of, by executor, n. 159.
Township.
May assist in construction of bridges, 12.
Township.—*Continued.*
Election of assessor in, when containing city or town, 16.
Remonstrances against division of, 15.
Taxes by, in aid of railways, 77.
Township Clerk.
Compensation of, as to highway fund, 56.
Township Trustees.
Employment of attorney by, 15.
May levy tax to pay same, 16.
Consolidation of road districts by, 55.
Duties of, as to highways, 55, 56.
Location of underground drains by, 65.
Toy Pistols.
Sale of, to minors, prohibited, 256.
Transportation.
Of infected persons prohibited, 254.
Trees.
In highway, to be preserved, n. 57.
Setting out of, by school directors, 129.
Trustees of Institution for Feeble-minded Children.
Duties, etc., of, 124.
Trustees of State Agricultural College.
Appointment, etc., of, 118.
Investment of funds by, 120.
Trustees of State Institutions.
Report of, 2.
Undertaker.
May deliver dead body for dissection, when, 253.
Union Railway Depots, 83.
Usury.
In confession of judgment, n. 196.
Vacancy.
In offices of incorporated towns, how filled, 32.
Vendor's Lien.
Merger of, in mortgage, n. 135.
Venue.
In action of replevin, n. 222.
In larceny, n. 249.
Of prosecution for violation of fish laws, 257.
Verdict.
General, right to, n. 190.
Verification.
What sufficient, n. 229.
Veterinary Surgeon.
Appointment, duties and compensation of, 89.
Veto.
Of ordinance or resolution by mayor, 33.
Visiting Committee.
To hospital for insane, report of, 2.

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Warden.
Of penitentiary, report of, 2.
Warrants.
County, calls of, to stop interest, 15.
Watercourses.
Powers of city as to, 19.
Changes in, 63.
On boundary between adjoining owners, drainage into, 65.
Weather Service.
Report of superintendent of, 2.
Weeds.
On highways, destruction of, 55.
Weighing.
Of coal from mines, 106.
Witnesses.
Before commissioner of labor statistics, 101.
Limitation of number of, n. 187.
Absence of, ground for new trial, n. 193.
Unclaimed fees of, paid into treasury, 241, 245.

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